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Group insolvency proceedings

A comparative analysis of the EU and national insolvency laws

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Introduction

Since 2008, the economic crisis has had a direct effect on people, jobs and businesses: most importantly, it led to an increase in the number of insolvent businesses [1]. In 2013, the EU Economic and Social Committee published a document stating, *inter alia*, that "*Europe is currently experiencing a major economic and social crisis, which is affecting all parts of society. Prioritising the survival of businesses is one of the measures that the European Union has identified as a means of getting back on track. Bankruptcies certainly have repercussions that go beyond damaging consequences for the companies concerned; they affect the entire economy of the Member States, especially the general public, in their capacity as taxpayers, employees and employers*" [2].

Since the beginning of the crisis, about one quarter of the insolvency proceedings started in Europe had a cross-border element: typically, insolvent debtors had ties to multiple jurisdictions (*e.g.*, establishments or assets belonging to the debtor were located in jurisdictions other than that where the debtor was domiciled or headquartered) or, alternatively, a single insolvency event affected several members of an international group of companies.

In general terms, well-designed legal and regulatory frameworks on insolvency and creditor/debtor rights facilitate the extension of credit and enable private sector development. The availability of credit is a key

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[1] From 2009-2011, an average of 200,000 firms went bankrupt per year in the EU. Over the same period, about 50% of all new businesses did not survive the first five years of their life.

[2] Today, substantially all EU major economies show improving failure rates: in particular, in France, the number of corporate failures declined by 9.7% in the year to June 2017, while corporate bankruptcies in Germany were down by 8.2% over the same period. However, in 2017, in contrast to the improvement seen in many parts of Europe, in certain EU member States, insolvency figures remained appreciably higher than before the crisis: in particular, although insolvency activity in Spain has slightly eased from its peak in 2013, Italy continues to record more than twice as many insolvencies as before the crisis. So in such regions, a real turnaround is still only an incipient phenomenon.

driver of economic activity, innovation and growth. By providing for the restructuring and preservation of viable businesses, and providing for the orderly dissolution of distressed, non-viable businesses, insolvency laws ensure predictability and enhance investor confidence. Overall, the transparency and efficiency of legal systems have a direct impact on the allocation of credit risk and risk management in the financial sector, and consequently influence access to credit and its cost. In other words, efficient insolvency rules improve access to credit, which, in turn, encourages investment: in particular, banks are more likely to lend when they are confident that, even in an insolvency scenario, they will be able to collect their loans. Greater compatibility of the rules on insolvency proceedings can, therefore, improve the functioning of the market.

Such principles should also apply in case that a debtor belongs to an international group of companies, or in case where a debtor has ties to multiple jurisdictions: insolvency scenarios involving multiple jurisdictions have given rise to new complexities when dealing with insolvency, liquidation and recovery proceedings. In these situations, the absence of predictability in the handling of cross-border insolvency cases may create hurdles to capital flows and create disincentives to cross-border investment. Thus, the lack of effective legislation dealing with these issues may give rise to serious uncertainties, since, as mentioned, a large part of the bankruptcies since 2008 is represented by cross border insolvency cases.

National insolvency laws have not always coped with these challenges, and they often turned out to be inadequate to deal with cross-border insolvency cases. For instance, French law provides for several insolvency proceedings, such as *redressement judiciaire, sauvegarde, mandat ad hoc, conciliation, sauvegarde accélerée* and *sauvegarde financière*[3], which, however, are strictly supervised by the court and, most importantly, dedicate little room to cross border aspects and to enterprise groups (notwithstanding that, French insolvency law is often considered as particularly attractive, as opposed to other European jurisdictions, due to the relative speed of proceedings, the existence of local specialised courts and lower costs). As regards German law, in 2012, the *Insolvenzordnung*

[3] See *Loi* no. 85-98 of 25 January 1985 *relative au redressement et à la liquidation judiciaires des entreprises*, as amended by *Ordonnance* no. 2000-912 of 18 September 2000 *relative à la partie législative du code de commerce*.

(which was originally inspired by the US Bankruptcy Code, and, in particular, by the "Chapter 11" proceedings)[4] was amended by the *Gesetz zur weiteren Erleichterung zur Sanierung von Unternehmen*, providing for, *inter alia*, a pre-insolvency proceeding (*Schutzverfahren*), but avoiding explicit references to cross-border issues and insolvency of international groups[5].

Broadly speaking, national legislations frequently resulted in inefficient legal approaches, which hampered the rescue of financially troubled businesses, did not create support to a fair and efficient administration of cross-border insolvencies, often impeded the protection of the assets of the insolvent debtor against dissipation and hindered maximization of the value of assets. Therefore, the intervention of supranational organisations to take measures regarding cross border insolvency was often seen as more effective than domestic legislation. Remarkable attempts to create a harmonised legal framework on cross-border insolvency were contained in the Brussels Convention of 23 November 1995 on insolvency proceedings, in the Istanbul Convention of 5 June 1990 on international aspects of bankruptcy and, most importantly, in the Model Law on Cross-Border Insolvency adopted by UNCITRAL in 1997[6]. These were attempts to address important issues of international private law impacting on cross

[4] In the United States, bankruptcy is governed by federal law, commonly referred to as the "*Bankruptcy Code*" ("Code"). The United States Constitution (article 1, Section 8, Clause 4) authorizes Congress to enact "*uniform Laws on the subject of Bankruptcies throughout the United States*". The Congress has exercised this authority several times since 1801, including through adoption of the Bankruptcy Reform Act of 1978, as amended, codified in Title 11 of the *United States Codeand the Bankruptcy Abuse Prevention and Consumer Protection Act* of 2005 (BAPCPA).

[5] See LAUFER, *An economic analysis of the German bankruptcy code in the context of the European reform movement*, Frankfurt, 2012.

[6] See the Resolution no. 52/58 of the General Assembly of December 15, 1997 and the relevant *Guide to Enactment and Interpretation*. On this topic, see HARMER, *UNCITRAL Model Law on Cross-Border Insolvency*, in *International Insolvency Review*, 1997, 145; ISHAM, *UNICTRAL's Model Law on Cross-Border Insolvency: a workable protection for transnational investment at last*, in *Brooklyn Journal of International Law*, 2001, 1177; YAMAUCHI, *The UNCITRAL Model Cross-Border Insolvency Law: the stay of proceedings and adequate protection*, in *International Insolvency Review*, 2004, 87; HOLLANDER, GRAHAM, *Uncitral Model Law on Cross-Border Insolvency*, in PANNEN, *European Insolvency Regulation*, Berlin, 2007, 687.

border insolvency: in particular, the UNCITRAL Model Law refrained from suggesting the introduction of mandatory rules (of substantive or procedural nature) and promoted instead the adoption of merely "enabling rules", by providing for specific legislation on judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. In essence, the idea was to allow, whenever possible, a case-by-case convergence of choices by the contracting States, via the coordinated exercise of executive, legislative and judicial powers in their respective jurisdictions. Although the UNCITRAL Model Law had limited application and the said Conventions never took effect, they were a starting point for the following analysis and discussions.

In 2000, after years of laborious debates, the Regulation no. 1346/2000 (the "*2000 Regulation*") was adopted by the European Union to deal with issues of cross-border insolvency through recognition and coordination of national insolvency proceedings. The 2000 Regulation was basically aimed at avoiding incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (*forum* shopping)[7]. On the other hand, the 2000 Regulation turned out to be defective from multiple points of view. First of all, as its main scope was cross-border insolvencies, the Regulation did not harmonise insolvency laws regulating *national* insolvency cases. Thus, differences in national laws remained. A study commissioned by the European Parliament in 2010[8] highlighted that disparities between national insolvency laws can create obstacles, competitive advantages and/or disadvantages and difficulties for companies with cross-border activities or ownership within the EU. The study found that harmonising insolvency processes across the EU

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[7] ISRAEL, *European Cross-Border Insolvency Regulation. A study of Regulation 1346/2000 on Insolvency Proceedings in the light of a paradigm of co-operation and a* Comitas Europaea, Antwerpen-Oxford, 2005, 27; HUBER, *Die Europäische Insolvenzverordnung*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2002, 490; RAIMON, *Le règlement communautaire 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité*, Paris, 2007, 15.

[8] *Harmonisation of insolvency law at EU level*, European Parliament 2010, PE 419.633. This was followed by the study "*harmonisation of insolvency law at EU level with respect to opening of proceedings, claims filing and verification and reorganisation plans*", EP 2011, PE 432.766.

Member States would have increased the efficiency of insolvency and business reorganisation process. This would have also increased, in turn, the return to creditors, if a decision is made to liquidate the assets or improve the prospects for reorganisation, by encouraging creditors to support restructuring plans.

Second, most importantly, all issues related to insolvency affecting *international groups* (as a whole) were entirely neglected. At the time when the 2000 Regulation was adopted, the feeling was that groups of companies and the problems of their insolvency from an international perspective were too complicated to be handled efficiently. In short, there was consensus that it would be extremely difficult to reconcile, on the one hand, the need for an overall or coordinated approach to the crisis of an international group as a whole and, on the other hand, the pressure at the level of national laws to enforce a separate national treatment for each company of the group.

Thus, rather than risking failure by pushing for a too ambitious project (regulating insolvent groups from a cross-border perspective), prudence suggested to confine the scope of the 2000 Regulation to the (relatively) simpler issues of the *sole debtor* having links in more than one jurisdiction.

However, the overall scenario and the mood were about to change. Notwithstanding the initial fears of nationalistic hostility towards international cooperation in insolvency matters, such cooperation was about to take place and to deliver encouraging results. In addition, certain insolvency cases[9] involving multinational enterprises *organized as groups of companies* made clear the necessity or, at least, the potential usefulness of having some sort of *ad hoc* rules, dealing with the issues of insolvency in a group context (at the international level).

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[9] CJEU, Case C-341/04 (*Eurofood IFSC Ltd.*) of 2 May 2006; CJEU, Case C-1/04 (*Staubitz-Schreiber*) of 17 January 2006; CJEU, Case C-396/09 (*Interedil*) of 20 October 2011. See also BARIATTI, *Il regolamento 1346/2000 davanti alla Corte di giustizia: il caso Eurofood*, in *Riv. Dir. Proc.*, 2007, 203; LENNARTS, *The review of the EU Insolvency Regulation – Time to recognise the ties that bind company law and insolvency law. Report NACILL*, vol. 2012, Amsterdam, 2012, 47-88; RINGE, *Forum Shopping under the EU Insolvency Regulation*, in *EBOR*, 2008/9, 609-612; MOSS, FLETCHER, ISAACS, *The EU Regulation on Insolvency Proceedings*, 3rd ed., New York, 2016, 684.

As a result, there has been, on the whole, a substantial weakening of the reasons to abstain from regulating the insolvency of international groups and a parallel increase of the strength of the reasons militating in favour of starting up the process of creating such rules [10]. This led to a more thorough debate on insolvency affecting international groups as such (which should have been regulated separately from the rules affecting sole insolvent debtors having ties to multiple jurisdictions) [11].

A new legislative trend was originated by suggestions, recommendations and regulations issued by supranational organisations. The World Bank urged to put in place appropriate regulations on insolvency affecting groups. In particular, according to the World Bank, in the context of the insolvency of enterprise group members, "*the system should provide foreign representatives and creditors with access to the court, and for the recognition of foreign insolvency proceedings, if necessary*" [12] and the system should allow each national court to cooperate to the maximum possible extent with foreign courts or foreign representatives, either directly or through the local insolvency representative; the system should permit national courts to communicate directly with foreign courts or representatives and should allow insolvency representatives appointed to administer proceedings with respect to an enterprise group member to communicate directly and to cooperate with foreign courts and with foreign insolvency representatives, in order to facilitate coordination of the proceedings; in addition, *a single insolvency representative should be*

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[10] The 2008 global financial crisis added a powerful *momentum* to the initiatives aiming at a quick implementation of this process.

[11] According to a statement issued by the European Commission in 2013, "*modern insolvency law in the Member States should help sound companies to survive and encourage entrepreneurs to get a second chance. It should ensure that procedures are speedy and efficient, in the interest of both debtors and creditors, and should help safeguard jobs, help suppliers to keep their customers, and owners to retain value in viable companies*". See the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, "*A new European approach to business failure and insolvency*", COM (2012) 742 final.

[12] INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, Washington D.C., 2016. See, in particular, the principles nos. C.16 and C.17, regarding "*Insolvency of domestic enterprise groups*" and "*Insolvency of international enterprise groups*".

appointed for enterprise group members in different States. In such cases, according to the World Bank, measures should be adopted to address situations involving conflicts of interest (insolvency representatives and other parties in interest should be allowed, *inter alia*, to enter into cross-border insolvency agreements, involving two or more enterprise group members in different States, in order to facilitate coordination of the proceedings). All such suggestions were addressed to legislators which, as the European Union, had done too little to regulate the phenomenon of international group insolvency.

