

Group Insolvencies – Some Thoughts About New Approaches

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I. GENERAL OBSERVATIONS

It is remarkable that one phenomenon within insolvency law has caught relatively little attention in the past among academics and legislators when put in relation to its practical importance and to the dramatically increased attention towards insolvency law in general. This increase reaches back roughly ten years—it began when the bubble of the so called tiger states’ economies in East Asia began to burst, spread to Japan and Russia, and came finally to a stand-still in Brazil. In those days, in the middle of the 90s of the last century the globe came irritatingly close to a world economy crisis. The G-7 States reacted and established the Financial Stability Forum whose task was—and still is—to build up safeguards against a repetition of such a risky development. This Forum spotted twelve topics that it sees as critical for the financial stability of an economy—one of them being insolvency law.¹ It entrusted its observation and assessment to the World Bank, which in turn is supported by the United Nations Commission on International Trade Law (UNCITRAL) with respect to insolvency laws’ implementation.²

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1. See generally Christoph G. Paulus, *The Global Insolvency Law and the Role of Multinational Institutions*, BROOK. J. INT’L L. (forthcoming 2007).

2. See Financial Stability Forum, *12 Key Standards for Sound Financial Systems*,

However, the increased importance of insolvency laws is best documented through the published papers of the three big Multilaterals, which give legislators more or less detailed advice on how to draft a modern and effective insolvency law. The International Monetary Fund (IMF) was the first to publish in 1999,³ followed by the World Bank in 2001,⁴ and finally by UNCITRAL⁵ in 2004. During this time the American Law Institute was tackling how to better coordinate cross-border insolvencies resulting from an increased number of bankruptcies where creditors and assets were located in more than one North American Free Trade Agreement (NAFTA) country.⁶ Within those five years insolvency law mutated from an area of law reserved for centuries to a rather isolated circle of specialists, to one of practical global importance.

Irrespective of this development, astonishingly little work was put into deliberations about how to deal with the insolvency of not only a single legal entity but with that of a group of such entities as a whole. This neglect is reflected in the previously mentioned papers—the UNCITRAL Legislative Guide is the only one that even touches on this topic, and still devotes only a chapter to it. The substance of this chapter is to bring attention to the important role this issue plays in practice, and to illustrate the need for further consideration and research. Such consideration is being undertaken by a Working Group, which has recently (Dec. 2006) been established. It is generally well known that the insolvency of a company, which is a member of a group of companies, will often initiate a domino effect, leading to the subsequent downfall of the other group members. The consequence is that there are as many insolvent companies (and insolvency proceedings) as there are group members; the rule is “one company, one insolvency, one proceeding.” This phenomenon is particularly prevalent when cross-border issues are at stake. It is therefore not surprising that, at least in continental Europe, the need and necessity for intensified deliberations has been recognized in the wake of the European Insolvency Regulation enactment in mid-2002.

II. INCREASE OF EFFICIENCY

Before describing this development, it might be appropriate to pause for a moment and to observe the factual and legal situation in the case of multiple insolvencies. What has been a more or less coherent economic unit⁷ becomes, so to

http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html.

3. See International Monetary Fund, *Modern & Effective Insolvency Proceedings* (1999), available at <http://www.internationalmonetaryfund.com/external/pubs/ft/orderly/index.htm>.

4. See The World Bank, *Principles for Insolvency and Creditor Rights Systems* 1 (Dec. 21, 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20774193~pagePK:64065425~piPK:162156~theSitePK:215006,00.html>. The World Bank's original *Principles* were developed in 2001 in response to the financial crises in emerging markets in the late 1990s. In 2005, the *Principles* were thoroughly reviewed and revised. See *id.*, at 1-3.

5. See UNCITRAL, *2004 UNCITRAL Legislative Guide on Insolvency Law* (June 25, 2004), www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.

6. See generally Lance Liebman, *Forward* to AM. LAW INST., *PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES* xv, xv- xvii (2003) (noting that the bankruptcy systems of NAFTA countries—Canada, Mexico, and the United States—were the primary focus of the ALI's PRINCIPLES).

