INSOLVENT GROUPS OF COMPANIES IN CROSS BORDER CASES AND RESCUE PLANS

Report to the Netherlands Association for Comparative and International Insolvency Law (conference of 8 November 2012)

Contents

1. This report discusses rescue plans with respect to international groups of companies in the European Union and, in particular, the European Rescue Plan included in the proposal made in June 2012 by INSOL Europe for revision of the European Insolvency Regulation[1]. I should say at the outset, however, that the main topic of this report is the principles and policy considerations that play a role in connection with the effective reorganisation of groups and the interests at stake. They are relevant independently of the INSOL Europe proposal itself.

2. The European Rescue Plan is part of a larger draft which contains a choice on how insolvencies of international groups should be treated in general. As the regulation of international rescue plans cannot, in my view, be seen independently of this context, part of this report (Section 2) will be devoted to a discussion of which regime is preferable for insolvencies of international groups. Furthermore, no matter what regime is chosen for insolvencies of international groups, both the regime and the rescue plan require a way to determine whether or not a company is a group company. Section 1 of this report will therefore consider what constitutes a group of companies and what are its distinguishing features.

Section 1: Groups of companies and their legal relevance

I. Different types of groups

3. I will not attempt here to devise a definition of a group of companies. In fact, many legal systems do not provide a definition,[2] which seems to confirm my doubts as to whether it is indeed possible to catch the concept of a group in a

[1] Although my views on the INSOL Europe proposal can hardly be impartial as I chaired the drafting committee, I can at least discuss some of the considerations leading to the proposal. For the text of the proposal see http://www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe/.

[2] I. Mevorach, *Insolvency within multinational enterprise groups*, 2009, p. 26.

simple definition. The reason for this is that when we think of groups several elements spring to mind, but not all of them need to be present and probably no single element constitutes a distinguishing feature.

4. In general, a mere joining of forces such as in the formation of a cartel does not create a group of companies: an element of unified control is lacking. On the other hand, the existence of unified control does not always mean that there is a group. A small supplier may be completely dependent on a large company and may therefore be controlled *de facto* by it, but this is not usually considered to be a group. Obviously, shareholdership is an important feature and majority shareholdings ('subsidiaries') are usually considered to be included in the group of the majority shareholder. However, such shareholdership is not always decisive. Under § 17(2) in conjunction with § 18(1) of the German Aktiengesetz a majority shareholding only creates a presumption of a conglomerate (Konzern).

5. On the other hand, enterprises are often structured as groups of companies with business units or functions in separate legal entities. Sometimes a division is along geographical lines with separate companies for each country or region, sometimes the division depends on the type of activity (separate manufacturing, financing, trading companies) and sometimes there is a matrix-like structure. In many instances the reason for the group structure is to limit risk. Each company has its own debtors and creditors, and the insolvency of one company should not necessarily drag down the other companies. Sometimes the reasons are more of an organisational nature. Responsibilities are limited to separate companies which each have their own management structure. And sometimes the reasons have to do with the financial structure of the group. In cases where the group structure has been the result not of a blueprint but rather of a process of takeovers and joint ventures, the structure may be historically determined in the sense that assets or activities just happen to be in separate companies and were never transferred.

6. The creation of a group may generate synergy between the individual group companies. Such synergy may occur in several ways[3]:

- There may be a common policy determined by the parent company.

[3] As regards levels of integration, see I. Mevorach, *Insolvency within multinational enterprise groups*, 2009, p. 130 et seq.

- The companies of the group may have integrated businesses. Sometimes, economies of scale can be achieved if several units in different countries have similar activities. Sometimes, each of the units is responsible for a separate link in the process (vertical integration). A company that fulfils a function subservient to the group may therefore be unable to survive independently. An example would be a company that produces parts for a machine that is assembled elsewhere in the group if such parts have no other use. Businesses can also be said to be integrated where they share some kinds of support services ('overhead').
- A group of companies may have a stronger position in the market than a single company would have. The group can negotiate more favourable contracts with other market participants because of its size or because it monopolises a certain type of assets such as mineral resources or intellectual property rights.
- There may be an integration of assets. Several companies in the group may use the same intellectual property rights held by one of their number or they may share equipment.
- There may be financial integration.

7. There are cases in which a subsidiary is allowed to act fairly independently or where there is no real synergy between the parent and the subsidiary, and there are even cases where the parent does not have control over the subsidiary, although "subsidiary" may not be the right term here. This may be because other shareholders have certain priority shareholdings or even because a corporate governance system is in place which does not give control to the shareholders or owners or beneficial owners. Such separation of control and ownership may be achieved under Dutch law, for example by interposing a foundation as sole shareholder and giving the owners depositary receipts issued by the foundation which do not confer any voting rights and give no control over the foundation or the company. Recently, moreover, the possibility of having shares without voting rights was introduced in Dutch law.

II. Groups under German law

8. German law has a fairly sophisticated set of rules on conglomerates, which merit brief discussion because they focus on conflict-of-interest issues between the companies concerned. §§ 15-18 Aktiengesetz (law on public companies) determine when companies constitute a conglomerate. §§ 300 et seq. regulate certain consequences of the formation of a conglomerate. The starting point of

the rules is a control agreement (Beherrschungsvertrag) between a controlling company and a controlled company. The distinguishing feature is that under such an agreement the controlling company has the right to give instructions to the controlled company (§ 308 Aktiengesetz). The controlled company is then bound to obey these instructions even if they are contrary to its own interests. This may be the case, for example, if the instructions are prejudicial to the business of the controlled company or to the interests of its creditors or minority shareholders.

9. § 18-I AktG provides that a controlling company and one or more dependent controlled companies constitute a conglomerate (Konzern). Where there is a control agreement there is always a conglomerate. § 76-I AktG provides that the management of an AG has some discretionary power to decide whether to follow instructions. This discretionary power also exists if there is a majority shareholder, but not if there is a control agreement. In the latter case, however, the controlling company has to provide compensation for the controlled company's losses (§ 302-I AktG). The controlling company also has to make up for the deficit of the controlled company in any year. The rationale for these rules is that as a consequence of the right of the controlling company to instruct the controlled company, the latter company may be prevented from pursuing its own interest, i.e. the interest of its stakeholders such as employees and creditors, and must follow instructions from the controlling company. As the interests of the two companies may conflict, the controlling company has to be liable for losses sustained during the period of control.

10. The starting point for these provisions is the control agreement. It is dealt with in §§ 308-310 AktG. However, control agreements are rare, and control is usually exercised through a majority holding. §§ 311-318 AktG therefore concern the situation in which there is control but no control agreement. § 317-I AktG provides that if there is no control agreement but the company with de facto control instructs the controlled company to enter into a transaction that is to its detriment, the controlling company should provide compensation for such loss.

11. §§ 308 et seq. AktG do not apply to private limited liability companies (GmbHs) and cannot be applied by analogy to them[4].

[4] Kuhlmann v. Ahnis, Konzern- und Umwandlungsrecht, 3rd ed. 2010, no. 237.

12. The management of a GmbH do not have the discretionary powers available to the management of an AG. § 46-6 GmbHG provides that the shareholders may give detailed instructions to the management and only in exceptional cases may the management refuse to comply. In conglomerates the German subsidiaries are almost always GmbHs and control agreements are very rare. It follows that the provisions of §§ 308 et seq. AktG on obligations in conglomerates (with or without control agreement) do not seem very relevant. The law on GmbH conglomerates is unwritten and is based on the Treuepflicht[5], i.e. the obligation to act in good faith. This good faith obligation means that the controlling company should not exercise its control in a way that is prejudicial to the interests of the GmBH subsidiary. However, the manner in which the good faith obligation is interpreted is connected with §§ 311 et seq. AktG, which, as mentioned above, deal with conglomerates of AG's without control agreement.

13. Because of the focus on conflicts of interests in the German doctrine on group relations, 'control' is the central issue. Under § 18-I AktG, which also applies to GmbHs, the requirement is that there should be a controlling and a controlled company[6] under the common management of the controlling company. A group of companies always exists if there is a control agreement, even if the controlling company is not a shareholder of the controlled company. If the company is a majority shareholder of another company, it is assumed that a subsidiary is controlled by the parent, but this assumption is rebuttable.

III. Consolidation and the VIIth Directive

14. The EC Seventh Council Directive of 13 June 1983 (83/349/EC, L193/1) concerns the consolidation of the accounts of group companies. This directive provides that parent companies should draw up consolidated accounts for themselves and their subsidiaries, regardless of where the registered offices of the subsidiaries are situated (Article 3). A parent company is defined as a company that:

'(a) has a majority of the shareholders' or members' voting rights in another undertaking (a subsidiary undertaking); or

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5 Idem no. 239 et seq.

6 The statutory criterion is 'Unternehmen', which is rather more complex than the term company, but I will leave this aside for the purpose of this report.

(b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another undertaking (a subsidiary undertaking) and is at the same time a shareholder in or member of that undertaking; or
c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions. A Member State need not prescribe that a parent undertaking must be a shareholder in or member of its subsidiary undertaking. Those Member States the laws of which do not provide for such contracts or clauses shall not be required to apply this provision; or
(d) is a shareholder in or member of an undertaking, and:

(aa) a majority of the members of the administrative, management or supervisory bodies of that undertaking (a subsidiary undertaking) who have held office during the financial year, during the preceding financial year and up to the time when the consolidated accounts are drawn up, have been appointed solely as a result of the exercise of its voting rights; or
(bb) controls alone, pursuant to an agreement with other shareholders in or members of that undertaking (a subsidiary undertaking), a majority of shareholders' or members' voting rights in that undertaking. The Member States may introduce more detailed provisions concerning the form and contents of such agreements.'

15. Obviously the provisions of this directive aim to provide relevant information to third parties dealing with a group of companies. The definition of parent company includes both companies which have a majority financial interest and companies which have control. The directive differs from the rules of German conglomerate law in that its purpose is very different. German conglomerate law is concerned with conflict-of-interest issues and control is paramount. By contrast, the directive is concerned with the provision of financial information about the groups of companies which may in some way be contingent. Here, both control and financial interest (equity) may be relevant.

<u>IV. Some provisions of Dutch law</u>

16. Article 2:403 of the Dutch Civil Code ('DCC') provides that if consolidated accounts have been published, subsidiaries do not have to publish extensive

accounts of their own, provided the parent company files a statement accepting joint and several liability with the relevant subsidiaries for their contractual obligations. Here no separate definition of parent company is used, although a subsidiary is defined as ‘a legal entity belonging to a group’ and Article 2:24b DCC defines a group as ‘an economic unit in which legal entities and/or partnerships are linked together in organisational terms’. The reason why the liability does not extend to non-contractual creditors is probably that they do not rely on a subsidiary’s accounts when entering into a legal relationship with it. As a result of the provisions of Article 2:403 DCC, the financial interests of group companies are closely interwoven. Although each company is, in principle, a separate unit and has its own assets and liabilities, the statement filed under Article 2:403 DCC creates financial interdependency. Other instruments causing such interdependency are:

- joint and several liability of group companies for a loan facility;
- tax grouping (e.g. for corporate income tax or VAT);
- intercompany claims.

17. Article 33 of the Dutch Works Council Act refers to ‘enterprises linked together in a group’. This Act concerns employee participation through works councils. The expression ‘enterprises linked together in a group’ refers to control (Dutch Supreme Court 14 March 2008, JOR 2008/94).

V. Conclusion

18. The way in which groups are defined differs from one instance to the other and depends on the purpose for which the group-concept is used. Sometimes 'control' is the determining factor, sometimes a majority financial interest is of importance.

Section 2: The preferable regime for insolvency of a group of companies

I. Insolvency, synergy margin, Pareto improvement and group compensation rule

19. The basic premise in insolvency laws across the world is that insolvency proceedings concern one legal entity (company) at a time and that each company has its own creditors for whose benefit its assets are available. Thus, in the case of a single company, its assets may be sold individually or as a whole (sale of business), or its creditors may agree to some kind of haircut in order to

bring the value of the assets more into line with the liabilities (by decreasing the liabilities).

20. In the case of groups of companies two additional factors may complicate matters. First, there may be synergy between two or more group companies which may be lost if the assets of the companies are sold separately. The KPNQwest insolvency is a clear example of such loss of synergy. KPNQwest owned rings of fibre cable through which data were transported. The rings ran through several countries. For example, one ring ran through Germany, France, Belgium and the Netherlands. However the sections of the rings were owned by local KPNQwest companies. So the German part was owned by a German subsidiary, the French part by a French subsidiary and so on. Clearly, the proceeds of the sale of a ring would be much greater if sold as a whole rather than in sections, but in practice this proved to be impossible to achieve with respect to most of these rings. Another example is a conglomerate in which several products are manufactured in different companies, but sales and distribution are combined. Preserving synergy may be important in the case of a liquidation. A better price may be obtained if the business or coherent parts of the business which are dispersed over several companies are sold as a whole. However, preserving synergy may also be important in cases where reorganisation is considered. For example, if the group or part of it can be refinanced, thereby allowing the business to be continued, the plan may fail if some assets which contribute to the synergy are owned by another insolvent group company and are sold to a third party. A second feature of groups is that in some cases group companies cannot survive outside the incubator that constitutes the group. Although these individual companies are considered to be separate for the purposes of creditors' rights, they cannot exist independently of the group. For example, if manufacturing is done in one company and the necessary IP rights are held by another company, the manufacturing company may not be able to survive independently. The same may apply if one group company has all the employment contracts and makes employees available to the manufacturing or trading companies within the group. Here too, dependency may be relevant both in a reorganisation and in a liquidation scenario.

21. Since group companies are not always formed primarily to create separate pools of assets and liabilities for recourse purposes and since creditors do not always rely on this separateness, these legal structures could conceivably be ignored in insolvency proceedings so that all assets and liabilities of the group are pooled. However, it seems to me that this approach would turn things upside down. The

essence of a legal entity is still that it constitutes a separate 'container' of assets and liabilities and that its assets are only available to its own creditors. The prevailing view is – rightly – that this basic premise should be maintained in insolvency proceedings. The principle is referred to in German as ‘Haftungstrennung’, which I will translate as ‘separateness for recourse purposes’.

22. Outside insolvency proceedings synergy is preserved and interdependency is managed by the chain of command. There may be a unified management or at least instructions from the holding company which looks after the interests of the group as a whole. In some insolvency proceedings the chain of command is preserved. Often this is the case in preservation or reorganisation proceedings where there is some kind of debtor-in-possession concept. Even in liquidation proceedings this may be the case. However, if liquidators[7] are appointed or if creditors’ committees of individual companies have substantial influence, the chain of command may effectively be broken and in such cases insolvency law might be the only possible means to manage synergy and dependency. Finally, it should be noted that conflicts of interests between individual group companies may be much more pronounced in insolvency proceedings. In fact, these are conflicts of interests between the creditors of these individual group companies. If proceeds are attributed to one company instead of another, creditors of the latter company may receive less. The position is very different in the case of solvent groups because here the creditors may expect to be paid in full. Thus there is no concurrence and no manifest conflict of interests between creditors of solvent groups of companies. In cases where only the ultimate parent company has outside shareholders no manifest conflict of interests will exist between solvent individual group companies.

23. So how should these synergy/dependency/conflict-of-interest issues be resolved in insolvency proceedings? To try to answer this I will take a simple case (the design of which is borrowed from Vormstein[8]). Let us assume that company A has a subsidiary B. A is a manufacturing company which uses a machine. B manufactures parts for the machine. Both A and B enter into insolvency proceedings. A's liquidator would like to reorganise, but a successful reorganisation can be achieved only if B remains in the group. However, B’s

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7 The term ‘liquidator’ is borrowed from the European Insolvency Regulation and will be used in this report to indicate any kind of liquidator, bankruptcy trustee or administrator in insolvency proceedings.

8 F. Vormstein, *Zuständigkeit bei Konzerninsolvenzen*, 2005.

liquidator would prefer B’s assets to be sold and some of its employees transferred to an outside company that is prepared to pay a good price for the business. Thus, if B’s business is kept in the group its creditors are worse off than they would be if the business were sold, and if B’s business is sold A’s creditors are worse off than if the business were kept. I think that B’s liquidator should insist as a minimum condition for cooperation that B’s creditors do not suffer a loss as a consequence of the cooperation and that they should receive at least the value which they would receive if B’s business were sold to the outside company. It is not necessary for them to receive cash, since if their claims trade at this higher value that may be sufficient. Thus some value will have to be transferred from A to B (in the form of a cash payment, transfer of assets or claims). On the other hand, this value transfer may not be of such a magnitude that A’s creditors are worse off than if the transaction had not taken place. It follows that the amount of the consideration to be given to the liquidator of company B will fall between (i) the value that B's creditors fail to realise because the stand-alone preferred transaction does not take place (lower boundary) and (ii) the surplus value that A's creditors realise because the stand-alone transaction does not take place (upper boundary) (this will be referred to as the ‘**synergy margin**’). The amount of the value transfer should primarily be determined in negotiations between the two liquidators. In general there is likely to be scope for negotiation because if the transaction does not take place the synergy will not be realised. The negotiations are therefore in fact about how the synergy margin is shared. The existence of scope for negotiation demonstrates that there is a conflict of interests between the insolvent companies. The example given here is somewhat theoretical, for example because it may not always be possible to determine at this stage what value B’s creditors could expect to receive if B’s business were sold. Sometimes these values will have to be estimated. Nevertheless, I would propose the following **group compensation rule**, which is an example of a Pareto improvement[9]:

24. "An insolvent group company may agree to a scenario which is in the interests of other group companies but detrimental to its own creditors only if accompanying measures are taken to ensure that its creditors receive at least what they would have received under the likely stand-alone scenario for this company. "

25. An important application of this rule concerns dependent companies. If B is a dependent company it cannot sell its business to a third party. In that case it may

[9] An action taken in an economy that harms no one and helps at least one person.

only be able to sell its assets in a fire sale, and the value that can be realised is thus the lower boundary for the compensation (clearly, the upper boundary is the synergy margin that would be realised by the companies in the group scenario).

26. The negotiations between the liquidators of different companies to maximise the proceeds for the creditors may be hindered by local legislation. For example, if the legislation of Member State B provides that the assets should be sold within a certain time or in a certain way, this may prevent the liquidator of company B from entering into a transaction that maximises the proceeds for the group and for B's creditors.

II. Existing insolvency law with respect to groups of companies

27. Under § 1408 (1) of title 28 of the U.S. Code, companies can file bankruptcy proceedings in any district in which they are domiciled or have their residence, principal place of business or principal assets. Furthermore, pursuant to § 1408 (2) of that title a company may file for bankruptcy in a court where a bankruptcy case is pending with respect to an affiliate. The affiliate venue rule enables corporate groups to file all bankruptcy proceedings in the same court. Cases involving groups of companies can be joined[10] and, if trustees are appointed, the same trustee can be appointed in all or several bankruptcy proceedings[11], but separateness for recourse purposes is maintained. Joint administration facilitates a group rescue plan, but the plan still needs to meet the requirements in each separate bankruptcy. In some cases, all assets and liabilities of several companies are consolidated if the companies are considered to be a single economic unit or if the assets of the various group companies cannot be disentangled. This is called substantive consolidation.

28. Under the Spanish Bankruptcy Act proceedings involving companies belonging to the same group can be joined. Group proceedings can be requested by the creditors, a liquidator, a debtor, etc.. If the request is granted the same liquidator is appointed in the insolvency proceedings of the group companies and they are supervised by the same court. The joining of the proceedings does not entail consolidation of the assets or liabilities of the group companies. However, this may be allowed if the assets are commingled to such an extent that they cannot be separated without excessive costs.

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[10] Bankruptcy Rule 1015 (b).

[11] Bankruptcy Rule 2009 (a).

29. The Dutch Bankruptcy Act does not contain provisions on the insolvency of groups of companies. In practice, the same person is often appointed as liquidator of all or several group companies. As this does not involve consolidation of assets and liabilities, the principle of separateness for recourse purposes is maintained. In cases where conflicts of interests between estates of the group companies may arise, additional and different liquidators are sometimes appointed to look after the specific interests of the individual companies involved.

30. The prevailing view in the Netherlands is that assets should be consolidated only if they cannot be disentangled. In the Zilfa case[12] the Dutch Supreme Court decided that in such a situation the creditors' meetings of the group companies should be combined.

31. No legislation exists at international level. Although there are some guidelines on court-to-court cooperation, they mainly address cases in which proceedings have been opened in several jurisdictions but with respect to a single entity. However, over the last twenty years there have been a number of very important and large cases involving groups of companies such as BCCI, Montedison, Lehman and Enron and their economic impact has been substantial. There are probably two reasons for the absence of legislation: first, the topic is quite complicated, because there are very different kinds of group structures and levels of integration within groups and because there may be significant conflicts of interests between the group companies, which tend to surface mainly in insolvency situations. Second, sensitive issues of sovereignty play a role here (as the Rastelli[13] case may have shown). There is reluctance to let the courts of another country where the parent company is located determine what should happen in the insolvency proceedings of the subsidiary. In the European context it is not surprising that the present Insolvency Regulation does not contain provisions on groups of companies, let alone on rescue plans for such groups. Even with respect to single companies full and automatic recognition of insolvency proceedings opened in another Member State has long been a sensitive issue and it took the European Union almost half a century to adopt the Insolvency Regulation.

[12] HR 25 September 1987, NJ 1988, 136.
[13] EU Court of Justice 15 December 2011, Case No. C-191/10.

32. The courts have dealt with the lack of legislation in two ways. One solution has been to develop protocols between the courts. They play an important role, particularly in transatlantic cases. Another solution that has sometimes been attempted in the European Union is to treat the centres of main interests of the group companies as being situated in the same place. Once a court has allowed concentration of proceedings by opening them with respect to several group companies, the effect of Article 16 of the Insolvency Regulation is that a decision cannot be challenged in other jurisdictions. Some well-known cases on this point are Daisytek[14], Rover[15], Montedison[16], Collins & Aikman[17] and Crisscross[18], to mention but a few.

III. Distinction between European law and other recognition cases

33. As regards desirable legislation on the insolvency of international groups, a distinction has to be made between cases in which groups of companies are all situated in countries that give automatic and full effect to each other's insolvency proceedings and cases in which there is no such recognition. An obvious example of the former situation is the European Union. Under the European Insolvency Regulation, automatic recognition is given to proceedings in other Member States and the foreign liquidator in the main proceedings can exercise the powers he is charged with under the laws governing the insolvency proceedings in the home State. This system is based on the so-called Community trust which applies between the EU Member States. An example of the latter situation is provided by the UNCITRAL Model Law on cross-border insolvency. Here there is no automatic recognition and the foreign liquidator has to ask the court of the receiving State for 'relief' in order to act there. Such relief will usually not be governed by the law of the insolvency proceedings, but by the law of the receiving State. This paper is limited to the type of situation found in the European Union.

[14] Daisytek, High Court of Justice, 16 May 2003,[2003] B.C.C. 562.
[15] High Court of Justice, Chancery Division, Birmingham 18 April 2005 (MG Rover I), 2005 [EWHC] 874.
[16] Dutch Supreme Court 28 April 2000, *LJN* AA5658 (Montedison).
[17] Collins & Aikman Europe SA Collins & Ors, Re Insolvency Act 1986, Court of Appeal - Chancery Division, June 09, 2006, [2006] EWHC 1343 (Ch).
[18] Crisscross Communications Ltd (in the UK High Court, 20 May 2003, unreported) (Crisscross).

IV. Two ends of the spectrum of solutions

34. The insolvency of international groups could conceivably be dealt with within the European Union without any legislation. In that case the realisation of the synergy margin will entirely depend on the liquidators or debtors in possession of the individual companies, who will have to negotiate matters such as how the insolvency proceedings should be coordinated, whether and, if so, how assets belonging to several group companies should be sold jointly and how the synergy margin should be shared. Sometimes there will be legal obstacles to realising the synergy margin, and I do not think that there are many examples from the past where mere negotiation between liquidators from different countries has produced an optimal result. At the other end of the spectrum is the option to forget about separate recourse, and to pool all the assets of the group companies and distribute the proceeds of that pool to all the creditors of all companies, as mentioned above at 21. This is what is called substantive consolidation under U.S. law. Substantive consolidation benefits some creditors and deprives others of what they would get if the principle of separateness for recourse purposes were applied. Let me give a simple example:

	A	B
Assets	200	200
Creds	500	1,000
D.P.	40%	20%

	A + B
Assets	400
Creds	1,500
D.P.	27%

35. Let us assume that company A has 200 in assets and creditors with claims of 500, all of equal ranking. Company B has 200 in assets and creditors with claims of 1,000, also all of equal ranking. If the bankruptcies are dealt with separately A's creditors would receive 40% of their claims and B's creditors 20%. If, however, substantive consolidation is applied and all assets are pooled all creditors would receive 27%. Therefore B's creditors profit to the detriment of A's creditors.

36. Vormstein writes in his thesis *Zuständigkeit bei Konzerninsolvenzen*[19] that the American tendency to apply substantive consolidation with some regularity can be explained by the fact that American bankruptcies are geared more towards rescue whereas continental European systems perceive insolvency proceedings mostly as a means of liquidation. It may be questioned whether this view gives either system the credit it deserves. However, as mentioned at 21 above I do agree that the principle of separateness for recourse purposes should be the starting point in dealing with groups of companies and in dealing with insolvencies of international groups.

V. Regimes in ascending order of integration

37. Having briefly discussed the extremes, I will now turn to several solutions that have been suggested for the integrated treatment of insolvencies of international groups in relation to the European Union. In more or less ascending order of integration these are:

(a) coordination between the courts supervising the insolvency proceedings or between the liquidators on a non-hierarchical basis;
(b) designation of group main proceedings and coordinating powers for the liquidator of these group main proceedings;
(c) appointment of the same liquidator in all main proceedings;
(d) opening of all main proceedings in the Member State of the group COMI[20] (joint administration by the court);
(e) substantive consolidation.

The last solution to be considered is the so-called flexible approach, which I will briefly discuss as item (f).

(a). Coordination on a non-hierarchical basis

38. The lightest form of coordination is coordination on a non-hierarchical basis between the courts and/or between the liquidators.

39. Rules of coordination have been fundamental both in legislation such as the European Insolvency Regulation and in guidelines such as the IBA Cross-Border

[19] Frank Vormstein, *Zuständigkeit bei Konzerninsolvenzen*, diss. München: Martin Meidenbauer Verlagsbuchhandlung, 2005, p. 118.
[20] Centre of main interests

Insolvency Concordat, the ILA Guidelines and the CoCo Guidelines as well as in protocols drafted for the purpose of individual cases. Most of these guidelines and items of legislation concern multiple insolvency proceedings with respect to a single debtor, for example where there are main and secondary proceedings. Some of the protocols in individual cases concern multiple debtors (groups of companies). Legislation and guidelines with respect to single companies could to a large extent also be used for coordinating proceedings in a group setting, but not without caution. Since situations with multiple debtors involve different sets of creditors, conflicts of interests are much more likely to occur between the estates of group companies than between the creditors in main and secondary proceedings involving the same company.

40. Pursuant to Article 31 of the European Insolvency Regulation the liquidators in the main and secondary proceedings have a duty to communicate to each other information which may be relevant to the other proceedings. They also have a duty to cooperate with each other. The liquidator in the secondary proceedings should give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of assets in the secondary proceedings. These rules concern communication between liquidators, not between courts. In the context of the current revision consideration is being given to the inclusion of rules on cooperation and coordination between courts and between courts and liquidators. The INSOL Europe proposal does not contain such rules. When the proposal was being drafted the judicial wing of INSOL Europe was discussing such rules and the INSOL Europe drafting committee wished to avoid intervening in or pre-empting that process. Since then the judicial wing has drafted proposed rules enabling courts to communicate with each other.

41. Articles 25-27 of the UNCITRAL[21] Model Law contain provisions on court-to-court communication. Courts should cooperate to the maximum extent possible with foreign courts and foreign liquidators. Communication can take place directly or through the liquidator. Liquidators should also cooperate wherever possible under the supervision of their court and should be entitled to communicate directly with the foreign court. Cooperation may be provided for in an agreement for that purpose adopted by the relevant courts.

[21] United Nations Commission on International Trade law.

42. The IBA[22] Cross-Border Insolvency Concordat (1996) goes much further than mere coordination because it involves a transfer of powers. For example, it provides that one forum should have primary responsibility for coordinating all insolvency proceedings relating to the same entity (principle 1) and that after payment of secured and privileged creditors in the secondary proceedings the remaining assets should be turned over to the main proceedings for distribution (principle 2). Ordinary creditors can file in the main proceedings (principle 2). The concordat is designed for multiple proceedings with respect to the same debtor[23], but it is not easily adaptable to a group situation.

43. The ALI[24] Guidelines (2001) have been applied in particular in cases between the United States and Canada. They are not explicitly limited to cases involving the same debtor. Guideline 2 provides that a court may communicate with another court for the purposes of coordinating and harmonising proceedings before it with those in the other jurisdiction. Likewise a court may communicate with a liquidator in another jurisdiction. The ALI Guidelines contain rules on how such communication should take place and how transparency and adequate participation by the stakeholders should be ensured. The document also contains other rules, for example that the court may direct that any stay of proceedings affecting parties before it shall not apply to applications or motions before the other court.

44. The CoCo Guidelines (2007)[25] were drafted by Virgós and Wessels. The guidelines apply to cross-border insolvency proceedings within the context of the European Insolvency Regulation and concern multiple proceedings involving the same debtor. Guideline 6 provides that liquidators should communicate with each other directly. Guidelines 7 and 8 lay down further rules on the obligation of liquidators to communicate with each other. Guideline 12 concerns cooperation: 12.1 provides that liquidators are required to cooperate in all aspects of the case, and 12.2 that they should ensure that cooperation takes place with other liquidators with a view to minimising conflicts between parallel proceedings and maximising the prospects for rehabilitation and reorganisation of the debtor's business or the value of the debtor's assets subject to realisation. Guidelines 13 and 14 concern cooperation with a view to cross-border sales and reorganisation. Guideline 16.4 provides that courts should cooperate with each

[22] International Bar Association
[23] Main proceedings and/or one or more secondary proceedings.
[24] American Law Institute.
[25] European Communication and Cooperation Guidelines for Cross-Border Insolvency.

other to the maximum extent possible directly, through liquidators or other persons or bodies appointed to act at the direction of the court. Guideline 12.4 refers to the possibility to attain cooperation between liquidators by way of a protocol. No mention is made of a protocol relating to communication between courts.

45. Examples of protocols with respect to particular cases are the Lehman protocol and the Nortel protocol. The Lehman protocol was agreed between the liquidators of Lehman entities in ten jurisdictions. It did not impose any duties or obligations on any of the liquidators (Section 1.2). The most important provisions concern sharing of information (Section 4), preservation of assets (Section 7) and rules on the establishment of a common set of financial accounting records that form the basis of intercompany claims. These financial accounting records are to be treated as prima facie valid, unless there are elements of proof suggesting otherwise. A committee was established to try to reconcile the intercompany claims.

46. The Nortel protocol was a protocol established by the Canadian and Delaware courts in cases concerning a number of U.S. and Canadian Nortel companies. The protocol provides for rules on communication between the U.S. and Canadian courts and deals with matters concerning the liability of officials (such as the Canadian monitor) in the other proceedings.

47. Protocols addressing communication and cooperation obligations may be useful. Wessels states[26] that they may prevent stakeholders from endlessly continuing proceedings at great expense, may reduce costs and maximise value by underlining mutual interests and may allow information sharing. Nevertheless, their possibilities are limited. As appears from the instruments discussed above, rules on communication between courts are mainly concerned with the question how to safeguard transparency and the participation of stakeholders. Ultimately, however, communication between courts can only yield results where they have to take decisions and also have discretionary powers. In the United States, for example, bankruptcy courts can be actively involved and can to a large extent manage the bankruptcy. Sometimes, indeed, it may be wondered who is in possession: the debtor or the court. Since under Anglo-American law insolvency proceedings are a matter of equity, the courts have substantial discretionary

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[26] B. Wessels, *Cross-border insolvency agreements: what are they and are they here to stay?,* in: D. Faber and N. Vermunt (eds), *Overeenkomst en insolventie*, Deventer, Kluwer 2012, pp. 359-384.

powers. A famous example is the Rover case in which the English court decided that the foreign order of ranking could be applied to the proceeds of foreign assets. Other legal systems have a different philosophy. They see insolvency primarily as a fairly rigid system. The positions of the stakeholders are fixed at the commencement of the proceedings and should determine the rights during reorganisation or liquidation. The courts only have a supervisory role or the job of resolving disputes between stakeholders. Where the court lacks discretionary powers, communication between courts will not resolve synergy and conflict-of-interest issues of the kind discussed above.

48. Communication and cooperation between liquidators is good, but saying that they must cooperate to the maximum extent possible and in good faith may be insufficient. Should they not do so anyway? In group situations each liquidator may act in good faith, but he still has to act in the interest of the creditors of *his* debtor. In practice, such obligations may be insufficient to resolve conflict-of-interest and synergy issues. If nobody is in charge, it must be doubted whether an obligation to cooperate is sufficient to bring about the integrated administration and liquidation of the group's assets. What is needed is some kind of centralised control or coordination[27].

49. Another important problem is that local law may prevent solutions within the synergy margin. To go back to the earlier example[28], let us assume that the liquidator of company A would like the business of company B to be preserved because it is necessary for the rescue of the group, whereas the liquidator of company B can get a better price for the assets by selling them to an outsider. As discussed above at 23-24, the solution should be that company B receives sufficient value to compensate for the loss of proceeds. However, even if liquidator B were prepared to accept such a settlement within the synergy margin the laws of country B might prevent the deal, for example because they oblige liquidator B to sell the assets at a public auction within a short time frame. The first core problem here is that rules on coordination and cooperation cannot set aside mandatory rules of national law. This requires binding provisions at an international level which supersede national law. In other words, there should be provisions to that effect in the European Insolvency Regulation. That protocols and guidelines cannot prevail over national law is demonstrated by these instruments themselves, which refer time and again to the supremacy of the

[27] Mevorach, 2009, p. 155.
[28] Above at 23.

applicable law[29].

50. In a complicated international group insolvency there is a need for rules that allow a court to take a decision on the sharing of the synergy margin[30]. It is difficult to reach a solution out of court if situations are likely to arise in which liquidators of subsidiaries will try to exploit their holdout position in the interest of their stakeholders or must try to do so in order to further the interests of the creditors of their debtor company in accordance with their national law. Practice has shown that in the absence of such international rules a reorganisation of a European group is not achievable in cases where insolvency proceedings take place in multiple jurisdictions. This is not because the liquidators of the subsidiaries are not acting in good faith, but because there are conflicting interests between the estates. To put it simply, the liquidator of the parent company should be able to ask the court hearing the insolvency proceedings of the subsidiaries to consent to solutions in the interests of the group as a whole which comply with the group compensation rule.

(b). Liquidators with coordinating powers

51. Under the second regime one liquidator is designated to fulfil a role in the interest of the group as a whole and has certain powers to do so. Under the European Insolvency Regulation such rules exist with respect to multiple proceedings involving the same debtor. The liquidator in the main proceedings has some powers with respect to the secondary proceedings. However, most of those powers involve the intervention of the court in the State where secondary proceedings have been opened. For example, the liquidator of the main proceedings may ask the court which opened secondary proceedings to stay the process of liquidation in whole or in part (Article 33(1)). In such a case the court in the secondary proceedings may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Apart from that, the request may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Another example is that the liquidator in the main proceedings may propose a rescue plan, a composition or comparable measure where the law applicable to the secondary proceedings allows for such proceedings to be

[29] On the subject of these limitations see also B. Wessels, *Cross-border insolvency agreements: What are they and are they here to stay?*, in: D. Faber and N. Vermunt (eds), *Overeenkomst en insolventie*, Deventer, Kluwer 2012.

[30] See H. Eidenmüller, *Verfahrenskoordination bei Konzerninsolvenzen*, ZHR 2005, pp. 528-569 and 535.

closed by such a measure (Article 34).

52. If a similar regime were to be applied in the context of groups of companies the following questions arise:
(1) how should the group be determined?
(2) how should the 'group main proceedings' be determined?

53. The same questions have to be decided under any of the regimes listed above at 37 (b)-(d). Under all these regimes there must be a court or liquidator for the group main proceedings that has certain powers to further a coherent approach.

54. As is apparent from Section 1 of this report, different 'definitions' of the term group are used. How a group should be defined depends in large part on the purpose of the definition. For the purposes of group insolvencies, the definition of the companies belonging to the group could conceivably be based on the degree of ascertainable integration of their businesses into the business of the group. To some extent that would enable a company's creditors to ascertain in advance whether they will be confronted with a group regime. However, the need for a group regime may depend on quite different factors than whether outsiders can perceive an integrated business. Creditors may not be aware of financial interdependence or the sharing of certain assets. And, as Wautelet writes, creditors may not be aware of the group's internal structure.[31] It therefore seems preferable not to make the definition of the group contingent on some kind of level of integration, nor, for example, merely on control. My preference would therefore be to apply the broad definition that is used in the Seventh Council Directive for Consolidated Accounts (83/349/EEC) quoted above at 14, in which both financial interest and control play a role.

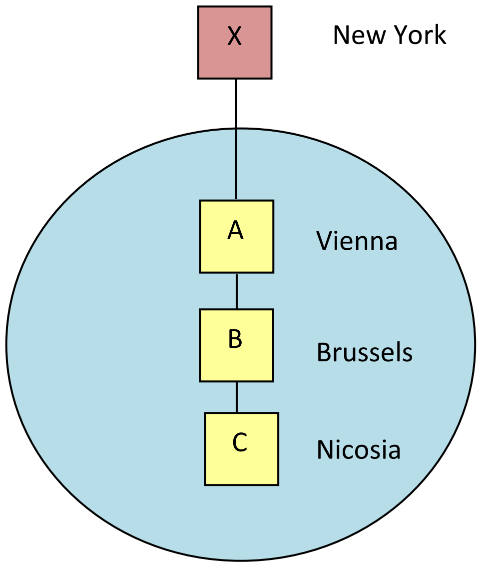
55. The next, difficult question is how to determine which proceedings should be the group main proceedings. The question of which proceedings should be seen as the group main proceedings or where the group COMI is deemed to be located becomes less important if the answer has less impact on the rights of the creditors of the subsidiary. For example, in model (d), which is discussed below at 73 et seq., the main proceedings of all companies are opened in the State of the group COMI. If Article 4 EIR is applied to all those proceedings, many issues with respect to the insolvency proceedings of the individual group company have

[31] P. Wautelet, *Some considerations on the COMI as jurisdictional test under the EIR*, in: G. Affaki (ed.). Cross Border Insolvency and Conflict of Jurisdiction, Bruylant 2007.

to be decided under the laws of the group COMI. Thus, if there is a French parent company with a Belgian subsidiary and the group COMI is deemed to be in France, questions as to the ranking of the creditors of the Belgian subsidiary are determined by French law. The same may apply to many other issues such as rules on set-off, powers of the liquidator, termination of contracts and so on. Such consequences of a shift from Belgian to French law with respect to the Belgian subsidiary are referred to as the redistributive effect[32]. I think that in this respect two observations should be made. The first is that the larger the redistributive effect is, the more important becomes the question of where the group COMI is located. The second observation is that it is desirable for the redistributive effect to be as small as reasonably possible. This is because, in our example, the creditors of the Belgian subsidiary have relied on the application of Belgian insolvency law and such reliance should be respected in so far as possible. Moreover, some of the subsidiary's creditors may be quite unaware of the identity of the group to which the subsidiary belongs. The subsidiary may act quite independently from the rest of the group, but nevertheless coordination of the insolvency proceedings of the group members may be needed, for example because those companies are debtors under one facility. The preferable solution from a legislative point of view is therefore for the group COMI to have minimal effect on creditors' rights. If that is the case, it does not matter very much if the group COMI is determined on the basis of a single objective criterion, even if that criterion is somewhat arbitrary. If the redistributive effect of the decision on the COMI is small, the question in which State the group COMI should be deemed to be located becomes less important.

56. Several criteria have been proposed for determining the group COMI or, what amounts to the same, the group main proceedings. A criterion which is at first sight fairly simple is to treat the COMI of the top insolvent company (the ultimate parent) as the group COMI. To be rather more precise, in an EIR context the ultimate parent company would be the top company which is both located in the EU and subject to insolvency proceedings itself. I will try to illustrate this in the following diagram.

[32] Mevorach, op. cit, pp. 240-249, 254-259, 122, 165, 237 and 327.



57. Let us assume that there are four companies: X is located in New York, A in Austria, B in Belgium and C in Cyprus. X is the parent of A, A is the parent of B and B is the parent of C. If both B and C are subject to insolvency proceedings B is the ultimate parent company, but if A, B and C are subject to insolvency proceedings A is the ultimate parent company. If X is also subject to insolvency proceedings, A is still the ultimate parent and therefore the group COMI because X is located outside the EU.

58. This system (which is used in the INSOL Europe proposal[33]) has several disadvantages. (i) It is fairly easy to move a company around within a group or to park it somewhere else, thus redetermining which company qualifies as its ultimate parent company. (ii) If, in the above example, companies B and C open insolvency proceedings first, B is C's ultimate parent company. But if insolvency proceedings are subsequently opened with respect to company A as well, company A becomes C's ultimate parent. This shift may complicate matters and necessitate the introduction of rules dealing with the transition. However, this problem may not be insurmountable under the regime where the powers of the liquidator of the group main proceedings are mainly limited to the right to make certain requests to the court of State C. (iii) Sometimes the ultimate parent is

[33] For the text of the proposal see http://www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe/.

located in a jurisdiction where the group has no real activity but which serves as a tax haven. INSOL Europe's solution for this problem is to link the COMI to operational activities.

59. There may also be a problem in designating the ultimate parent company if a structure is in place with two holding companies.

60. The big advantage of this system, however, is its simplicity. If the redistributive effect of the decision on the group COMI is small, that advantage may well outweigh the disadvantages.

61. Another solution is to locate the group COMI at the place where the centre of gravity of the group activities is located. However, this may require knowledge of the group and an assessment of the relevant factors, which may not produce an unequivocal outcome. Moreover, such a centre may be less relevant if there is only minor integration of the activities of the individual companies.

62. Finally, it has been suggested that the main proceedings of the group company opened first should serve as group main proceedings. In my opinion, this is a rather awkward criterion.

63. The regime under which one liquidator – the liquidator of the group main proceedings – has powers of coordination with respect to the other proceedings thus requires a definition of the group and of the group main proceedings. My suggestion is that the INSOL Europe criterion should be adopted and that the main proceedings of the ultimate parent company (the highest European company in respect of which insolvency proceedings have been opened) fulfils this role.

64. The question how the group main proceedings are to be decided is of course also of importance if the adoption of a group rescue plan is a matter for the court of the group main proceedings.

65. Under regime (b) the basic premise is that the insolvency proceedings of each of the group companies are conducted by a separate liquidator under the supervision of the local court. Intervention by the liquidator of the group main proceedings should, in principle, be subject to consent by the local court of the subsidiary. To enable the liquidator of the group main proceedings to discharge his responsibilities, he should be entitled to receive any information with respect

to the subsidiary which is at the disposal of the subsidiary's liquidator or to which the latter is entitled. Moreover, the subsidiary's liquidator should, on his own initiative, provide the liquidator of the group main proceedings with all the relevant information. Conversely, the subsidiary's liquidator should be entitled to receive information from the liquidator of the group main proceedings and from other liquidators of group companies in so far as the information is relevant to the subsidiary's insolvency proceedings. Furthermore, the liquidator of the group main proceedings should be entitled to take part in any proceedings, hearings and creditors' meetings with respect to the subsidiary in the same way as a creditor of the subsidiary would be entitled to take part in them, and he should also be allowed to submit any requests to the court in the subsidiary's insolvency proceedings in the same way as a creditor or quorum of creditors would be allowed to do. The liquidator of the group main proceedings should also be allowed to ask the court in the subsidiary's proceedings (i) to suspend sales of assets of the subsidiary, or (ii) to prevent secured creditors from exercising their rights. Both measures should be possible regardless of local law. And the liquidator of the group main proceedings should (iii) be allowed to ask the court in the subsidiary's proceedings to decide that agreements should be continued or terminated, if such order for continuation or termination is possible under the laws of that State and (iv) be allowed to offer a reorganisation plan to the stakeholders in the subsidiary's proceedings in accordance with the laws of the State of those proceedings.

66. The test that the court should apply is that the requested measure should be in the interests of both the group and the creditors of the subsidiary. If any action would be prejudicial to the subsidiary's creditors there should be accompanying measures or compensation in order to at least satisfy the group compensation rule. Furthermore, the court should investigate whether a reasonable distribution of the synergy margin is provided for. This, by the way, is exactly the kind of issue which could benefit from court-to-court communication.

67. In an Austrian case in which the liquidator of the English main proceedings was also the liquidator in the main proceedings of other group companies, the liquidator applied for a stay in the Austrian secondary proceedings (which actually encompassed all assets of that group company) under Article 33(1) EIR. The order was granted by the Graz Court of Appeal on the grounds that if the liquidator in the main proceedings is also appointed liquidator for several other group companies that are integral part of the organisation and is trying to achieve a uniform sale of all assets as a going concern, a stay of liquidation in the

secondary proceedings cannot be deemed to be 'manifestly of no interest to the creditors in the main proceedings[34]'.

68. In addition to the coordination powers of the liquidator of the group main proceedings, the INSOL Europe proposal provides for a European Rescue Plan. In essence this plan is a composition which includes any number of group companies subject to insolvency proceedings and is confirmed by the court of the group main proceedings. This European Rescue Plan will be discussed in Section 3.

(c). Mutual liquidator regime

69. One step further than the regime in which the liquidator of the group main proceedings has (i) certain powers of coordination, subject to supervision by the courts of the subsidiaries and (ii) the power to propose a plan subject to confirmation by the court of the group main proceedings, is the regime in which the same liquidator is appointed in the main proceedings of all group companies, but the proceedings themselves remain under the supervision of the local courts[35]. This solves many of the problems inherent in the former regime because under the mutual liquidator regime it is much easier to adopt one common policy and there is less need for decisions by the courts of the subsidiaries' insolvency proceedings. In some instances, however, such decisions will remain necessary. Similar to what has been defended above with respect to regime (b), decisions of the subsidiary's court are needed not only to resolve conflicts but also to set aside local law if that is necessary in the interests of the group, and therefore indirectly in the interests of the subsidiary's creditors (see above under 65). However, one major problem with the main liquidator regime is that it glosses over the conflicts of interests between the group companies and between their creditors[36]. In the example in which a subsidiary should be compensated if it does not sell off its assets to a third party because the group's interests are served by holding on to those assets, the liquidator would have to negotiate with himself about the form and magnitude of the compensation. Conflicts of interests may, of course, also arise over such issues

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[34] A. Klauser and G. Mandelbacher, *The European Insolvency Regulation in recent Austrian case law*, which can be found on http://www.iiiglobal.org/component/jdownloads/finish/39/4057.html p. 9.

[35] Advocates of this solution are C.G. Paulus, *Überlegungen zu einem modernen Konzerninsolvenzrecht*, ZAP 44/2005, pp. 1948-1955, I Mevorach, 2009, p. 159 et seq. and N.W.A. Tollenaar, *Dealing with the insolvency of multinational groups under the European Insolvency Regulation*, TvI 2010, p. 94 et seq.

[36] Eidenmüller 2005, p. 541.

as settlement of intercompany claims and attribution of assets. As mentioned earlier in this report (at 22 above), conflicts of interests often become much more prominent in a situation of insolvency, because if a group is solvent and only the top company has shareholders there is no apparent prejudice in trade-offs between group companies.

70. It is remarkable that there are many domestic cases in which the same liquidator is appointed in the insolvency proceedings of more than one group company. This of course enhances efficiency, especially if the same court is supervising all these proceedings, but it is questionable whether such a joint appointment is always appropriate. I know of a number of Dutch cases involving very substantial conflicts of interests where one could have doubts about how these issues were resolved and about the degree of detail in which the outside creditors of these companies were informed of the justification for the settlements. A good example of an international case where these conflicts of interests are apparent is the Lehman case. The companies in countries such as the United States, England, the Netherlands, Curaçao and Switzerland have different liquidators and different sets of creditors. How intercompany claims are settled in that case will be of great importance to these various sets of outside creditors.

71. An additional issue of the mutual liquidator regime is that the liquidators have to deal with different laws and legal cultures with respect to the group companies. Basically, this means that they have to act in an area in which they have no expertise and may be faced with court documents and proceedings in languages they have not mastered. Furthermore, courts that do not speak the language of the liquidator may not be capable of supervising his work adequately.

72. Each case is different and in some cases the efficiency gain may be expected to outweigh the conflict-of-interest issues and communication problems, whereas in other cases the scales would tip the other way. For that reason appointment of the same liquidator or liquidators in all proceedings cannot be the standard solution and cannot serve as the basis for provisions on group rules. However, in the case of some regimes, for example regime (b) (coordinating powers), such an appointment would be possible and could be considered where appropriate. A precondition would be that insolvency practitioners from one jurisdiction can be appointed in the other jurisdiction and that the qualifications of liquidators from one State are recognised in other States.

(d) Joint administration regime

73. The next regime is the joint administration regime. Joint administration is very popular in the United States. There it means that all proceedings of the group companies are conducted in one and the same bankruptcy court, which joins the proceedings for procedural and administrative matters (see also at 27 above). In such proceedings a joint restructuring plan can be proposed for all the companies included in the joint administration, but it has to be accepted and confirmed for each of the companies concerned separately. There are, however, important differences between the American and European situations and some of these make joint administration less attractive in a European setting.

74. First, it should be noted that in a typical U.S. Chapter 11 case the debtor remains in possession of the assets and no trustee is appointed. For a group structure that makes the concept quite different. In a system where a different liquidator is appointed in each of the insolvency proceedings the chain of command of the group is broken. The liquidator of the parent company cannot dismiss or appoint liquidators of the subsidiaries. In the U.S. situation the management of all the Chapter 11 companies almost always remains in place. This improves the chances of preserving the group structure, although an important change is that the management of each company will have a fiduciary duty to the creditors of that company. In some European jurisdictions debtor in possession regimes have been introduced, but most reorganisation proceedings still involve a liquidator.

75. A second important difference between the U.S. system and the European situation has to do with jurisdiction and applicable law. Joint administration in the United States may mean that a company which is actually located in San Francisco could be subject to Chapter 11 proceedings in New York. However, although this may be a different location, the insolvency proceedings will still be conducted by an American federal court and there will be virtually no change in the applicable law because bankruptcy law is federal law[37]. In Europe, of course, this is quite different. If rules were developed to allow joint administration of group companies with COMIs in different jurisdictions, there would be two possibilities. First, if Article 4 EIR were to be applied, all these proceedings would be subject to the same law. For example, if the group were to consist of a French

[37] "Virtually" because there are some issues of state law that may affect the bankruptcy, but these concern only a limited number of topics such as the assets that are not included in the bankruptcy estate.

parent company (i.e. with its COMI in France) and Belgian, Italian and Greek subsidiaries and those companies were to be subject to joint administration by the French court, French law would apply to all these proceedings and therefore also to questions such as the ranking of creditors and the termination of contracts with respect to the Belgian, Italian and Greek companies. This solution is unattractive for a variety of reasons. It would entail a substantial redistributive effect. And it would also be very easy for the group to manipulate the applicable law by moving a subsidiary around inside the group or by moving it outside the group. The second possibility is that the French court would apply Belgian law to the Belgian subsidiaries, Italian law to the Italian subsidiaries and Greek law to the Greek subsidiaries, but this too is very unattractive. Another disadvantage of this kind of joint administration is that it infringes the sovereignty of the States more than is necessary, because it relocates the proceedings of the subsidiary to another jurisdiction.

76. Joint administration has been attempted in several cases of which the Daisytek, Rover and Collins & Aikman cases are the best known. In the Daisytek, Rover and Collins & Aikman cases, the English court decided that the centre of main interests of the subsidiaries was located in England, which justified opening main proceedings in England with respect to the parent and these subsidiaries[38]. In the Daisytek case the High Court sitting in Leeds opened insolvency proceedings with respect to an English company[39] and three German companies and one French company, in the Rover case the High Court sitting in Birmingham opened insolvency proceedings with respect to English, German, French, Dutch, Belgian, Luxembourg, Spanish, Irish, Italian and Portuguese companies[40] and in the Collins & Aikman case[41] the High Court in London accepted jurisdiction over 24 group companies throughout Europe. In order to achieve this result the London court held that the head office functions were carried out from England. In fact, the court applied here a group COMI criterion in the sense that the determining factor was the location from which control was exercised over the subsidiary. Moreover, both in the Rover and in the Collins & Aikman cases the English court allowed the liquidator to apply local law to the ranking of the creditors with respect to the foreign assets. Virtually all assets of most of these subsidiaries

[38] Although the most prominent cases of this kind are English cases, there are also examples from other States, such as Mpotec (France), Energotech (France) and Hettlage (Germany).

[39] High Court of Justice, Leeds 16 May 2003, [2003] BCC 562.

[40] High Court of Justice, Birmingham 11 May 2005, NZI 2005, 515; B. Wessels *Multinational Groups of Companies under the EC Insolvency Regulation: where do we stand? Ondernemingsrecht* 2009/55.

[41] High Court of Justice, London 9 June 2006, ZIP 2006, 2093, EWiR 2006, 623.

were located in their respective Member States.[42] This was in fact the situation described above in which there is joint administration in the court of the group COMI, which then applies local law to the subsidiaries. To reach this result, the English courts deemed the subsidiaries' COMI to be the COMI of the controlling parent company[43]. Apart from the objections to this solution which I set out above, it is questionable whether this head office criterion can still be applied since the Eurofood judgment[44] and the Stanford judgments of the High Court in London and the Court of Appeal[45]. In the Eurofood judgment the European Court of Justice stressed how important it was that the COMI should be ascertainable by third parties if it is to be somewhere else than the place of the registered office. Moreover, the European Court of Justice held that the mere fact that a company was controlled by a parent company in another Member State was not enough to refute the presumption of Article 3 paragraph 1 EIR that the centre of main interests is located at the registered office. It also seems quite likely that if applications had been made to open main proceedings in the Member States of the subsidiaries' registered offices before those main proceedings were opened in England, the courts concerned would have accepted jurisdiction[46]. Although the English courts are not the only ones to have attempted joint administration, I think that their judgments are most illustrative of this kind of COMI manipulation.

77. Joint administration could also involve the appointment of the liquidator in the main proceedings as the liquidator in the proceedings of all the subsidiaries. This is actually a combination of the joint administration and mutual liquidator regimes. In fact, that is what happened in the English cases mentioned here, and the conflict-of-interest difficulties discussed with respect to regime (c) apply here as well. If anything, the problems are actually somewhat more severe here, because not only the liquidator but also the court is the same. In the United States, where joint administration is very common, the same trustee can be appointed in the joint cases, but the creditors have the right to elect separate trustees under Bankruptcy Rule 2009.

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42 For Austria see for example A. Klauser and G. Mandelbacher, *The European Insolvency Regulation in Recent Austrian Case Law*, which can be found at http://www.iiiglobal.org/component/jdownloads/finish/39/4057.html, p. 8.

43 C.G. Paulus, *Überlegungen zu einem modernen Konzerninsolvenzrecht*, ZAP 44/2005, pp. 1948-1955, H. Hirte, *Towards a framework for the Regulation of Corporate Group Insolvencies*, ECFR 2/2008, pp. 213-236.

44 ECJ 2 May 2006, C 341-04.

45 High Court 3 July 2009, 2009 WL 1949459; Court of Appeal 25 February 2010 [2010] EWCA Civ 137.

46 Judgment of Tribunal de Commerce Cergy-Pontoise, 1 July 2003, not published (as observed by P.M. Reuss, 'Forum shopping' in der Insolvenz, 2011, p. 127).

(e). Substantive consolidation

78. The highest level of integration is obtained under the substantive consolidation regime which was already discussed above (at 34 - 36). Although substantive consolidation must have been applied to cases in many jurisdictions, the doctrine was developed in the United States. The U.S. Bankruptcy Code does not contain provisions on substantive consolidation (except for a provision regarding spouses), so the development of this part of the law is a matter of case law. Although American scholars and courts claim that substantive consolidation is applied only in exceptional cases in the United States, it seems that in practice this may not be entirely true. Under U.S. law, substantive consolidation may be applied in two instances. It may be applied where the financial affairs of the debtor cannot be disentangled and it may be applied where the creditors have dealt with the entities as an economic unit[47]. One of the attractions of substantive consolidation under U.S. law is that it allows the offering of a single Chapter 11 plan to the creditors of the related units.

79. Substantive consolidation is unavoidable where the assets or liabilities of the debtor are entangled to such an extent as to be inseparable. As the Dutch proverb says, 'Where there is nothing, the emperor loses his right.' In a European context extending substantive consolidation beyond that category seems unattractive. It would mean that the law to be applied would not be the one expected by the creditors of the disappearing company/proceedings and that there would be a redistributive effect. In cases where there is uncertainty about part of the assets the liquidators in the relevant insolvency proceedings should settle, particularly if the dispute is not worth the cost of litigation.

80. As mentioned above, an incentive for substantive consolidation under U.S. law is that it will open the way to a single plan for the consolidated companies. If the concept of a pan-European plan (as will be discussed below) is adopted there would not be any need for substantive consolidation to create this possibility, because a unified plan is then possible with respect to any combination of companies within the group.

(f). Flexible approach

[47] C.J. Tabb, *The Law of Bankruptcy*, 2nd ed. 2009, p. 242.

81. Some authors advocate a flexible approach in which different regimes can be applied to different situations[48]. Some cases would be more suitable for joint administration, others for a protocol or for a liquidator with coordinating powers. My own view is that a flexible approach of this kind creates too much uncertainty and is too complicated. It would be preferable to have a system whose core is formed by rules on liquidators with coordinating powers, as set out in regime (b). This would not prevent solutions involving court-to-court or liquidator-to-liquidator communication, which could in fact play a very useful role in supporting such coordination. Nor does it exclude the possibility of appointing the same liquidator in proceedings with respect to several group companies, but special attention should be given here to issues involving conflicts of interests. Substantive consolidation should be limited to cases where disentanglement is not practicable.

Section 3: A group rescue plan

I. Restructuring scenarios

82. There are essentially two scenarios in which restructurings of insolvent companies take place.

83. The first type of restructuring scenario is a restructuring or rescue plan. The essence of this kind of restructuring is that the creditors agree to relinquish or modify their claims in such a way that the company becomes solvent again. Often such rescue plans entail much more than a mere write-off of debts or postponement of repayment. The activities of the company itself need to be restructured in the sense that less profitable activities have to be sold or ceased, employees may need to be dismissed, management may need to be changed and more profitable activities may need to be developed. Rescue plans launched in the absence of insolvency proceedings usually require the consent of all creditors whose interests would be impaired by the plan (there are exceptions under some legal systems), whereas rescue plans adopted in insolvency proceedings contain mechanisms by which obstructing creditors may be outvoted or crammed down[49]. In order to safeguard the interests of the disgruntled creditors some kind of court involvement is needed. The rationale for the reduction of the debts is that, as a consequence of the debtor's insolvency,

48 E.g. Mevorach, op. cit, p. 127 et seq.
49 For the meaning of cram down, see 92 below.

the claims against the debtor are no longer fully recoverable – or at least not recoverable when they are due – and that in a liquidation scenario the creditors might receive even less then if they ‘allow’ the debtor to continue trading and accept the rescue plan. The basic scenario of such a rescue plan is that the company’s refinancing is used wholly or partially to pay off the old creditors. From the creditors’ point of view, this means that a pot of money which is distributed among them replaces their right of recourse against the debtor’s assets. In this way, their claims are partially repaid and the remainder of the claim is relinquished. Other possibilities are, for example, that the terms of the claims are changed or that claims are exchanged for equity.

84. The second type of restructuring scenario is the going-concern assets sale. Under this scenario the liquidator sells off the assets which comprise the company’s business (or the viable part of the business) to another legal entity. Such an entity may be external, but it may also happen that the entity is financed by creditors or shareholders of the insolvent company. From the perspective of the company’s creditors, such a sale often produces the same result in economic terms as a rescue plan: the rights of recourse against the debtor’s assets are replaced by a pot of money which is distributed among the creditors and reflects the value of the debtor’s viable business.

85. Which of these two basic scenarios is chosen depends on a number of legal factors, which I will now discuss briefly. I will focus on the issues under Dutch law but many of these legal factors play a role under other legal systems as well:

(1) For historical reasons rescue plan proceedings are much more complicated and require much more creditor and court involvement under Dutch law than the going-concern sale of assets. In general, it can be said that the creditors in Dutch proceedings have more rights to influence the liabilities side of the debtor’s balance sheet than the assets side. They are allowed to dispute each other’s claims, and a write-off of the debt in plan proceedings involves a creditors’ meeting, voting and confirmation proceedings in which creditors can oppose the plan. Under Dutch law a decision in the confirmation proceedings is subject to appeal and a further appeal to the Supreme Court. In the case of a private asset sale the liquidator will need the permission of the supervisory judge, and individual creditors may try to oppose the sale, but no appeal is allowed from the supervisory judge’s decision. Furthermore, secured creditors usually need to be involved because in Dutch insolvency proceedings they retain their

rights of enforcement. In many cases it is actually the secured creditors who take the initiative in launching a going-concern asset sale. Thus an asset sale is much less of a hassle than a rescue plan. I think the same applies in most other legal systems. Under Dutch law the difference has to do with the roots of Dutch insolvency proceedings, which lie in proceedings concerning attachments and distribution of proceeds. Moreover, when the Dutch Bankruptcy Act was enacted it included a provision basically preventing a going-concern asset sale until the possibility of establishing a rescue plan had lapsed (Article 101 (1) DBA). However, the Supreme Court killed this provision in the 1930s[50]. As mentioned above, I think that in many other countries too asset sales are easier to accomplish than rescue plans. Sometimes there are obstacles to asset sales, but it seems that such obstacles are now playing a less prominent role. In the United States, where rescue plans have long been quite popular, there now is also a tendency towards sale as a going concern.

(2) The possibilities of accomplishing a Dutch rescue plan are very limited. Only ordinary creditors can be affected by the plan in the sense that a minority can be bound by a majority voting in favour of the plan, but preferred and secured creditors are not affected at all. This means that the interests of preferred creditors and secured creditors cannot be impaired against their will. Employees are very important preferred creditors. Since in most bankruptcies ordinary creditors will not receive anything anyway, a rescue plan may not help to resolve the insolvency situation. Furthermore, a party who is prepared to refinance the business may find a rescue plan scenario unattractive because preferred and secured claims, which are not affected by the plan, may come out of the woodwork after the plan has been accepted and executed. Often, therefore, parties in this position prefer to start with a clean company and have an asset sale. Under U.S. and German rescue plans preferred and secured creditors can be bound.

(3) A going-concern asset sale may have negative tax consequences and it may not always be possible to take over all contracts or licences. To the extent that they are needed for the business, this may constitute a problem in the asset sale scenario.

50 HR 27 August 1937, NJ 1938, 9 (Nieuw Plancius).

(4) Rescue plans may provide a more flexible approach than the going-concern asset sale liquidation scenario.

For the reasons mentioned at (1) and (2) Dutch rescue plans are very rare. I do not know of any insolvencies involving a substantial number of employees where a plan aimed at continuing the business of the debtor has been accepted.

86. If several group companies are involved it may be attractive to arrange for a coordinated sale of the assets. This involves the cooperation of the liquidators in multiple proceedings. Similarly, if several group companies are involved rescue plans that are offered and adopted for the individual companies could conceivably be coordinated.

87. In a group situation two scenarios can be added to the two scenarios described above. The first additional scenario concerns a consolidated sale of the assets of the viable business of group companies, not by way of coordination between the liquidators of the individual companies, but at the direction of one liquidator (i.e. a unified sale with one seller). The second additional scenario involves the adoption of one consolidated plan for the whole group or a number of group companies. Thus we can distinguish between the following scenarios for a group:

(i) coordinated asset sales by the individual group companies;
(ii) coordinated rescue plans for the individual group companies;
(iii) unified sale of assets;
(iv) unified plan.

In discussing these scenarios I will disregard national groups and move on straightaway to international groups which have group companies in a large number of jurisdictions.

(i) *Coordinated asset sales by individual group companies*
Under the preferred regime (b) involving a liquidator with coordinating powers, the liquidator of the group main proceedings has the right to ask the court of the subsidiary proceedings to suspend asset sales by the subsidiary's liquidator. The purpose of this power is to allow a coordinated sale of the assets of several group companies or to include those assets in a reorganisation e.g. through a set of coordinated rescue plans. A coordinated sale of this kind could thus ensue, but would be difficult to achieve in a multi-jurisdictional case because all the courts would need to

become aligned. Under the regime involving coordination on a non-hierarchal basis (a), the liquidators of the subsidiaries may need to become aligned as well.

(ii) *Coordinated rescue plans*
Under the preferred regime involving a liquidator with coordinating powers the liquidator of the group main proceedings can propose rescue plans in all subsidiary proceedings. Although in such a case the role of the liquidator of the subsidiary proceedings may be somewhat reduced, the plan still needs to be accepted in each jurisdiction under local law and each of the courts needs to confirm the plan. Moreover, as the Dutch example shows, the national rules on plans may contain such very serious limitations that coordinated plans are unachievable. To my knowledge, no plan involving continuation of the business of group companies has ever been accepted in three or more jurisdictions.

(iii) *Unified asset sale*
One way of achieving a concerted sale of the business is by providing that the liquidator of the parent company has the power to sell all or part of the assets of the companies in the group under the sole supervision of that liquidator's own court. To a large extent this meets with the same difficulties as administration of multiple group companies by the same liquidator, because there may be conflicts of interests with respect to such sales between the group companies and because there is no creditor influence similar to the influence involved in the adoption of a rescue plan. Such a conflict of interests may, for example, concern the question of which assets should be included in the consolidated sale, but also the question of how the purchase price should be attributed to the individual estates. If a patent right is owned by company A and a machine by company B and if the sale of the patent right and the machine together may be expected to yield a substantially better price than the sale of the assets individually, a question of attribution of the synergy margin arises. In fact, where there is no such conflict of interests, solution (i) (coordinated sale) should provide an adequate outcome.

(iv) *Consolidated plan*
Finally, there is the possibility of having one rescue plan for the whole group. A single plan of this kind is more appropriate for adequately resolving conflict-of-interest issues than a unified asset sale. Under U.S.

bankruptcy law especially, rules on reorganisation plans have been developed to deal with conflicts of interests. Although the provisions on rescue plans under Chapter 11 concern single companies, the underlying principles can be applied in a multi-company situation as well. The U.S. system with respect to Chapter 11 rescue plans has been the basis of legislation in other countries such as Germany. As noted at the start, INSOL Europe has developed a European Rescue Plan based on these principles. As will be discussed in some detail below, this plan was framed against the background of the U.S. and German plans.

II. Classification, cram down and confirmation under U.S. and German law

88. The first underlying principle of the U.S. plan is that creditors are placed in classes. U.S. law requires that claims may be placed in a particular class only if they are substantially similar to the other claims of such class (§ 1122 (a) US BC). There may be conflicting interests between creditors of different classes: for example preferred or secured creditors may have an interest in having a fire sale, whereas ordinary creditors may have an interest in an attempt to continue the business of the debtor. However, a very important principle is that the interests of the creditors *within* a class are mutually aligned.

89. As to the voting procedure the starting point is that all classes of creditors vote on the plan. In fact, this is not entirely correct: creditors that are not affected by the plan are not entitled to vote because they have no legitimate reason to oppose the plan. At the other end of the spectrum there may be creditors who receive no value at all. They do not need to vote either, since they are assumed to reject the plan. After the plan has been voted on, the court will decide whether or not to confirm it. In this respect, it is important to determine whether or not a class has accepted the plan. Under U.S. law, if the plan has been accepted by a class of creditors the basic premise is that each creditor belonging to that class is bound by the majority decision. That is the reason why it is so important for all creditors belonging to that class to have substantially similar claims and to have interests that are mutually aligned. Nevertheless, an individual creditor that has been outvoted may still oppose the plan in subsequent confirmation proceedings. The ground for such opposition is that the creditor receives less under the plan than he would receive in a Chapter 7 liquidation. Although it is usually not phrased in this way, this rule can be explained as meaning that if a creditor would be deprived of any value in his claim, this would amount to an expropriation which

he need not accept.

90. German law has similar classification rules. Classes can be created of creditors with the same legal position (if their legal position is different they must be placed in different classes) and similar commercial interests (the latter classification is optional) (§ 222(2) InsO).

91. The basic principle is therefore that an individual creditor should not be forced to accept less value than the value of his claim. Under U.S. law this rule is referred to as the best interests test. It is provided for in § 1129 (a)(7) BC[51]. German law has a similar rule (§ 251(1) InsO). Dutch law too has a similar notion. Pursuant to Articles 153(2)(1), 272(2)(1) and 338(2) Dutch Bankruptcy Act the court has to refuse confirmation if the proceeds of the estate exceed the amounts stipulated in the rescue plan. Under an American or German plan which can include different kinds of creditors such as ordinary, preferred and secured creditors, this means that each creditor should at least receive what he would be entitled to in a liquidation, but a more flexible approach is allowed with respect to the surplus value that can be realised under the plan[52]. Under U.S. law, there are some additional requirements for confirmation of the plan, the most important of which is that the court is of the opinion that the plan is feasible (§ 1129 (a) (11) Bankruptcy Code)

92. The real problem is how to deal with a situation in which some classes accept the rescue plan and some do not. It may well be that all creditors will be better off if the rescue plan is accepted, and the few classes opposing it may be acting unreasonably or trying to negotiate disproportionate advantages. Here the court has to balance the interests of the various groups of creditors. Where the court decides that a group of creditors should have accepted the plan and is therefore deemed to have done so, this is known as 'cram down'. Under German law the theoretical justification for the court's cram down powers is that the rejecting groups of creditors are committing an abuse of power[53]. Cram down could therefore be seen as an exceptional measure. Whether the basis for cram down powers is perceived as similarly restricted under U.S. law is questionable. However, it is clear that overruling in this way a group of creditors who have rejected the plan is of a completely different order of magnitude than refusing

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[51] With respect to secured creditors the rule has been phrased somewhat differently.
[52] C.J. Tabb, *The Law of Bankruptcy*, 2nd ed. Foundation Press, pp. 1099 and 1136-1137.
[53] S. Madaus, *Der Insolvenzplan*, pp. 259 and 280.

confirmation because objecting creditors belonging to a class that has accepted the plan by a majority voting in favour of it receive less than liquidation value under the plan. With respect to cramming down a rejecting class, § 1129(b)(1) Bankruptcy Code provides that if a class has rejected the plan the court shall nonetheless confirm the plan '*if the plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interests*[54] *that is impaired under, and has not accepted, the plan*.' The most important application of this provision is the absolute priority rule. Under this rule, no one junior to the rejecting impaired class should receive any value under the plan (§ 1129(b)(2)(B)(ii) Bankruptcy Code). Under U.S. law the absolute priority rule applies only from the dissenting class down: 'classes senior to the dissenting class will not be subject to the rule. In short "senior accepting classes are permitted to give up value to junior classes as long as no dissenting intervening class receives less than the amount of its claims in full."'[55]For secured claims the test is somewhat different, but that is a topic that is beyond the scope of this report. Under German law, cram down can take place if (i) the creditors belonging to a rejecting class receive an appropriate share of the going-concern value (§ 245 InsO) and (ii) the majority of the classes have accepted the plan. Pursuant to § 245 (2) InsO the requirement of an appropriate share is met if the absolute priority rule is observed and other creditors with the same ranking are not unduly favoured[56]. The requirement that a majority of the classes should have accepted does not seem very convincing. The relevance of a majority within a class is that a majority of creditors having the same interest decide to accept the plan. The idea is that where the interests are mutually aligned the majority should be able to bind the minority. However, the requirement that a majority of the classes accepts the plan cannot be based on this principle because the different classes may very well have different interests. In fact, that is precisely why creditors are put in different classes in the first place. It may be significant that this requirement did not occur in the government draft of this paragraph, but was inserted on the initiative of parliament[57].

III. Classification, cram down and confirmation with respect to group plans

93. The system of classification as laid down in the U.S. Bankruptcy Code and the German Insolvenzordnung could very well be used for a single plan involving

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[54] 'Interests'primarily refers to shareholders' interests.
[55] Tabb, pp. 1151-1152.
[56] Kreft, *Insolvenzordnung, Heidelberger Kommentar*, 6th ed 2011 p.1724.
[57] Kreft, Ibid,, p.1721.

several group companies. The reason why it can be transplanted fairly easily is that under these plans the treatment of creditors with different interests has already been taken care of by the classification system. In that respect creditors of different companies do not differ substantially from creditors of the same company and the system of classification, cram down and confirmation can just as well be used with respect to creditors from different companies as it is presently used with respect to creditors of the same company who have conflicting interests. In such system creditors of different group companies should not be placed in the same class since their interests are not substantially similar. Furthermore, under the group plan similar tests would be required as in a single company plan, such as the best interests test, and the tests that the plan should not discriminate unfairly and is fair and equitable with respect to each class of claims. On the basis of Community trust it may be expected that the single court dealing with the cram down and confirmation processes will be able to apply such a rule with respect to all creditors regardless of their geographical location or of the identity of the group company which is their debtor (and which is included in the plan). It should be noted, however, that in a group situation the absolute priority rule may be less suitable as a cram down criterion than in a single company case. The group situation is different in the sense that there may not be a ranking order between creditors of different group companies: often it is not possible to say that ordinary creditors of company A are subordinated to preferred creditors of company B. A different cram down criterion should therefore be used in a group plan, bearing in mind that a cram down rule should be applied with restraint because the rejection by the class concerned should be overruled only where upholding the rejection would bring about a manifestly unfair result.

IV. INSOL Europe's European Rescue Plan

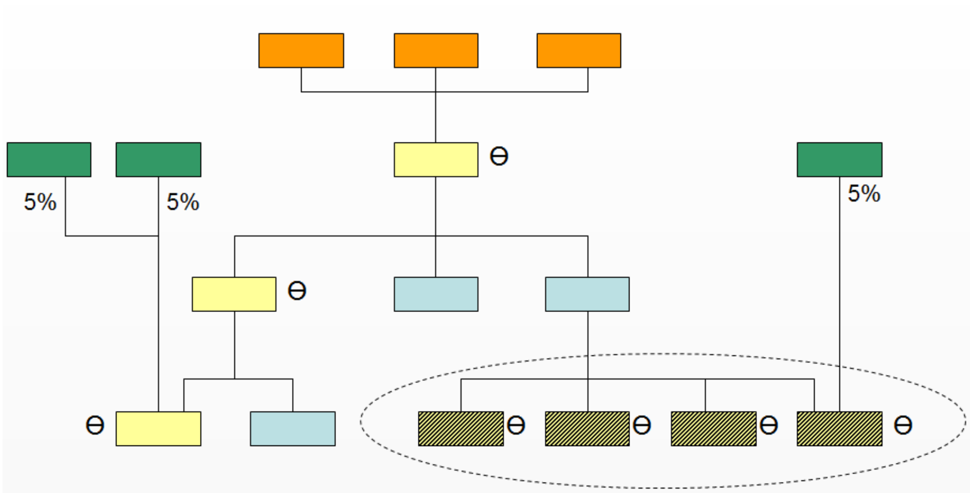
94. Chapter VI of the INSOL Europe proposal provides for a European Rescue Plan, which is essentially a reorganisation plan that includes any number of group companies subject to insolvency proceedings in different jurisdictions. The authority to confirm the plan lies with the court of the group main proceedings. As discussed above[58], I think that scenario (ii), providing for a composite plan to be adopted in the main insolvency proceedings of each of the group companies involved, is indeed not achievable in complicated situations. In those situations scenario (iv), providing for a unified plan to be adopted in proceedings before a

[58] At 87.

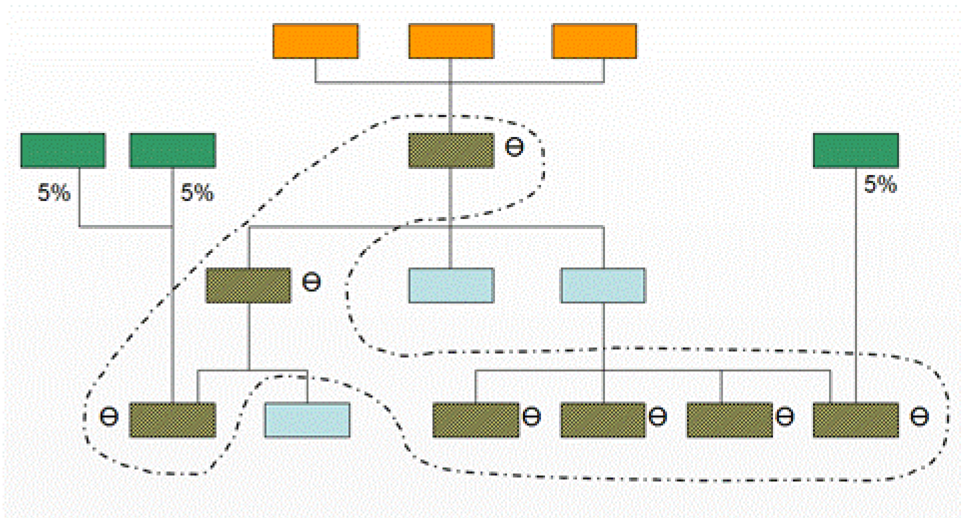
single court and involving one liquidator, stands a much better chance. The European Rescue Plan is such a plan. The provisions of Chapter VI of the INSOL Europe proposal are attached to this report.

95. Under the INSOL Europe proposal, group companies which are not subject to insolvency proceedings cannot be included in a European Rescue Plan if their creditors are thereby impaired. It is to be assumed that these companies are solvent and that their creditors can therefore receive the full value of their claims. Nevertheless, it is conceivable that companies which are not subject to insolvency proceedings could obtain rights or assume obligations under the plan.

96. With regard to group companies that are subject to insolvency proceedings, there can be several possible variations in the mix of companies included in the plan. The plan need not include the ultimate parent company or all of the other group companies that have opened insolvency proceedings. This is illustrated in the following diagram. The companies that have opened insolvency proceedings have been marked with the Greek letter ϴ and those included in the plan have, in addition, been shaded with diagonal lines.



97. The following diagram shows another possible variation for the same group.



98. In order to avoid a variety of competing plans involving different sets of insolvent group companies, it is important that only one person should be allowed to propose a plan. Article 47(1) of the INSOL Europe proposal seeks to resolve this issue by granting the right to propose a European Rescue Plan exclusively to the liquidator of the ultimate parent company. The only exception is that the management of the ultimate parent company is entitled to submit a plan together with its request to open insolvency proceedings or while such a request is pending. Under the INSOL Europe proposal, at no time will the management and the liquidator have concurrent powers to propose a plan. In this sense the European Rescue Plan differs from a U.S. Chapter 11 plan and from a plan under German law. In Chapter 11 proceedings the main rule is that the debtor in possession has an exclusive right to propose a reorganisation plan during the first 18 months of the bankruptcy proceedings. After that so-called exclusivity period has ended, creditors also have the right to propose a plan. Under German law both the liquidator and the debtor are entitled to propose a plan. So in this respect the INSOL Europe proposal is more limited, which is probably necessary: having several proponents in a situation with multiple companies in multiple jurisdictions would be too complicated.

99. Another issue is which court should supervise the group plan. Since the liquidator of the group main proceedings will in most cases be the sole proponent of the plan, it would be most efficient if the court supervising those proceedings also supervises the proceedings relating to the plan and its confirmation. That is the rule adopted in Article 47(1) of the INSOL Europe proposal.

100. With respect to the question of the governing law, it would be impossible to apply the laws of each jurisdiction in which a company subject to the plan is situated because the plan is an integrated one. Moreover, in some jurisdictions – such as the Netherlands – the substantive and procedural rules on reorganisation plans are very old and restrictive. Under Dutch law a plan is not permitted to affect either secured or preferred creditors, although this might be necessary to make the plan viable in a group insolvency situation. In any event, the discrepancies between the plan-related rules in the various jurisdictions would make this approach unworkable.

101. Another possibility would be to apply the law of the Member State in which the group main proceedings have been opened. This would mean, however, that the law governing the permissible contents of the plan and the other substantive and procedural rules applicable to the plan could differ substantially depending on which company is deemed to be the ultimate parent company (as the main proceedings with respect to that company will be deemed to be the group main proceedings). However, the designation of a group's ultimate parent company and, consequently, the Member State in which the group main proceedings are opened, can be manipulated very easily and is therefore to some extent arbitrary[59]. If the applicable law were to be the law of that Member State, it would be easy to produce a redistributive effect and this is undesirable from the point of view of legal certainty. It would also mean that each Member State would have to develop its own laws on international group plans. It therefore seems preferable for all such plans to be subject to the same rules and for those rules to be drawn up under Community law. Chapter VI of the INSOL Europe proposal is intended to provide such rules at Community level. Only typically local issues of procedural law should be governed by national law.

102. Article 50 of the INSOL Europe proposal lists a number of issues with which a European Rescue Plan may deal, but this list is not exhaustive. Under the INSOL Europe proposal the proponent of the plan enjoys a large degree of freedom with

[59] See above at 56-58

regard to its contents and structure. Under the U.S. Bankruptcy Code and Dutch bankruptcy law, the possible contents of such a plan are largely unlimited as well. Under German law the rules on the contents of a plan are set out in §217-221 InsO. In view of the complexity of a group's internal and external legal relations, INSOL Europe elected not to limit the possible content of the plan insofar as the group companies which are subject to insolvency proceedings are concerned. Claims against such insolvent group companies or shares in such companies, may be modified, cancelled or decreased (Art. 50). The plan may affect the rights of secured creditors and provide for the termination of agreements to which insolvent group companies are a party. Solvent group companies may also be included in the plan, but only with their consent. Creditors and shareholders of solvent companies can be impaired under the plan with the consent of each of the affected creditors and shareholders.

103. Under the INSOL Europe proposal there are three key documents: (i) an information memorandum, (ii) a class schedule and (iii) the draft plan itself. Chapter 11 of the U.S. Bankruptcy Code provides for a disclosure statement that must be sent to the creditors and shareholders (§1125). The amount of information to be included in that statement depends on the type of bankruptcy. In small, simple bankruptcies creditors need not be buried under expensive 300-page documents; in complicated bankruptcies the disclosure statement will be more elaborate. It is of course important that the creditors receive an information memorandum which is sufficient to enable them to take an informed decision. Under the INSOL Europe proposal the information "must be of a kind and in sufficient detail as far as is reasonably practical" to achieve that purpose. The proposal also requires the information memorandum to be approved by the court (Art. 51). Under U.S. law a disclosure statement is not needed if, prior to the opening of the bankruptcy proceedings, the plan proponent received sufficient powers of attorney to vote in favour of the plan and have it accepted. In that case, there is no need to solicit votes after the opening of bankruptcy proceedings and a disclosure statement is therefore also unnecessary. These proceedings are referred to as pre-pack proceedings. The INSOL Europe proposal does not provide for such proceedings.

104. Under U.S. law, the classification of creditors is part of the plan and is not subject to prior review by the court. Only at the confirmation hearing does the court decide to what extent disputed claims are to be allowed and how disputes on classification should be resolved. This means that under U.S. law these issues are decided after the voting on the plan has taken place. It seems to me that this

is an unfortunate sequence of events. For one thing, the classes can be manipulated to influence the voting outcome by, for example, placing dissenting creditors in a larger class of creditors that favours the plan and thereby diluting their influence. Furthermore, It would seem preferable for the court to resolve disputes on the allowance and classification of claims before the actual voting occurs, because the court may otherwise be tempted to resolve them with a view to obtaining the desired voting outcome. Under German law, disputes on the allowance of claims are resolved before voting (§236 InsO). As I understand it, classification issues are part of the German court's first review under §231 InsO, which takes place before the voting but is not definitive. Under the INSOL Europe proposal, both allowance and classification issues are resolved at the acceptance hearing and precede the voting. Under Article 51 of the proposed rules, the court sets a date for an acceptance hearing after approving the information memorandum. The liquidator then sends the information memorandum, the draft class schedule and the draft plan to the creditors and the (outside) shareholders of each of the group companies and invites them to the acceptance hearing. At the acceptance hearing, the court decides whether and to what extent disputed claims will be allowed for the purpose of their participation in the voting process and establishes the class schedule, which sets out the classification of the creditors and shareholders (Article 53).

105. Under U.S. law voting on a plan does not take place in court. The court's involvement is limited to approving the disclosure statement and confirming the plan. Under German law the voting likewise does not take place in court, but the voting forms have to be sent to the court. In the case of a European Rescue Plan, voting takes place at the acceptance hearing after the court has decided on the disputed claims and established the class schedule (Article 54). The rules on voting are similar to those under a Chapter 11 plan. Classes of creditors who are not impaired under the plan do not vote; the same applies to classes of creditors who receive or retain no value under the plan. In order for a class to accept the plan, the plan must be approved by a majority representing more than two-thirds of the amount of the claims voting in that class and more than half of the number of creditors voting in that class. The same requirement applies under a Chapter 11 plan (§1126(c) U.S. Bankruptcy Code), but under German law simple majorities in both amount and headcount are sufficient (§244 InsO). INSOL Europe prefers the stricter requirement under the U.S. system, because of the international dimensions of the plan. A European Rescue Plan will have far-reaching consequences in the jurisdictions of the subsidiaries and it is therefore

necessary that the plan have strong and widespread support. For the same reason the prerequisites for a cram down are rather strict.

106. Under both U.S. and German law, the courts will in principle apply the cram down provisions against a class of creditors that has rejected the plan if the absolute priority rule is met[60]. Under the INSOL Europe proposal an additional test must also be met with respect to such creditors: the rejection must not have been in good faith. In my opinion this addition was warranted because, as mentioned above, the absolute priority rule cannot be applied effectively as between classes of creditors of different group companies. Therefore, if certain classes of creditors of both group Company A and group Company B are impaired but do receive some value and one or more of those classes reject the plan, usually the question of whether the plan is fair and equitable with respect to a rejecting class or whether the plan discriminates unfairly against such a class cannot be resolved through the absolute priority rule. In accordance with Article 54 of the proposal, cram down should be decided upon at the acceptance hearing. Classes of creditors that receive nothing and shareholders are not entitled to vote on the plan. Thus, they do not stand in the way of its acceptance and therefore do not need to be the subject of a cram down decision. They may, however, oppose the subsequent confirmation of the plan essentially on the same grounds as those on which rejecting classes may oppose a cram down. This is mainly a technical matter.

107. Article 55 of the INSOL Europe proposal provides that a plan which has not been rejected will be confirmed unless a creditor, shareholder or liquidator starts opposition proceedings and one of the grounds for refusing to confirm, which are listed in Article 55(3), applies. Article 55(3)(c) and (d) refer to the best interests and feasibility tests, which also constitute grounds for refusing to confirm under U.S. and German law. Under Article 55(3)(b), confirmation will also be refused if the absolute priority rule is not met with respect to objecting creditors that receive no value under the plan or with respect to objecting shareholders. As mentioned above, these creditors and shareholders are not subject to the cram down process. Therefore, the absolute priority rule will have to be applied to them at this stage. Finally, Article 55(3)(a) provides that the court will also not confirm the plan if it unfairly favours one or more creditors or shareholders. INSOL Europe

[60] As mentioned above at 92, German law also requires acceptance by a majority of the classes. Under U.S. law the best interests test is not applied in the context of cram down, but always if a creditor opposes confirmation. Therefore, there can be no effective cram down under U.S. law if a creditor opposes confirmation and the best interests test is not met.

was of the view that this test is needed because of the potential complexity of a European Rescue Plan and because of the limited relevance of the absolute priority rule. A similar test can be found in the Dutch Bankruptcy Act (Arts. 153(2)(3), 272(2)(3) and 338).

108. Although the proceedings are structured somewhat differently, the outcome under the European Rescue Plan is essentially the same as under U.S. and German plans. An individual creditor should not be forced to accept less value than the value of his claim in a liquidation (best interests test). A more flexible approach is allowed with respect to the value that can be claimed under the plan above liquidation value. This surplus can be the synergy margin or it can be the aggregate of the differences between the going-concern values and liquidation values of the individual group companies. It can also be a combination of the two. The distribution of this margin is a matter for negotiation with or between the different groups of creditors. As to rejecting classes they can be crammed down but under the INSOL Europe proposal the test is somewhat different from the absolute priority rule, because it may not be possible to determine a ranking of creditors of different group companies.

109. It should be noted that the INSOL Europe proposal may not be fully comprehensive and that further rules relating to the European Rescue Plan will have to be added to the European Insolvency Regulation. For example, further rules may be needed to deal with the effects of the submission of the plan on the insolvency proceedings of the group companies included in it, such as rules on (i) a stay of liquidation activities in those proceedings, (ii) a stay of court proceedings with respect to the group companies other than the insolvency proceedings and (iii) expenses and fees incurred in the insolvency proceedings of the group companies that are included in the European Rescue Plan.

110. It has been suggested that the European Rescue Plan in effect amounts to substantive consolidation. I do not think that that is a correct assertion. Substantive consolidation relates to liquidation: all assets and liabilities are pooled and the liabilities are paid from the proceeds of the liquidated assets. A rescue plan in essence means that the creditors forego their mutual right of liquidation and accept value in some form in lieu of the proceeds of the liquidated assets. The value that each of the creditors receives is equal to the liquidation value of his/its claim against the estate of the relevant company or companies, plus a share in the margin as discussed above at 91.

V. Conclusion

111. Section 2 has discussed the possible group insolvency regimes. The conclusion drawn from that discussion is that the regime in which the liquidator of the group main proceedings has coordinating powers is the preferred standard scenario. This regime may be combined with further rules on coordination between courts, but in many cases such coordination alone is not enough. Appointing one liquidator in all main proceedings of the group companies may sometimes seem an attractive option, but it may often be inadvisable as conflicts of interests between group companies can become particularly apparent in insolvency situations. If the COMIs of the group companies are located in different Member States, joint administration too is not an advisable solution because it produces serious redistributive effects or may require the court to apply laws from all over the European Union. It also seriously infringes the sovereignty of the Member States in which the COMIs of the group companies are located.

112. As discussed in Section 3, under the coordinating powers regime four scenarios are conceivable for the rescue of all or part of the business of an international group. The first scenario involves a coordinated asset sale in which both the liquidators and the courts of all group companies participate, and the second involves bundling rescue plans, one for each of the group companies involved. To my knowledge, no bundling of contingent rescue plans for group companies in three or more jurisdictions has ever led to the rescue of the business. Moreover, it is so complicated that good results can hardly be expected. The third scenario involves a combined sale of assets of group companies by the liquidator of the group main proceedings, under the supervision of the court overseeing those proceedings. This scenario faces the same problems that can occur in the case of a mutual liquidator. The fourth scenario is the unified rescue plan, a variant of which is proposed by INSOL Europe as the European Rescue Plan. It consists of a plan proposed by the liquidator of the group main proceedings (or its management). The plan proceedings are conducted under the supervision of the court of the group main proceedings and governed by Community law. It applies the system developed in U.S. and German rescue plans, which resolve conflict-of-interest issues through a cram down and confirmation process. Where a case is too complicated to achieve a coordinated asset sale or contingent rescue plans (which are, in principle, conceivable under the liquidator with coordinating powers regime, but will fail in most cases because of their complexity), the unified rescue plan is the only viable solution. I

think that it is important for this possibility to be created. U.S. law achieves the same result through joint administration, but as discussed, this is not an attractive solution in the European context for administering the insolvency proceedings of group companies located in different jurisdictions. To some extent the unified rescue plan scenario could be seen – solely for the purpose of adopting the plan – as a partial joint administration governed by Community law. The unified rescue plan scenario would enhance the regenerative possibilities of European groups and put them on a par with their U.S. counterparts. It would also strengthen the internal market and avoid the wasteful and unnecessary destruction of the capital of international groups in financial distress.

VI. Comments by Professor Madaus

113. I was very happy to read in his report to this Association (under VI) that Professor Madaus supports the European Rescue Plan. In that very interesting report, he nevertheless raises a number of objections to the plan in its present form, which will be discussed in this section.

114. As I understand it, Professor Madaus's main objection relates to the absolute priority rule. As discussed above at 92, this rule provides that if a creditor is impaired a lower-ranking creditor (or a shareholder) may not receive any value. Under U.S. and German law this rule does not apply with respect to classes of creditors that have accepted the plan, but applies only if the court is asked to impose a cram down on classes of creditors that have rejected the plan. The same system is adopted in the INSOL Europe proposal. So if a class has accepted the plan and a minority of creditors within that class opposes confirmation, the court will not apply the absolute priority rule. In other words, the plan can leave something for these lower-ranking creditors or for shareholders provided that the plan is accepted by the higher-ranking class(es). That an outvoted minority has to accept the receipt of value by a lower-ranking class is justified by the fact that a majority of its class – consisting of creditors with parallel interests – has accepted the plan, including this element thereof. Thus the creditors can negotiate on how any surplus above the liquidation value of the relevant group company should be distributed among the various classes of creditors and the shareholders. If, however, a dissenting minority of a class receives less than the amount it would have received in the event of liquidation, it can successfully oppose confirmation based upon the best interests test. I think this is a fair system. If a class has rejected a plan the court should apply a much

stricter test than if that class had accepted the plan. As is the case under Dutch law, a rejection should only be set aside if it is unreasonable (Art. 146 DBA). If the plan does not comply with the absolute priority rule, the rejection is deemed to be reasonable. Professor Madaus, however, is of the opinion that the absolute priority rule should be inapplicable not only if a creditor belonging to a class that has accepted the plan opposes confirmation but also in relation to cram down (II. 4.(2).b-d), VI.6). I respectfully disagree with him on that point.

115. