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9 — Enterprise Groups in Insolvency: Recent International Developments

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I. — Introduction

Until fairly recently, the problem of enterprise groups, domestic and international, in insolvency has been given only preliminary thought by international bodies developing best practice standards and frameworks for insolvency and cross-border insolvency. Often, the issue was left completely untreated. Evidently, the original version of the UNCITRAL Legislative Guide on Insolvency Law² ("Insolvency Guide") has only addressed the issue tentatively.³ The UNCITRAL Model Law on Cross-Border Insolvency ("UNCITRAL Model Law") still deals only with single debtors having multi-jurisdictional operations.⁴ The current text of the European Union ("EU") Regulation on Insolvency Proceedings⁵ does not provide rules for groups at all.

Indeed, it is a challenge to regulate groups in insolvency. Groups come about in different structures and different degrees of integration and therefore a "one size fits all solution" may not be appropriate to these types of cases.⁶ It is also difficult to reconcile insolvency objectives and fundamental concepts of company law when regulating groups. On the one hand, measures taken in the event of insolvency should promote the goals of insolvency law — maximizing wealth, ensuring equitable treatment of creditors, procedural fairness and facilitation of rescues.⁷ However, the promotion of these goals may require treating the group as the relevant body or acknowledging inter-connections among group members, which may imply disregarding the legal separateness among the group members. For example, a profitable rescue plan may need to encompass all the group entities rather than handle their insolvency on an entirely separate basis. In certain circumstances, it may be most efficient to pool the assets and debts of the group members together in the course of insolvency, since their affairs were so intermingled in the course of business. On the other hand, such actions may have detrimental impact on the doctrine of the corporate form and its significant economic benefits.⁸ International bodies deliberating on insolvency reform have been reluctant to make inroads into the company law building blocks and devise rules that may amount to lifting of the corporate veil.

Yet, this state of affairs — where group insolvency regulation is being put aside — is beginning to change. Importantly, UNCITRAL has developed new standards on the treatment of enterprise groups in insolvency, dealing with both the domestic and the international aspects. The new recommendations were added to the original Guide. The EC Regulation followed suit. It is currently undergoing revision, and in this context, the treatment of groups is explicitly considered. The article makes note of these developments and provides some critical comments. It also highlights remaining gaps, primarily the lack of explicit treatment of cross-border insolvency of groups in the UNCITRAL Model Law on cross-border insolvency.

II. — New Solutions for Groups Forthcoming in the Revised EU Regulation

As noted above, the current text of the EU Regulation does not provide any rules for enterprise groups in insolvency. It was a conscious decision not to offer rules for groups, recognized by the Virgos-Schmit Report, which has been issued to serve as an interpretive guide to the Insolvency Convention that was later transformed into the Regulation.⁹ At the time, the key challenge was to devise and agree upon a cross-border insolvency framework for Europe. The difficulties arising in cases of groups were

best left to a later stage. Yet, the Regulation was due for revision after 10 years of operation. During that time, it had become very clear that the phenomenon of groups is so significant that it cannot be ignored anymore.

Indeed, the proposal of the EU Commission for a revised EU Regulation¹⁰ devotes a new chapter for groups with some explicitly outlaid solutions.¹¹ It therefore appears to be a significant improvement on the current state of affairs where there are no rules for groups. Furthermore, the Commission proposes to promote cooperation and coordination of enterprise groups insolvencies in order to ensure their efficient administration and in particular strengthen the restructuring of groups through the development of means of cooperation.¹² This proposal is in line with the goals of insolvency.¹³ However, it is doubtful that the Commission's proposal represents the most optimal solution for groups. In particular, efficient administrations may be undermined by the focus of the new proposal on cooperation between multiple proceedings rather than on encouraging the centralization of the process in a single jurisdiction or at least on clearly identifying a leading court and office holder that could coordinate the group proceedings.

Under the Commission's proposal, the liquidators appointed in proceedings concerning members of the same group shall cooperate if it would facilitate the effective administration of the proceedings. They should communicate information, explore the possibilities of group restructuring and coordinate the supervision of the group affairs. They may also agree, if permitted by the applicable law, to grant additional powers to one of the appointed liquidators. The courts, which preside over group members' proceedings, should cooperate with courts handling proceedings of other members of the same group, including by communicating information, coordinating the administration of the group affairs, coordinating hearings and approving protocols. Liquidators appointed in the insolvency proceeding of group members should also cooperate with courts handling proceedings of other group members, including by requesting information or assistance. The liquidators shall have the right to be heard and participate in other group members' proceedings, to request a stay of such proceedings, to propose a rescue plan and any other additional procedural measures.¹⁴

Thus, the proposal ensures a link between proceedings initiated or taking place against members of the same corporate group in different member states' courts is maintained, as all liquidators and courts involved in the process should cooperate and coordinate the supervision of the group affairs. These rules concerning cooperation between multiple proceedings are analogous to the provisions regarding the opening of secondary proceedings, in addition to main proceedings, against the same company. In that context too, it is acknowledged that parallel proceedings may be opened and cooperation between the main and the secondary proceedings is required. However, with regard to secondary proceedings, the Commission's proposal suggests limiting the opening of such proceedings to circumstances where it is necessary to protect the interests of local creditors, where the company has an establishment.¹⁵ Various other provisions ensure that the leading role of the liquidator in the main proceeding is retained *vis-à-vis* the secondary proceedings. In contrast, no limitations are imposed under the Commission's proposal on the opening or the handling of parallel proceedings against related companies. All liquidators have the same status and all may ask to stay other proceedings and propose a rescue plan. It is not required to file the proceedings in a single jurisdiction, or to instigate main or supervisory proceedings at a group centre. Although it is provided that in the course of cooperation it may be agreed to defer to one of the liquidators, such deference would depend on the applicable law and would require the consent of the relevant liquidators.¹⁶

The problem is that agreeing on centralization could be time consuming, expensive and difficult to achieve, especially as the Commission's proposal does not propose which of the forums could be the group centre and thus the potential leader of the process. Indeed, liquidators may "cooperate" with each other, but not necessarily agree with what the others propose in the course of the cooperation efforts. In the absence of a "centralization agreement", conducting parallel proceedings is likely to increase costs of the process and may generally hinder attempts at agreeing on efficient solutions for the group as a whole.

The Commission's approach can be contrasted with the original proposal of the European Parliament regarding the revision of the Regulation,¹⁷ which took a more obtrusive but nuanced approach providing concrete solutions for different types of groups rather than leaving it to the parties to decide on the appropriate solution. The Parliament recommended that where the group structure allows it, proceedings would be centralized in the jurisdiction of the group headquarters. Any additional

proceedings opened against members of the same group would be ancillary to the main group proceedings. Where the group was decentralized, coordination mechanisms should be utilized. It was also proposed that in cases of intermingled groups, where asset and debts were mixed together in the ordinary course of business, proceedings could be consolidated substantively, namely the assets and debts of the different group members may be pooled together. These recommendations fit more adequately with the economic reality of groups, which come about in different structures. Specifically, the primary solution, the full centralization of the proceedings, is based on the fact that groups are often integrated in terms of their business,¹⁸ and centrally controlled, especially where the group or parts thereof collapsed as a whole. It is likely that for such groups it will be relatively easy to identify a mutual centre for all the group members in insolvency and conduct the process from there. Full centralization or coordination from a single forum and by a single office holder in such cases is also likely to be more effective in light of the way the group has been operating. In other cases, where groups were decentralized but still integrated, a coordinated solution should be facilitated.¹⁹ In the rare cases of integration in terms of the assets and debts, *i.e.*, beyond mere business integration, the radical solution of substantive consolidation should be permitted.²⁰

Indeed, a nuanced approach that provides different solutions for different types of groups would be more complex. However, such complexity only reflects the intricacy of group reality. Furthermore, the European Regulation provides a regime within which a jurisdictional rule for groups could fit properly. The Regulation is not merely a framework for cooperation and therefore it is odd that for groups the Commission's proposal suggests loose rules, which give such primacy to voluntary arrangements.²¹ While it seems that the concern was not to interfere with the concept of corporate separate personality, it must be acknowledged that jurisdictional centralization does not entail lifting the corporate veil. Only substantive consolidation would result in pooling assets and debts together.

The Commission's proposal can also be contrasted with the practice where, in spite of the lack of group treatment in the Regulation, group proceedings have been consolidated procedurally (*de facto*) in a single jurisdiction, avoiding the opening of multiple proceedings against the same group; see for example the *Daisytek*, *Energotech* and *Hettlage* cases.²² Indeed, the Commission's proposal acknowledges this practice, to some extent. Thus, a new recital²³ provides that the provisions for groups should not limit the possibility of a court opening insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests ("COMI") of these companies is located in a single member state. In such situations, the court should also be able to appoint, if appropriate, the same insolvency representative in all proceedings concerned. This concept of a mutual COMI of group members is reinforced by the new definition of COMI proposed by the Commission, which refers to the company's central administration/actual centre of management and supervision of management.²⁴ Indeed, the COMI of members of integrated centralized groups would often be at the same central administration, *i.e.*, the head office of the group.²⁵ The problem is that this important concept is mentioned in a recital and has no resonance within the chapter on groups and within the body of the Regulation. As such, the impression might be that the primary rule for groups is the opening of multiple proceedings with accompanied duties to cooperate.

The European Parliament responded to the Commission's proposal in a published draft report,²⁶ where the Parliament expressed its support of the Commission's proposals but also suggested amendments. Regarding groups, the Parliament is now proposing a compromise between its original proposal that distinguished between different group scenarios and the Commission's proposal, which does not attempt to assign different tools to different groups. Thus, the Parliament's current suggestion is that in addition to the provisions regarding coordination among parallel proceedings of group members proposed by the Commission, it will be possible for a court to open what is called "coordinating proceedings" with a "coordinating office holder" at any jurisdiction where proceedings against group members are pending, provided that these members serve crucial functions within the group and have their COMI in the jurisdiction. Where more than one forum is seized to open group coordination proceedings, the group coordinating proceedings should be opened at the COMI of the most crucial member of the group. The coordinator will have responsibility for mediating between office holders appointed in the various proceedings, identifying and outlining procedural and substantive recommendations for the coordinated conduct of the insolvency proceedings and for proposing a group-wide plan where this approach is suitable. Once such proceedings are opened, the right of office-holders, other than the

coordinating insolvency representative, to ask to stay the other group member proceedings terminates unless the stay is pending and subject to the right of the coordinator to ask to lift the stay.²⁷

This recommendation reflects a push from mere cooperation between parallel proceedings to a more centralized approach. The solution proposed by the Parliament may indeed increase the likelihood of achieving a coordinated and more harmonized process to the insolvency of related companies as it defines a possible coordination centre and gives some prerogatives to a coordinating insolvency representative. The problem is that this suggestion too, focuses on the coordination of multiple proceedings and fails to emphasize the common scenario of a centralized group. Such groups will significantly benefit from localizing all the proceedings in one place: particularly saving costs associated with duplicate hearings and facilitating a coordinated approach to the group's proceedings. The Parliament's report still does not make any specific reference in the body of the Regulation to recital 20(b), which mentions the possibility of identifying a single COMI for all group members. Indeed, the proposal does not preclude the possibility of full centralization based on the finding of a mutual COMI but the focus on group coordination mechanisms in the body of the Regulation may detract the attention of users of the Regulation from this solution.

Furthermore, the concepts of "crucial functions within the group" and "most crucial functions" in case of jurisdictional competition as the criteria for opening coordinating proceedings looks to be a *caveat* here. It would most likely complicate the process for achieving the desired coordination and would be challenged by interested parties. The Parliament's proposal here essentially provides an alternative jurisdictional test. The first limb of the definition of members with crucial functions refers to the ability, prior to the opening of insolvency proceedings with respect to any member of the group, to take and enforce decisions of strategic relevance for the group or parts of it. Alternatively, "crucial functions" means the economic significance within the group, presumed if the group member contributed at least 10 per cent to the consolidated balance sheet total and consolidated turnover.²⁸ A less confusing approach would simply synchronize the jurisdictional test for the identification of the coordination centre with the concept of COMI, which, as aforementioned, refers mainly to the central administration, i.e., the company's actual centre of management. Similarly, a group coordination centre could be at a place from which the group, or parts thereof that were integrated and subject to insolvency, was coordinated and centrally administered, namely at the actual operational head office of the group — where the group was managed during the regular course of business.²⁹ This place would correspond with the actual head office of each group member, in cases of centralized groups or else the coordinating head office, i.e., place of supervision of management, of the group entities in cases of decentralized enterprises where local entities were autonomous but were still coordinated on the group level. Additional concepts such as the location of the member that was economically significant may be useful as a "second best" solution, but a clear priority between the tests could increase legal certainty and avoid jurisdictional battles.

The revision of the Regulation is still a work in progress and the final outcome of the deliberations is yet to be seen. It is hoped that the result will not be "one step forward, two steps backwards". It is clearly the first time that explicit rules encouraging cooperation and efficient administration of group proceedings are included. However, it holds the risk of overhauling the practice of centralizing group proceedings in a single jurisdiction using a regime that encourages multiple proceedings as the primary solution.

Another amendment proposed by the Parliament with regard to the treatment of groups is the addition of a reference to provisions that member states may introduce on the insolvency of groups of companies within their jurisdiction, which go beyond the provisions of the Regulation and do not affect the efficient and effective application of the Regulation.³⁰ This proposal recognizes that local jurisdiction plays an important role, in particular with regard to insolvency of groups. Explanatory notes provided by the Parliament highlight that some member states are currently discussing the introduction of domestic rules on corporate groups in insolvency and it needs to be clarified that these reform processes are not hampered as long as the national rules do not impair the proper functioning of the Regulation. It is an important note. Indeed, the Regulation's main focus is on the conflict of laws aspects pertaining to insolvency, while the regulation of groups in insolvency requires a range of rules to deal with their administration. Thus, this linkage between the EU Regulation framework, which focuses on conflict of laws matters, and the substantive laws on groups that may be developed and complement the solution in the Regulation is commendable. It is also possible that harmonized solutions for groups would be developed on the EU level as part of a program

on the harmonization of insolvency laws.³¹ Such initiatives may be inspired by the work that has been done in this area by UNCITRAL to which we now turn.

III. — Standards Developed by UNCITRAL

In 2005, UNCITRAL concluded that the topic of enterprise groups in insolvency deserves specific attention and is mature enough to be the subject of deliberations by a Working Group. The task was given to Working Group V who had deliberated on the topic during 2006-2010.³² The Working Group had to deal with challenges arising from the intersection of insolvency and company law; namely, the concern that group solutions will interfere with the doctrine of the corporate form. It also had to address the complexity of international groups in insolvency at a time where the framework for cross-border insolvency of single company was still being tested and concepts such as COMI were still not fully developed. Against this backdrop, the Working Group attempted to reach some wide global consensus on the treatment of enterprise groups in insolvency.

A set of recommendations were eventually devised and were added as Part III of the Insolvency Guide. The recommendations are divided between those related to domestic groups and those dealing with the international aspects of groups in insolvency. The recommendations on the international aspects, that is, the conflict of law issues pertaining to group insolvencies, are fairly similar to those proposed by the Commission discussed above, as they focus on access to proceedings, co-operation and co-ordination. Thus, the Guide builds on the provisions on co-operation, co-ordination and communication provided in the Model Law, and expand them to groups, suggesting that insolvency laws will allow courts and insolvency representatives presiding over the proceedings of different members of the same group to cooperate, including by way of agreeing on protocols (cross-border insolvency agreements), and communicating, including directly between the courts. The Guide goes beyond that and propose some additional forms of co-operation and communication among group members' proceedings, including the appointment of the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different states, which can assist in achieving global group-wide solutions.³³

Thus, the Working Group provided a whole set of measures for the cooperation between proceedings opened against members of the same enterprise groups, including the option of appointing the same insolvency representative to all, but it did not suggest rules for the identification of the leading jurisdiction or the centralization of the proceedings in a single forum. In fact, the Working Group deliberating on those recommendations did consider proposing a jurisdictional rule for the group as a whole ("group COMI") where proceedings may be centralized, yet this discussion has not materialized into an agreed international standard.³⁴ The Working Group considered the COMI to be a vague and not fully developed notion, and thus considered its extension into enterprise groups premature.³⁵ The Working Group also failed to transform the recommendations on the international aspects into model provisions that could be included in the Model Law, as discussed below.

The recommendations on the domestic aspects, that is, the actual insolvency regime applied to groups, are more comprehensive. Here, the Guide proposes a range of rules and doctrines, including the concepts of procedural coordination, substantive consolidation and group-wide reorganization plans.³⁶ Although the Guide links these measures to domestic groups, such measures will also serve multinational groups that may end up being handled in a jurisdiction that has adopted any of the proposed measures. In essence, procedural co-ordination will allow the handling of two or more proceedings against members of the same group in some joint manner. The Insolvency Guide suggests flexibility here, so that coordination can be implemented in different ways; the entire process may be handled under the supervision of a single court, where it is permitted by domestic law, or *via* coordination among several proceedings opened in different courts; it may involve different coordination techniques regarding different aspects of the process, such as coordinated hearings, coordination of avoidance proceedings and so forth.³⁷

A single representative may be appointed to all group members.³⁸ Alternatively, if more than one representative is appointed the representatives should cooperate to the maximum extent possible.³⁹ Such cooperation may include the sharing of information, the division of powers and responsibilities in regard to the enterprise, with the possibility of any of the representatives taking a leading role, the coordination of reorganization plans' proposals, and coordination of administration of debtors' affairs, including matters of funding, preservation and selling of assets.⁴⁰ A coordinated reorganization plan for an enterprise group may be

proposed either within a procedural coordination process or absent a formal order of coordination.⁴¹ The Guide envisages group-wide reorganization plans comprising several group members under insolvency, yet an enterprise group entity that is not subject to insolvency proceedings may participate in such a plan as well. Such participation will be based on an ordinary business decision taken by that member, subject to applicable company law.⁴² Substantive consolidation, *i.e.*, the pooling of assets and debts of the various entities together, is kept for the rare circumstances where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or where the court is satisfied that enterprise group members were engaged in a fraudulent scheme or activity with no legitimate business purpose.⁴³

It seems that with regard to the domestic aspects pertaining to group insolvencies, UNCITRAL generally got it right. It suggests different measures for different types of scenarios. In the more common scenario, procedural coordination of some sort will suffice in order to promote efficiency of the process. In those circumstances the assets, debts and creditors of each member remain intact and thus there is no real intervention with the notions of separate corporate personality and limited liability. Only in exceptional cases the "veil of incorporation" may be lifted in the sense that assets and debts will be mixed. Intermingling of assets is indeed a scenario where the partitioning of assets (usually regarded as the key economic benefit of separate personality in the group context) was just a façade,⁴⁴ and fraud is always a reason to look behind the "corporate veil".⁴⁵ Thus, the exceptions are certainly limited and are within the legitimate boundaries of the corporate form concept.⁴⁶

IV. — A Unified Global Framework for International Groups? — A "Gap" in the UNCITRAL Model Law on Cross-Border Insolvency

Perhaps the key shortcoming of the UNCITRAL output on groups discussed in the previous section is that the recommendations it provided regarding the international aspects of group insolvencies were not developed into model provisions in a Model Law. Indeed, as noted above, the UNCITRAL Model Law does not provide explicit rules for groups. It refers to situations where parallel proceedings are opened against the same debtor and facilitates cooperation in such cases. It also provides rules for the identification of the main or non-main proceedings regarding a debtor for the purpose of seeking recognition.⁴⁷ In this respect, and in a way similar to the EU Regulation, the Model Law refers to the COMI regarding main proceeding, or the establishment in regard to non-main proceedings of a debtor. There are no rules for identifying a jurisdiction where proceedings against related companies may be opened.

However, the Model Law is an appropriate framework in which to address the international issues pertaining to groups. Whereas the aim for domestic enterprise groups is that reforms in national laws may take place in light of UNCITRAL-recommended international standards, for multinational groups, it would have been more helpful to provide a coherent international framework for the treatment of their insolvency, rather than a set of recommendations that allow considerable flexibility. Countries could then wholly incorporate the model into their laws,⁴⁸ and UNCITRAL could maintain an updated list of those countries that have adopted the model. As a result, potential participants in multinational enterprise groups' insolvency proceedings would then know that they could invoke any of the model provisions in cases involving a nation that had adopted the UNCITRAL model. The consequence would be greater cooperation and harmony in conducting cross-border insolvencies in regard to group members when compared with domestic legislation not based on a uniform model.

Addressing the international aspects pertaining to groups in the Model Law would also allow building on the existing framework the Model Law provides, namely the recognition of proceedings based on the presence of COMI and the relief that ensues, as well as means for cooperation and coordination.⁴⁹ Thus, within a recognition process under the Model Law, courts, in forums where recognition is being sought, could take into account the group scenario and accordingly may recognize foreign proceedings against several related companies opened in the same jurisdiction. This approach is especially feasible in view of recent clarification provided by Working Group V of UNCITRAL that COMI primarily refers to the location of the company's headquarters.⁵⁰ As mentioned above, in cases of centralized integrated groups, this place is likely to be the centre of the various entities belonging to such a group. Proceedings could therefore be opened against several entities in the same jurisdiction and

the representative could then seek recognition in other countries if they adopted the Model Law, where, for example, some of the entities were incorporated or had other type of presence. It should be noted that this approach is not purely theoretical. In fact, it has significant resonance in the practice of the Model Law where courts, especially in the US and Canada, have been recognizing foreign proceedings opened against related companies in the same jurisdiction.⁵¹

The Model Law could also accommodate the scenarios of decentralized groups, where it may be appropriate to open more than one set of proceedings in relation to the group entities, as discussed above. Thus, in circumstances where proceedings against a group entity, locally managed in a forum that adopted the Model Law, were opened in that forum, while proceedings against a related entity were also opened in a foreign jurisdiction, the Model Law's provisions regarding cooperation, applied to groups, could assist in promoting efficient cooperation and achieving coordinated solutions between the entities. Thus, the foreign representative appointed to administer the foreign group entity proceedings could apply to the court of the adopting state to seek assistance by way of cooperation and coordination of the proceedings.

In this respect, UNCITRAL can also draw on the work of the International Insolvency Institute's Committee on International Jurisdiction and Cooperation that has developed "Guidelines for Coordination of Multi-national Enterprise Group Insolvencies".⁵² The Guidelines propose an array of mechanisms to promote efficient solutions for multinational enterprise groups in insolvency. The means of cooperation proposed in the Guidelines fall along a continuum, and include both actions that jurisdictions may adopt immediately, as they may comply with many existing laws, and more ambitious solutions that may require legislative reform, possibly *via* an adoption of a Model Law, if such was developed with regard to groups. Thus, the Guidelines contain rules that would encourage cooperation, coordination and communication. Such rules may be employed without much interference with existing approaches of many insolvency systems that already allow cooperation, although as aforementioned inclusion of such mechanisms in a Model Law would promote a consistent application of such rules. Importantly, the Guidelines propose further, the concept of deference to a group centre for an integrated multinational enterprise, to permit the value of the multi-national enterprise to be maximized for the benefit of all stakeholders. A "group centre" is defined in the Guidelines as "the jurisdiction from which the operations of an integrated multinational enterprise are directed".⁵³ The Committee recognizes that this aspect of the Guidelines would require amendment of existing laws in most if not all jurisdictions, and they are, therefore, regarded as proposals for legislative reform.⁵⁴

V. — Conclusion

Thus far, neither the EU Regulation nor the Model Law had provided an explicit framework for the cross-border insolvency of groups, although group cases were addressed in practice under these models and pragmatic solutions have been achieved. For the first time, the EU Regulation may attempt to provide some concrete solutions. Regrettably, though, the main focus of the revised EU Regulation in this respect might be on the coordination of multiple proceedings rather than the centralization of the proceedings in a single jurisdiction. While coordination is an important solution in many cases, the primary approach should be the attempt to minimize the number of proceedings opened against an integrated group. Nevertheless, the practice of concentrating group proceedings in the same country may continue to prevail and it is noted that the current recommendations include the facility to do so. It is also hoped that UNCITRAL will continue deliberating on aspects pertaining to cross-border insolvency, improving the framework provided in the Model Law on Cross-Border Insolvency, including the treatment of groups.

At the same time, it is hoped that legal regimes as well as regions developing harmonized insolvency laws will be inspired by the new standards that UNCITRAL has developed regarding the treatment of groups,⁵⁵ notably the recommendations regarding procedural coordination, substantive consolidation and group-wide reorganizations.

Footnotes

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2 UN Commission on International Trade Law (UNCITRAL), *UNCITRAL Legislative Guide on Insolvency Law, 2004*; available at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.

- 3 By providing a brief commentary, which merely highlighted the main difficulties pertaining to groups in insolvency, see Insolvency Guide, Part two, chapter V, at paras. 82-92.
- 4 UN Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on Cross-Border Insolvency with Guide to enactment*. Available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.
- 5 Council Regulation (EC) No 1346/2000 of 29 May 2000.
- 6 See I Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford University Press, 2009), Chapter 5.
- 7 See a list of objectives delineated by the Legislative Guide (n. 2, Part One). The list is comprised of nine such objectives, along the lines of the above concepts, yet without prescribing the details of particular ways of pursuing the tasks and the ways to balance between goals.
- 8 Especially the possibility of partitioning assets and liabilities that can reduce transaction costs; see H Hansmann and R Kraakman "The Essential Role of Organizational Law" (2000) 110 *Yale LJ* 387.
- 9 M Virgos and E Schmit, "Report on the Convention on Insolvency Proceedings" (1996) 6500/1/96, REV1, DRS 8 (CFC) (hereafter "Report Virgos-Schmit"), [76] states that "[T]he Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes) . . .".
- 10 European Commission, "Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings", 12.12.2012 COM(2012) 744 final ("Commission Proposal").
- 11 The Commission's Proposal, *ibid.*, Chapter IVa, Articles 42a-d.
- 12 The Commission's Proposal, *ibid.*, recital 20a.
- 13 See *supra* note 7 and accompanying text.
- 14 The Commission's Proposal, *supra* note 9, article 42.
- 15 The Commission's Proposal, *ibid.*, article 29a.
- 16 The Commission's Proposal, *ibid.*, article 42a(2).
- 17 European Parliament (Committee of Legal Affairs), "Draft Report with recommendations to the Commission on insolvency proceedings in the context of EU company law" (6 June 2011) 2011/ 2006(INI), Part 3, Recommendations on the insolvency of groups of companies.
- 18 Mevorach, *supra* note 5 at Chapter 5.
- 19 See I Mevorach, "The Home Country of a Multinational Enterprise Group Facing Insolvency" (2008) 57 *International and Comparative Law Quarterly* 427.
- 20 See further, the discussion below of UNCITRAL recommendations regarding procedural and substantive consolidation.
- 21 See I Mevorach, "European insolvency law in a global context" (2011) *Journal of Business Law* 666.
- 22 *Re Daisytek-ISA Ltd*, [2003] BCC 562 (E.C.J.); *Re Energotech SARL*, [2007] BCC 123 (Tribunal de Grande Instance (France)); *Hettlage-Austria* (4 May 2004), AG Munchen Beschl.v.4.5.2004-1501 IE 1276/04 (Munich District Court (Amtsgericht)).
- 23 Commission's proposal, *supra* note 9, recital 20b.
- 24 Commission's proposal, *ibid.*, recital 13a and article 3(1).
- 25 Mevorach, *supra* note 18; G Moss and C G Paulus, "The European Insolvency Regulation — the Case for Urgent Reform" (2006) 19 *Insolvency Intelligence* 1, 2.
- 26 European Parliament, Committee on Legal Affairs, 11.9.2013, "Draft Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings" (COM(2012)0744 — C7-0413/2012 — 2012/0360(COD)) (Parliament Draft Report).
- 27 Parliament Draft Report, *ibid.*, articles 42da-df.
- 28 Parliament Draft Report, *ibid.*, article 20(ja).
- 29 Mevorach, *supra* note 18 at 446-7.
- 30 Parliament Draft Report, *supra* note 25, recital 20a.
- 31 See European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law, 2011/2006(INI) — 15 November 2011; 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, 12.12.2012 COM (2012) 742 final, ch 5.
- 32 The author had the privilege of participating in the deliberations as adviser to the United Kingdom delegation. All views expressed here, though, are solely those of the author.
- 33 Part III of the Guide, *supra* note 1, recommendations 239-254.
- 34 For a critical analysis see I Mevorach "Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency" (2010) 18 *Cardozo Journal of International & Comparative Law* 359.

- 35 See further Mevorach, *supra* note 20 at 675.
- 36 Part III of the Insolvency Guide, *supra* note 1, proposes some additional remedies for group insolvencies, including provisions on avoidance proceedings and intra-group post-commencement finance.
- 37 *Ibid.*, recommendation 204, and para.23.
- 38 *Ibid.*, recommendation 232.
- 39 *Ibid.*, recommendations 234 and 235.
- 40 *Ibid.*, recommendation 236.
- 41 *Ibid.*, recommendation 237.
- 42 *Ibid.*, recommendation 238.
- 43 *Ibid.*, recommendation 220.
- 44 Mevorach, *supra* note 5, Chapter 6.
- 45 Limited liability should only operate to restrict liability where the risk taking is based on conduct that society regards as legitimate: see P Davies, "Directors' Creditor-Regarding Duties in the Vicinity of Insolvency" (2006) 7 *EBOR* 301, 331.
- 46 Though fraud could be tackled in other ways, for instance by avoiding illegitimate transactions. Indeed the recommendation on substantive consolidation provides that the doctrine should be applied only when substantive consolidation is essential to rectify that scheme or activity: see Part III of the Guide, *supra* note 1, recommendation 220.
- 47 See articles 15-17, 25-27 of the UNCITRAL Model Law, *supra* note 3.
- 48 The aim is that countries adopt a model law in a uniform manner, although this is not always achieved in practice. See, I F Fletcher, *Insolvency in Private International Law* (2005 & supp. 2007), at 490, describing the way UNCITRAL Model Law has been adopted by Japan; I Mevorach, "On the road to Universalism: a Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency" (2011) *EBOR* 12.
- 49 See mainly articles 15-17, 19-22 and 25-27 of the UNCITRAL Model Law, *supra* note 3.
- 50 See UNCITRAL Working Group V (Insolvency Law), Forty-third session, New York, 15-19 April 2013 "Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)", A/ CN.9/WG.V/WP.112, paras. 123D-123I. The final text of the revised Guide to Enactment should be available soon on the UNITRAL website (<http://www.uncitral.org>). The author had the privilege of participating in the deliberations as adviser to the United Kingdom delegation. All views expressed here, though, are solely those of the author.
- 51 Mevorach, *supra* note 47.
- 52 International Insolvency Institute, "Guidelines for Coordination of Multinational Enterprise Group Insolvencies", available at: [http:// www.iiiglobal.org/images/pdfs/guidelines_coordination_multinational_EGI.pdf](http://www.iiiglobal.org/images/pdfs/guidelines_coordination_multinational_EGI.pdf). The author advised the Committee in the development of these Guidelines.
- 53 *Ibid.* at 8.
- 54 *Ibid.* at 5.
- 55 Further developments in this area are anticipated as UNCITRAL Working Group V has concluded in its recent meeting that it should further deliberate on the development of the cross-border insolvency framework, in particular with regard to the treatment of enterprise groups. See report of Working Group V (Insolvency Law) on the work of its forth-forth session (Vienna, 19-20 December 2013), which will be published on the UNCITRAL website.