7. To be sure, what is presented here is somewhat simplified, as the appearances of groups are manifold. See GERARD HERTIG & HIDEKI KANDA, *Creditor Protection, in THE ANATOMY OF CORPORATE LAW* 71, 75 (Renier R. Kraakman et al. eds., 2004) (for an analysis of the intricacies and

speak, a pile of shards—each separate legal entity is subject to its own insolvency proceeding as the decision to open a proceeding for each entity is determined separate and independent of the others.⁸ The consequence is that there are many insolvency administrators to be appointed, many creditors' assemblies and committees to be conducted, and many investigations to be initiated into potential pre-proceeding transactions of the debtor—to the detriment of the creditors as well as into potential violations of directors' duties. This is only a brief overview of the activities to be initiated after the economic and legal breakdown of the group entities; it makes sufficiently clear that the real topic behind any considerations about the law of group insolvencies is the desire and need for greater efficiency. Like the parallel set of intricacies in the field of cross-border insolvency law where the universality principle is gaining more and more ground internationally due to its greater efficiency prospect, one should approach the intricacies of a group insolvency law, too, from the perspective of increased efficiency.

A closer look at this statement—as convincing as it might appear at first glance—reveals that there are some traps better avoided at the outset. One has to ask, namely, what is meant by “greater efficiency?” This question touches on the fact that not all insolvency laws in this world are premised on the same policy objectives. Thus, some laws declare it as their highest priority to achieve the best possible satisfaction of the creditors. Some say almost the contrary—namely to give the debtor the chance of a fresh start, or to foster entrepreneurialship in general. Still others view efficiency as preserving the work place, the integrity of the economic unit, or ensuring payment of certain creditors in that very state. Efficiency under these diverse circumstances thus comes to have different meanings, which must be kept in mind for possible solutions to the problem of group insolvencies. As a working hypothesis, I define efficiency in this text as asset maximization by preserving the debtor companies to the utmost while obtaining the best possible satisfaction of the creditors. I emphasize this hypothesis will be fine-tuned in the future, and should be treated as a hypothesis in its infant stage of development.

III. THE EUROPEAN DEVELOPMENT

It is fair to say that the English administrators and courts have taught the continent a lesson in how to interpret the written law. The European Insolvency Regulation is built on the concept of what is usually called “modified universality.” Under such a regime, an insolvency proceeding opened in one of the member states is automatically recognized in all other member states. As a general rule, the insolvency law of the opening state—the so called *lex concursus*—is to be applied in all other member states. This universalistic approach, extending to the territory of twenty-five member states, is subject to some exceptions.⁹ The most important one

complexities of corporate groups).

8. Henry Peter describes this phenomenon as privileging “form over substance.” Cf. Henry Peter, *Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How?*, in *THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY* 199 (Henry Peter et al. eds., 2006).

9. For a general discussion of the European Insolvency Regulation (EIR), see CHRISTOPH G. PAULUS, *EUROPÄISCHE INSOLVENZVERORDNUNG-KOMMENTAR* 57 ff. (2002); GABRIEL MOSS, IAN FLETCHER, & STUART ISAACS, *THE EC REGULATION ON INSOLVENCY PROCEEDINGS* 155 (2002); and Miguel Virgós & Francisco Garcimartín, *The Normative Model*, in *THE EUROPEAN INSOLVENCY*

in the present context is the possibility to have secondary proceedings opened in every member state where the debtor has an establishment. The effect of this insolvency proceeding, however, is restricted to this member state, for it follows the territoriality principle.

This distinction between the types of proceedings necessitates a rule according to which one proceeding is the main one and the other the secondary one. For the latter, the “establishment” is decisive, whereas the main proceeding is to be opened pursuant to Article 3 paragraph 1 of the European Insolvency Regulation (EIR) in the member state where the debtor has its “centre of main interests.” This standard was adopted by the drafters of the UNCITRAL model law on cross-border insolvencies, turning the standard’s designation into something of a global standard.¹⁰

Many in Europe thought that this is quite a precise definition requiring not much interpretation¹¹—particularly when seen in combination with the further rule that this centre is to be presumed where the company has its registered seat, unless proven to the contrary.¹² By contrast, the professionals from the Island declared, occasionally in a superficial and a bit far-fetched manner, the centre of a group subsidiary to be located at the seat of the mother company when and if it exercised the “head office functions.” The English courts generally accepted this interpretation so that an astonishing number of cross-border group insolvency proceedings were opened in England. Needless to say, the reaction in the rest of Europe was rather harsh, even though (or better perhaps because of) there was not much maneuvering available due to the automatic recognition rule in the Regulation. However, after some grumbling, the lawyers on the continent followed this approach and declared the location of the mother company as the centre of main interest for the mother’s subsidiaries. Courts in Italy,¹³ Germany,¹⁴ Hungary,¹⁵ and most recently France¹⁶ have followed this line of argument and decided accordingly.

REGULATION: LAW AND PRACTICE 11, 11-14 (2004). As to possible and desirable improvements, see Gabriel Moss & Christoph G. Paulus, *The European Insolvency Regulation - The Case for Urgent Reform*, 19 *INSOLV. INT.* 1, 1 (2006).

10. For a discussion of this term and the problems created thereby, see Jay Westbrook, *Locating the Eye of the Financial Storm*, *BROOK. J. INT’L L.* (forthcoming 2007); Gabriel Moss, *Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, *BROOK. J. INT’L L.* (forthcoming 2007).

11. This formulation is modeled after Section 3.1 of the German Insolvency Ordinance, which reads:

The insolvency court in whose district the debtor has his usual venue shall have exclusive local jurisdiction. If the centre of the debtor’s self-employed business activity is located elsewhere, the insolvency court in whose district such place is located shall have exclusive jurisdiction.

Insolvenzordnung [Insolvency Statute], Oct. 5, 1994 I.S. 2866, § 3.1 (F.R.G.). It is obvious that this determination of the competent court causes few (if any) problems within one and the same jurisdiction.

12. Some authors argue that this presumption should become the un rebuttable rule. See, e.g., Horst Eidenmüller, *Free Choice in International Company Insolvency Law in Europe*, 6 *EUR. BUS. ORG. L. REV.* 423 (2005).

13. See Cecilia Carrara, *The Parmalat Case*, 70 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT [F.R.G.]* 538 (2006).

14. See District Court of Munich, May 4, 2004, available at http://ww9184.wb09.de/eirdatabase/admin/bilder_eir/123-1_EMTEC.pdf.

15. See Commercial Court of Nanterre, Feb. 15, 2006, available at http://ww9184.wb09.de/eirdatabase/admin/bilder_eir/47-1_PARMALAT%20Hungary-Slovakia.pdf.

16. See Fejer, June 14, 2004, available at http://ww9184.wb09.de/eirdatabase/admin/bilder_eir/123-1_EMTEC.pdf.

After all, the English approach was a step towards developing a group insolvency law, since now the group as a whole was in the hands of one administrator in one insolvency proceeding—a much more efficient way of handling the insolvency of a group than the one envisaged by the Regulation. Its approach is the aforementioned rule: “one company, one insolvency, one proceeding.” Moreover, even if a subsidiary could be seen as an establishment which would justify the commencement of a secondary proceeding, EIR Art.3 par. 3(2) says that this proceeding has to be a liquidation proceeding from the outset, excluding from the outset the possibility of a reorganization of the group as a whole or even of coherent parts of it.

What so far sounds as a success story of the English approach was confronted only a few months ago with serious irritations. The well-known Parmalat case¹⁷ opened the stage for a recent decision of the European Court of Justice (ECJ). Parmalat, the huge and world-wide acting group, had one affiliate in Dublin, Ireland. For tax purposes it was founded there under the name Eurofood; the company’s task was to collect financial means for the group as a whole. Like all the other group related companies—and typically for the aforementioned domino effect—Eurofood also went into an insolvency proceeding; the question of which national law exactly governs this proceeding as *lex concursus*, however, gave rise to a dispute between the Irish and the Italian courts. The issue finally became settled by the court in Luxemburg. The chain of events started namely with a filing in Dublin which initiated a preliminary proceeding; the proceeding included some protective measures to the benefit of the creditors, with the peculiarity that, pursuant to Irish law, the date of filing shall be assumed as the date of the opening of the insolvency proceeding when and if the court later concludes that the filing requirements are met and that the company is in fact insolvent.

However, before the Irish insolvency court came to this conclusion the relevant insolvency court in Parma had also opened the insolvency proceeding over Eurofood—with almost no delay. Eurofood, thus, had the dubious position to be subject to two mutually excluding insolvency regimes. After considering Advocate General Jacobs’ opinion,¹⁸ the ECJ decided May 2, 2006¹⁹ that the commencement of the Irish proceeding—irrespective of its preliminary nature and lack of an officially determined insolvency—was the earlier proceeding. Hence the Italian proceeding, according to the priority rule, was to be closed.²⁰

This, however, is the decision given only in this particular case. Its reasoning leaves room for further interpretation. In its heavy reliance on the Regulation’s Consideration No. 13 and its repetition in the Virgós/Schmit report, the court emphasizes the need for the recognizability of the centre of main interests for third persons. They would, in the case at hand and under the given circumstances, find that centre in Ireland. The court offers additional explanations, one of which is that

17. For a detailed description of this case, see Carrara, *supra* note 13, at 538.

18. See Christoph Paulus, *Professor Paulus on Advocate General Jacobs’ Opinion in the Eurofood case*, 70 GLOBAL TURNAROUND 10 (Nov. 2005), available at http://www.globalturnaround.com/article.php?issue_number=70.

19. See generally *Eurofood IFSC Ltd*, 2006 O.J. (C 341) 4, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=eurofood&domaine=&mots=&resmax=100>.

20. For a more detailed discussion of this decision, see Moss, *supra* note 10.

the “mind of management,” or head office functions, might be acceptable in evident cases such as a mere letterbox company or the like.

Taking into account that there is no definition of what constitutes the “centre of main interests,” it is astonishing that the decision (as well as the Regulation and the report of M. Virgós and E. Schmit) abstains from any explanation as to who constitutes “third persons.” Depending on how one answer this question, however, great differences might result there from. Given the fact that the debtor company is a legally separate entity, the members of the board of directors, for instance, are “third persons,” as are all employees. It is fair to assume that they regularly know about the group relationship—at least in most cases. But even further, creditors are “third persons”—at least the bigger ones (the Bank of America in the Eurofood case²¹) do very well know about the group structure. They all do not matter, according to the ECJ judgment. The example of the mail box company given by the ECJ indicates the mailman’s irrelevance.²² We may have to conclude that the third persons are the judges. The decision states that “the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.”²³

The previous statement suggests that, if additional facts had been added, the decision could have come out differently.²⁴ The letterbox company need not necessarily be taken as the only possible example—it is in fact an extreme case (note the decision’s use of “in particular”).²⁵ To save the progress in group insolvency law which had been achieved in Europe before the *Eurofood* decision, the search for additional facts is justified. I am convinced that the decision would have been decided differently if the name of the filing debtor had been Parmalat Finance Support and not Eurofood. Had Parmalat Finance Support filed, the company locale would be evident to the judges. The locale might also have been evident if the commercial advertisements for the company hinted towards the group to which the company belonged (i.e., member of the X group). Probably many more iterations might be thought of to justify this result which the ECJ—only on first sight—seems to exclude.

In sum: the English interpretation has shown a better way to come to grips with insolvency proceedings in a group of companies versus the traditional way. The *Eurofood* decision is not necessarily a backdrop; the reasoning can be interpreted in a way that reconciles the two allegedly opposing old and new views. The “mere fact” that the mind of management is abroad does not suffice anymore; however, if objective, third parties deem that recognizable facts hint towards the adherence to a group, the parent company can be seen as the affiliate’s centre of main interests. To be sure, this interpretation does nothing to provide a clearer rule than the existing one with its continuation of the “centre of main interests” language.²⁶ Improvements

21. Note that the “driving force” behind the *Eurofood* case was a creditor that wanted to have the insolvency proceeding opened in Ireland. See Carrara, *supra* note 13.

22. See Eurofood, *supra* note 19, para. 35.

23. *Id.* para. 36.

24. *But see* Christoph G. Paulus, The Aftermath of “Eurofood” – BenQ Holding B.V. and the Deficiencies of the ECJ Decision, 20 *Insolvency Intelligence* 2007, 85 et seq. (commenting a decision of the Amsterdam Arrondissement Court from Jan. 31, 2007).

25. *Id.* para. 35.

26. See Jay Lawrence Westbrook, *Multinational Financial Distress: The Last Hurrah of Territorialism*, 41 *TEX. INT’L L.J.* 321, 332, 334 (book review) (rightly pointing out that the COMI approach is a generally well functioning “first step” that provides a “good, although not perfect, level of predictability and

are possible and desirable—for example, by requiring a purely objective fact, rather than a “third party” subjective perception of the existence of an objective fact. It should be assumed, however, that the decision of the ECJ will have some impact on foreign jurisdictions such as the U.S., which also rely on the “centre of main interests” due to the influence insofar with the UNCITRAL Model Law.²⁷

IV. FURTHER CONSIDERATIONS

This Paper has thus far been more or less descriptive—i.e. reporting about facts and developments. These facts shall form the basis for further considerations about what appears to be feasible with respect to group insolvency law and what is desirable.

However, before turning to further considerations, we should contemplate the justification of the traditional maxim “one company, one insolvency, one proceeding.” The maxim has the enormous advantage of clarifying legal relationships—an advantage which brings us back as far as to ancient Roman law. From a bird’s eye view, one of its greatest achievements is that it reduced the complexity of real life dramatically by constructing a parallel legal world which splits this very complexity more or less into relationships between two persons. This is roughly true for substantive law as well as procedural law; still today our basic legal instruments in private law are the debtor-creditor relationship and the plaintiff-defendant relationship. To be sure, we can add many more actors but that does not exclude that the basic legal denominator is such relationship between two persons. By sticking to this elementary rule, the traditional maxim offers the valuable clarity of designating the debtor and its creditors.

Some scholars add another justification: the claim that the creditors’ trust in legal realities must be respected; these scholars seem to indicate that the creditors have selected their debtor with deliberation and have thus acquired the right that the law must respect their decision for this particular debtor. However, a legal argument based upon trust alone is shaky. Its psychological undertone has, to the best of my knowledge, never really been examined—let alone tested. Additionally, is it not equally justifiable to state that the Bank of America, as Eurofood’s main creditor, had more trust in the then-powerful Parmalat parent company than the new and quite dependent Eurofood? Therefore, this argument can at best be used for either side, limiting its persuasiveness.

A third justification brings us back to more solid ground. The said clarity of a two-person relationship is well at place when the issue is who gets what from whom. In terms of insolvency law, this is when a liquidation proceeding is at stake in which the debtor’s assets are sold piecemeal or as a whole to a third party (i.e. not to the creditors) so that the creditors receive at least their quota from their debtor’s estate. If all companies in a group undergo this type of proceeding, it might be easier to liquidate all assets within just that recently opened proceeding that has been opened over the legal entity that is (or has been) owner of these assets. As a general rule, it is fair to assume that the sum of proceeds from each group member’s piecemeal

control.”).

27. 11 U.S.C. § 1302(4) (2007).

liquidation sales is about equal to the sum of proceeds from one collective liquidation sale.

However, the advantage of transparency and clarity of two-person relationships is not as important when the sale of a going concern is at stake (whereby “going concern” in the present context means the added value of the group as a whole, or at least certain parts of it). A recent European example is the *Collins & Aikman* case which concerned some twenty-four companies in ten different member states of the EIR.²⁸ In a remarkable effort to keep the proceedings of over ten companies in different jurisdictions together, the court promised the local creditors the dividend (notably: in the English main proceeding) they would presumably have received under a local (secondary) proceeding - provided they would abstain from filing petitions for opening secondary proceedings.²⁹ The result of this promise and the creditors’ trust in it was a considerable increase of the sales price.

Finally, when the debtor’s reorganization is at stake in the insolvency proceeding, the clarity of the two-person-relationship is of little or no help. The reason being that reorganization concentrates primarily on the rescue of the debtor; hence the advantage for the creditors is in fact just a kind of reflex of such rescue.³⁰ Only then, when the rescue is successful, will the creditors have the chance to recover what they have lost due to their debtor’s insolvency. This mechanism is hard to describe or regulate in terms of a two-person-relationship—this model just does not work in such a context.

In summary, the traditional maxim “one company, one insolvency, one proceeding” certainly does have its advantages and justifications. However, when the debtor’s reorganization is at stake—be this the reorganization of the economic unit,³¹ or the reorganization of the legal entity itself³²—holding on to this maxim threatens the result of achieving the highest value maximization.

Thus the task is to find alternatives to the traditional rule which are better adapted to the modern insolvency law’s prioritization of reorganization over liquidation.³³ For a German, the often celebrated and quite frequently copied approach of a unitary proceeding³⁴ reveals a certain disadvantage. Without the initial division between these two types of proceedings, it is harder to *ex ante* predict the evolution of the case at hand and how it will be organized.

Nevertheless, two options for a modernized treatment of group insolvencies are recognizable: the first is of a procedural aggregation, the second option is of a substantive aggregation. Option one proposes the procedural aggregation of the multiple proceedings. Numerous models exist so far. A rather prominent model is

28. In the Matter of *Collins & Aikman et. al.*, (2006) EWHC 1343 (Ch), available at http://www.eir-database.com/download/cases/145/134-1_Collins-&-Aikman-III.pdf.

29. See generally Natasha Watson, *Comments on Collins & Aikman Europe SA and Other Companies*, 11 INT’L CASE L. ALERT (2006) (providing an overview of the case), <http://www.eir-database.com/download/caselaw/7/International-Caselaw---Alert-No-11-IV-2006-August-27,-2006.pdf>.

30. For an insightful discussion of this mechanism, see MANFRED BALZ, *SANIERUNG VON UNTERNEHMEN ODER VON UNTERNEHMENSTRÄGERN* (1986).

31. For example, the liquidation through the sale of the whole unit.

32. Or, the debtor’s reorganization in the strict sense.

33. The following observation of Hertig and Kanda is noteworthy: “Creditors of the members of corporate groups are arguably more vulnerable to the opportunism and negligence of controlling shareholders than the creditors of . . . independent companies.” HERTIG & KANDA, *supra* note 7, at 74 n.7.

34. See Christoph G. Paulus, *The New German Insolvency Code*, 33 TEX. INT’L L.J. 141, 143 (1998).

the appointment of just one insolvency administrator for all proceedings of the group members.³⁵ The main advantage of that model is that frictional losses, through the cooperation of several administrators, are avoided. There is no need to exchange information to coordinate the proceedings or to cooperate in general.³⁶ Some experience with cases under the umbrella of the EIR leave the impression that the written version of these obligations is sweeter than their practical realization. The handling of the multiple proceedings is considerably more efficient. However, the main disadvantage of this approach is the administrator's potential loss of neutrality and independence; there is a certain realistic threat of a collision of interests. This might become visible when, for example, tort claims within the group structure are to be pursued or when one company possibly has a claw-back claim against the other. The appointment of a special examiner in such cases usually serves as a solution; but this does not always erase the appearance of conspiracy.

A variant of this approach has been tested twice by the Insolvency Court of Köln (Cologne). After the opening of a main proceeding over the assets of the parent company in England, and the opening of a secondary proceeding over the assets of a subsidiary in Germany, the German judge declared that the English administrators were debtors in possession. This means under the relevant German rules³⁷ a custodian (Sachwalter) has to be appointed to monitor the debtor's actions and transactions.³⁸ In both proceedings, the judge in Cologne selected for this task an experienced German administrator, thereby leaving the English administrators sufficient freedom to act according to their overall plans and at the same time safeguarding the compliance with German law.

Another way of combining the proceedings on a procedural level is to designate a single insolvency court as competent for the opening of the proceedings of all members of the group; usually this is the court in whose district the parent company is situated. Some modern laws, such as the Spanish one, do have such a rule; the EIR does not. As previously described, the attempt initiated by the English courts to interpret the EIR, nevertheless, as if it had this rule has received the aforementioned backlash through the ECJ's "Eurofood" decision.

Finally, some commentators propose to cope with the problem of group insolvency law by means of cooperation duties among administrators. This implies, of course, that there are as many main proceedings as there are insolvent members of the group—thereby upholding the abovementioned traditional rule of "one company, one insolvency, one proceeding." This proposal has merit in that it avoids the somewhat tricky construction used quite often under the European Insolvency Regulation, which divides the insolvency proceedings of the group members into one main and several secondary proceedings despite the fact that each company is individually a legally separate entity. The proposal respects the separation of proceedings, and thus keeps the interference with existing concepts to a minimum. Pursuant to Art. 31 EIR, for instance, cooperation duties exist only between

35. For an example from the U.S., see generally *Blackwell v. Rio Mgt., Inc.* (*In re Blackwell*), 267 B.R. 732 (Bankr. W.D. Tex. 2001).

36. See generally art. 31 EIR, *supra* note 9, and 11 U.S.C. § 1525 ff.

37. Insolvenzordnung [Insolvency Act], Jan. 1, 1999 BGBl § 270 et seq. (F.R.G.).

38. For a similar approach, see generally *Maxwell Commc'n Corp. v. Société Generale* (*In re Maxwell Commc'n Corp.*), 170 B.R. 800 (Bankr. S.D. N.Y. 1994), *aff'd* 186 B.R. 807 (S.D. N.Y.), *aff'd* 93 F.3d 1036 (2d Cir. 1996).

administrators in a main proceeding and the corresponding secondary proceedings. However, the concern remains that cooperation duties are more easily prescribed than fulfilled in practice.

There might exist further possibilities to include even solvent group members into the procedural unity: One would be to establish a modification of the insolvency trigger “imminent insolvency”. This would be a trigger which transforms the experience with the aforementioned domino effect into statutory language – for instance, “A member of an incorporated group shall be deemed to be faced with group-related insolvency if it is likely to be affected by the opened insolvency proceedings of other group members.”³⁹ Another of the indicated possibilities is to have the phenomenon of group insolvency dealt with in a particular plan proceeding; thereby the solvent members of the group could be included into the group-wide plan without pulling them individually into an insolvency proceeding. A somewhat mitigated third possibility would be to establish for inter-group claims a particular avoidance rule or to declare group members throughout related entities – thereby alleviating the application of the existing avoidance rules.⁴⁰

The second option—a substantive aggregation—is the thornier one. Under the term “substantive consolidation,” substantive aggregation is admitted in the U.S.⁴¹ only when due to prior mismanagement the assets of the group members are so confused that the estates cannot be kept separate. One could call such a situation a kind of *force majeure*; factual obstacles impede compliance with the legal attribution of each individual right and duty to each individual legal entity.

The question arises whether substantive consolidation should in fact be restrained to such *force majeure* or whether one should go a step further and extend this approach—of course, with all caution.⁴² To be sure, asking this question does make sense only when and if there are advantages of consolidation over the mere procedural aggregation of the separate proceedings. The answer is positive because of increased efficiency which has supra been described as driving force behind the modernization of insolvency law. The increase of efficiency results not only from the appointment of just one administrator—this is achievable through a mere procedural aggregation as well, as shown supra—but also from the general applicability of just one law, the *lex concursus*.

To be sure, even this is achievable through the designation of one competent court whose order commences the proceedings over each one of the group members. However, the threat remains that the single proceeding would be broken up into several secondary proceedings when local creditors file respective petitions. This threat could possibly be eliminated if the insolvency administrator of the one and only proceeding were given the exclusive right to file such petitions. However, so far such a rule does not exist.⁴³ A recent decision of the English Chancery Division in

39. To be sure, this is meant to be just as a starting point for further necessary considerations.

40. A somewhat harsher version of this proposal would be to declare inter-group claims as being generally subordinated to the claims of the general unsecured creditors.

41. See generally David A. Skeel, *Groups of Companies: Substantive Consolidation in the U.S.*, in THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY 229 (Henry Peter et al. eds., 2006).

42. See, e.g., Peter, *supra* note 8, at 205. For the argument against substantive consolidation for principal reasons, see Daniel Staehelin, *No Substantive Consolidation in the Insolvency of Groups of Companies*, in THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY 213 (Henry Peter et al. eds., 2006).

43. In the course of the discussion before the enactment of the EIR, the European Parliament wanted

the *Collins & Aikman* case⁴⁴ illustrates the advantage of a unitary proceeding. In order to prevent the opening of secondary proceedings, the English administrators of the main proceeding promised the local creditors the dividend that they were supposed to receive in case of their opened local insolvency proceeding despite the fact that the only applicable English insolvency provides for a different distribution scheme. What Justice Lindsay permitted would barely be acceptable under continental European law outside a plan proceeding; but the outcome of the case was a sale of the whole at a remarkably higher sales price. Thus, to apply just one law meant greater efficiency.

The idea to explore extension of the substantive consolidation approach at all is the result of cases such as *KPNQwest*, which concerned a company that owned cables across Europe. Most of these cables formed networks; one of the bigger ones ran through Belgium, France, Germany, and the Netherlands. Notably, this particular network was—in terms of ownership—subdivided into four parts: the Belgian one was held by a Belgian subsidiary, the French one by a French subsidiary, and so on. Under such circumstances—would it not make sense to keep such an economic unit (this need not necessarily be the group as a whole) together with its respective insolvencies, at least when reorganization is at stake? The same principle could apply when a group (or parts of it) creates one product the components of which are built in subsidiaries.

Posing these questions provokes deliberations about how much insolvency law is restricted to tools designed for use in times of economic success. Possible reasons for the creation of groups are: tax considerations; the need for rationalization or other organizational grounds; or a somewhat opaque complexity for various reasons.⁴⁵ These and other justifications can accumulate—as they often do when a group expands beyond the borders of a single jurisdiction. *Eurofood* is a typical example: the company was domiciled in Dublin for tax reasons, and its purpose was to serve the group as a whole. Therefore—once again the question: is it appropriate when the insolvency lawyer is bound to look only at each of the pieces of the jigsaw puzzle rather than seeing the picture as a whole?

The answer is even less easy when this insolvency lawyer looks at his accumulated experiences: how often is the net number of group members used for purposes of shifting gains or losses from here to there—subsidiary x has to buy goods for a rather high price in order to sell it at a rather low price to subsidiary y which shall thereby (through an improved statement of financial conditions) be prepared for sale at a rather high price. German administrators term this strategy “to decorate the bride,” for increasing the bride price. This is but one example of how—seen from an ex post perspective of an insolvency lawyer—the separation of legal independent entities is fairly often (ab)used for purposes that make sense only when the group is seen and understood as a whole.

In sight of that, it is somewhat artificial to imply that creditors are creditors of just a particular debtor. If obligations and rights are shifted back and forth within

to have Article 29 restricted in this way. See Christoph G. Paulus, *A Theoretical Approach to Cooperation in Transnational Insolvencies: A European Perspective*, 11 EUR. BUSINESS L.R., 435 (2000).

44. See *Re Collins & Aikman Europe SA*, [2006] EWHC 1343 (Ch.) (U.K.).

45. See Neil Cooper, GRIP 21, *Corporate Groups & Insolvency* (Jan. 12, 2005), http://www.grip21.org/uk/actualites/actualites.php?id_actualite=41.

the group during its time of successful economic performance, it is more often than not accidental whether the particular debtor is still the real debtor and whether it is solvent. In general, the concentration on the debtor–creditor relationship (stemming from one of the most fantastic inventions of ancient Roman law) has become outdated in modern time when looked at from the global trade of both performing as well as non-performing loans. These observations, however, lead right into a wide field of further very fundamental questions about the law’s role in general. This is not the place to present additional outlooks. Such discussions must be left for separate treatises on philosophy of law as well as methodology of law.

Therefore, suffice it to conclude that it is possible to extend the concept of substantive consolidation in reorganization proceedings beyond the confusion of assets and estates. This, however, is certainly not yet the end of the necessary deliberations; after all, to pack all assets into one estate does not necessarily correspond with the economic realities. There is some fine-tuning necessary that shall not be developed here to its full extent; this requires additional thought and discussion. As an indication of how such fine-tuning could look, consider an obligatory formation of creditors’ groups in a plan of a group insolvency. Accordingly, all creditors of each member company necessarily form one group. Another tool would be to provide inter-group claims with a certain ranking system such as the one that exists under German law, where claims of shareholders based on equity replacing loans to the company are subordinated.

These are just two examples of many other possibilities. I hope that I have shown that it appears to be worthwhile to keep thinking along these lines and to add to increasing insolvency law’s overall efficiency.