A change to the 2000 Regulation was, then, predictable. In 2015, the EU adopted the Regulation no. 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, effective from 26 June 2017 (the "*2015 Regulation*"). Primarily, the scope of the Regulation extends to proceedings "*which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs*". The Regulation, in particular, governs all "*proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs*".

Most importantly, the 2015 Regulation finally dedicates a specific set of rules to group proceedings. With a view to "*further improving the coordination of the insolvency proceedings of members of a group of companies and to allow for a coordinated restructuring of the group*" [13], the Regulation introduces specific procedural rules on the coordination of the insolvency proceedings of members of a group of companies. Such coordination "*should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality*". Therefore, despite the principle of separate legal personality of each member of the group, a (unified) insolvency proceeding may now be opened with respect to the group as such.

In a nutshell, an insolvency practitioner appointed in a proceeding involving a member of a group may request the opening of *group coordination proceedings*, based on a coordination plan [14].

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[13] See the recital no. (45) of the Regulation no. 848/2015.

[14] The group coordination proceeding is essentially of a voluntary nature: the practitioners involved remain free to object to their participation in the proceedings. Pursuant

Group coordination proceedings must be always aimed at facilitating the effective administration of the insolvency proceedings related to each group member, and to have a "*generally positive impact*" for creditors: this is one the elements which should be assessed by the court, prior to opening group coordination proceedings [15].

By the way, the need to encourage a group-wide approach to insolvency is further underlined by the Directive (EU) no. 2019/1023 of the European Parliament and of the Council of 20 June 2019, on "*preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132*" (Directive on restructuring and insolvency) [16]. In particular, under recital (7), "*differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States. This is most notably the case with restructuring international groups of companies*". Recital (15) provides as follows: "*greater coherence of restructuring and insolvency procedures should also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union*". The same concept is further

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to article 64 of the 2015 Regulation, the practitioner appointed in respect of a group member may object to the inclusion of "its" proceeding within the group coordination proceeding. Such objection must be filed with court within 30 days of notice of request for the opening of the group coordination proceeding. It appears that: *(i)* the practitioner is the only subject entitled to object to the inclusion in a group coordination member (no other body or party involved seems to have a similar right); *(ii)* lacking any objection within 30 days, the inclusion in the group coordination proceeding is automatically confirmed.

[15] In particular, the advantages of group coordination proceedings should not be outweighed by the costs of those proceedings and must be determined in accordance with the national law of the Member State in which group coordination proceedings have been opened.

[16] See the Official Gazette of the European Union of 16 June 2019, L 172/19.

stressed by recital 24: "*a restructuring framework should be available to debtors, including legal entities and, where so provided under national law, natural persons and groups of companies, to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured*".

The rules contained in the 2015 Regulation will have to be analysed in order to assess whether the phenomenon of insolvent enterprise groups may be governed efficiently and the distortive cross border effects will be captured by the "group proceedings". At a start, the 2015 Regulation gives rise to many issues and concerns, which, to a large extent, had never been analysed before [17], so that the 2015 Regulation could function as a "wake-up call" for company law specialists. In particular, it seems still unclear whether the 2015 Regulation creates any (dystonic) overlapping with domestic legislations (and possibly with any *ordre public* rule or mandatory provision of law), considering that the majority of the European countries still allows little room for group proceedings. Our analysis will be focused on the structure of group proceedings and their impact on principles of domestic law (as applicable in each involved Member State): it will be investigated, *inter alia*, whether third parties' rights may be jeopardised or affected by decisions made by group proceedings and, if so, whether there is any possibility, for third parties, to object or react. If group proceedings are actually able to impact on third parties, this could be regarded as a deviation from several (civil law) fundamental principles, including the principle according to which *res inter alios acta neque nocet neque prodest:* the admissibility of such deviation, therefore, should be carefully assessed in light of the general principles governing domestic laws and EU law. It should be ascertained whether any deviation from the general principles may be accepted and consolidated as such or instead it needs to be counterbalanced by appropriate remedies

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[17] See MEVORACH, *The new proposed regime for EU corporate groups in insolvency: a critical note*, in *Corporate Rescue and Insolvency*, 2013, 89; MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, in *International Insolvency Law Review,* 2015, 235; MERLINI, *Reorganisation and Liquidation of Groups of Companies: Creditors' Protection vs. Going Concern Maximisation, the European Dilemma, or simply a Misunderstanding in the light of the new EU Insolvency Regulation No. 2015/848*, in *International Insolvency Law Review*, 2016, 119.

(of either procedural or substantial nature). Our analysis should also possibly suggest solutions *de iure condendo,* in order to prevent or neutralise any conflict between group proceedings and the general principles of (national) law, as applicable. For instance, any prejudice to third-party rights might be allowed only to the extent that they are justified by the need to ensure effective management of realisation of the debtors' assets (or to implement the debtor's recovery plan). However, the border lines between 'justified' and 'unjustified' prejudice to third parties' rights may turn out to be uncertain.

For instance, the 2015 Regulation provides that, on certain conditions, third parties (*i.e.*, creditors, practitioners of other proceedings related to the same group, courts and Authorities, debtors, etc.) are directly involved in the insolvency proceeding by which they are affected, while, in other cases, they are just passive beneficiaries or "addressees" of the effects arising from the proceeding. Article 56 regulates cooperation among insolvency practitioners and provides for the conditions on which different practitioners may cooperate and make joint decisions: in particular, pursuant to article 56, paragraph 2(c) of the 2015 Regulation, different insolvency practitioners may take actions with a view to implement a "*coordinated restructuring plan*". Even though the latter might have impacts on third parties' rights, it is unclear whether creditors and third parties in general are entitled to challenge such decisions and what are the legal effects arising from such "restructuring plan" for such third parties.

Again, under article 60, paragraph 1(b) of the Regulation, a practitioner may request a stay of the realisation of the assets with respect to any other member of the same group. So, apparently, proceedings may have "cross-effects", since the realization of the assets in a given proceeding may be stayed upon the initiative of the practitioner *of another proceeding*. In this scenario, based on the literal interpretation of the 2015 Regulation, it does not seem entirely clear if creditors affected by the stay are entitled to object (or to have a say on that matter) [18].

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[18] Similarly, pursuant to article 59 of the Regulation, the costs of cooperation "*shall be regarded as costs and expenses incurred in the respective proceedings*". So, are third-party creditors entitled to supervise, control and possibly object to "their" proceeding incurring cooperation costs? The cooperation might be regarded as useless

In a nutshell, the long-awaited group proceedings might turn out to have "extra-powers", potentially endangering third parties' rights (or possibly conflicting with principles of domestic law), which could be affected by decisions made by the group insolvency practitioners, without any possibility for them to react: as mentioned, if such conclusion will be confirmed, appropriate countermeasures could be outlined in favour of the "innocently" affected third parties, possibly by suggesting remedies or interpretative solutions.

Our analysis is not based on the consolidated opinions of authors or on case law, nor on usages or past practical situations, but it will mainly have to reconstruct the *rationale* of the Regulation, the genuine intent of the European legislator and the true meaning (and aims) of the provisions regulating group proceedings: to this purpose, the most recurrent issues, the reasonable needs and expectations of the players of insolvency proceedings should be also assessed, in order to reconcile the literal meaning of the norms with the practical needs and the ultimate aims of the European legislator.

Chapter 1 will analyse the issues related to the detection of the applicable substantive and procedural law: in absence of a clear legal framework on group insolvency, it may be uncertain whether claims, requests or actions brought by the insolvency practitioner of an insolvency proceeding (regarding one of the group members) *vis-à-vis* the proceeding related to another entity of the group are subject to the law of the former or to the law of the Member State where the "addressee" of the action is based. At a first glance, it may be argued that the 2015 Regulation sets up predictable mechanisms to deal with group insolvencies and dictates clear rules allowing for group restructuring plans. Such rules seem to lead to an increase of the degree of certainty when dealing with group insolvency: coordination among insolvency practitioners allows to avoid "fragmented" proceedings related to each group member, thereby avoiding consequent losses for creditors, shareholders, employees and stakeholders in general. On the other hand, it should be assessed whether possible distortive effects are captured (and neutralised) by the "group proceedings": the 2015 Regulation gives rise to specific issues, which, to a

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or inappropriate, in the light of their interest to maximise realization of the insolvent's assets.

large extent, have been barely analysed before and which (as mentioned) relates to the possible impact of group proceedings on third-party rights [19].

Chapter 2 contains an analysis of the possible clash between the 2015 Regulation and the principles of domestic law. As mentioned, pursuant to article 56 of the 2015 Regulation, if multiple affiliates of a group are declared insolvent, a "*coordinated restructuring plan*" may be set up. However, a group coordination proceeding may be set up only "*to the extent that such cooperation is not incompatible with the rules applicable to such proceedings [...]*". As a matter of fact, practitioners setting up a coordination proceeding should acknowledge that the possibility to cooperate is affected or reduced by the need to comply with different national laws. The 2015 Regulation is meant to allow a 'coordinated' proceeding, but, as long as all details are left to national law (and in absence of a real framework for coordinating the national regimes), an actual and effective coordination could be hard to achieve. The admissibility of any deviations from domestic rules should be carefully assessed in light of the general principles governing national laws.

[19] See MEVORACH, *The new proposed regime for EU corporate groups in insolvency: a critical note*, in *Corporate Rescue and Insolvency,* 2013, 89; MADAUS, *Insolvency proceedings for corporate groups under the new Insolvency Regulation*, in *International Insolvency Law Review*, 2015, 235; MERLINI, *Reorganisation and Liquidation of Groups of Companies: Creditors' Protection vs. Going Concern Maximisation, the European Dilemma, or simply a Misunderstanding in the light of the new EU Insolvency Regulation No. 2015/848*, in *International Insolvency Law Review*, 2016, 119.

Chapter 1

The applicable substantive and procedural law

SUMMARY: 1.1. Introduction. – 1.2. Cross guarantees. – 1.3. Setoff. – 1.4. Cash pooling arrangements and close-out netting provisions. – 1.5. The inhomogeneous array of restructuring tools under national law. – 1.6. The EU legislative trends. – 1.7. Does the 2015 Regulation solve all problems? The possible conflict between 'group proceedings' and third-party rights.

1.1. Introduction

Since 2008, over one quarter of the insolvency proceedings started in Europe have had a cross-border element: in the majority of cases, a single insolvency event affected several members of an international group of companies, which was comprised of several entities based in several jurisdictions across the European Union. However, although a large number of cross-border insolvencies involves a group of companies, the traditional approach of the EU Member States did not lead to enacting specific rules dealing with the insolvency of a multi-national enterprise group. The basic assumption in most European countries was that insolvency proceedings basically relate to a single legal entity and that, in principle, separate proceedings should be opened for each individual member of the group.

As a result, Member States legislations do not provide for compulsory coordination of insolvency proceedings opened for a parent company and its subsidiaries, even in cases where such a coordination would facilitate the reorganization of these companies or – where this is not possible – a more efficient liquidation of each company's assets. Substantially all measures provided for by national laws regarding coordination of the single group proceedings are not automatically applicable, nor compulsory, and each insolvency practitioner remains free not to request the merge, consolidation, coordination or unification of the proceedings involving the group companies, depending on his or her own discretionary evaluation, on a case-by-case basis. Neither the liquidators nor the courts involved in the different proceedings concerning members of a group are under a duty to cooperate and communicate: while liquidators may cooperate among one another on a voluntary basis, judges are, in many Member States, *de facto* prevented from cooperating with each other in absence of a legal basis expressly compelling them to do so.

In such scenarios, unless insolvency practitioners managing group members could be forced to coordinate their actions (on an automatic basis and not just by virtue of a discretionary evaluation by each of them), it is unlikely that the group can be reorganised as a whole and it may have to be broken up into its constituent parts. If no strict rules governing coordination are implemented (and each insolvency practitioner remains free to insist that each proceeding should stay autonomous from the others), the insolvency of a group of companies is likely to result in the commencement of multiple separate insolvency proceedings in different jurisdictions, regarding each of the insolvent group members, without any coordination or measure ensuring coherence among one another [1].

So, typical situations, where a debtor belongs to an international group of companies, remain generally overlooked. In 2012, the European Commission, according to which "*the lack of a specific framework for group insolvency constitutes in certain cases an obstacle to the efficient*

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[1] According to recommendation issued by the European Commission on 12 March 2014 "*on a new approach to business failure and insolvency*": "*It is necessary to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union. To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. For example, to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a mediator or a supervisor should not be compulsory but made on a case-by-case basis*".

administration of the insolvency of members of a group of companies" [2], had stigmatised this defective approach.

First of all, in absence of coordination, "fragmented" insolvency proceedings related to each group member do not ensure that assets are actually recoverable across borders [3], in order to achieve appropriate protection for creditors, with consequent losses for creditors, shareholders, employees and stakeholders in general. As a result, the absence of predictability in the handling of cross-border insolvency cases related to an international group may discourage cross-border turnaround investment.

Moreover, the lack of a strict regulation on group insolvency may lead to serious uncertainties in respect of the applicable (substantive and procedural) law. In absence of a clear legal framework, it may be uncertain whether claims, requests or actions brought by the insolvency practitioner of an insolvency proceeding (regarding one of the group members) *vis-à-vis* the proceeding related to another entity of the group are subject to the law of the former or to the law of the Member State where the "addressee" of the action is based. For instance, if a group is comprised of several companies, which are based in different Member States, and one of the subsidiaries is willing to bring a claim against the parent company (*e.g.*, due to abuses allegedly put in place by the latter, or due to actions taken in conflict with the proper group management rules, to the detriment of the controlled company), lacking any rule regulating claims and rights affecting international groups, it may be unclear whether the liabilities of the parent company are subject to the law of the subsidiary (*i.e.*, the claimant) or to the law of the parent company.

A different scenario might arise in case that the claim is brought against the parent company by the subsidiary's minority shareholder: in

[2] See the *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) no. 1346/2000 of May 29, 2000 on insolvency proceedings* – doc. COM (2012) 743 final dated December 12, 2012. For details see the Impact Assessment accompanying the proposal for a Regulation amending the Council Regulation (EC) no. 1346/2000 of May 29, 2000 on insolvency proceedings – doc. SWD (2014) 62 final, dated March 12, 2014.

[3] This topic was discussed in the European Parliament resolution P7_TA(2011)0484 of the 15th November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)).

such case, if the subsidiary's shareholder, the subsidiary and the parent company are based in three different jurisdictions, it may be unclear whether the claim is governed by the laws of the claimant.

This triggers the need to identify the applicable law both from a substantive (*i.e.*, the law regulating the merits) and procedural (*i.e.*, the law governing the applicable procedural requirements to be fulfilled, the relevant statutory limitations, the competent jurisdiction and the rules governing evidence to be provided at court) point of view.

Regarding substantive law, article 2497 of the Italian Civil Code specifically provides for the parent company's liability for damages created to its subsidiary, in case that the former acts in breach of the rules of proper management and such a behaviour gives rise to a prejudice to the latter; to that purpose, the Italian Civil Code regulates the conditions to be fulfilled in order to bring a claim against the parent[4]: more specifically, Italian law requires that management and coordination must be exercised in accordance with the principles of proper corporate and business management and in a way that does not impair profitability of the controlled company, the value of its overall assets, and the value of the shareholding interest. In case of damages arising from the violation of such principles, companies vested with management and coordination powers over the subsidiaries may be deemed liable for harmful acts carried out by the parent in its own interest or in the interest of a third party. Liability, however, does not arise if damages are offset by the overall result of coordination, on the basis of an after-the-fact inquiry; in other terms, liability only arises if the interest of both the subsidiary and the group as a whole has been disregarded[5]. On the other hand, if the liabil-

[4] CARIELLO, *Direzione e coordinamento di società e responsabilità: spunti interpretativi iniziali per una riflessione generale*, in *Dir. Soc.*, 2003, 1243; SACCHI, *Sulla responsabilità di direzione e coordinamento nella riforma delle società di capitali*, in *Giur. Comm.*, 2003, 670; TOMBARI, *Riforma del diritto societario e gruppo di imprese*, in *Giur. Comm.*, 2004, I, 69; BADINI CONFALONIERI, voce *Direzione e coordinamento*, in *Dig. Disc. Comm.*, 2007, 288; GIOVANNINI, *La responsabilità per attività di direzione e coordinamento nei gruppi di società*, Milano, 2007, 110; GUERRERA, *Gruppi di società, operazioni straordinarie e procedure concorsuali*, in *Dir. Fall.*, 2005, I, 22; VALZER, *La responsabilità da direzione e coordinamento di società*, Torino, 2011, 13.

[5] Additionally, in order to protect creditors, article 2497 *quinquies* of the Italian Civil Code was introduced to prevent undercapitalization (a situation very common within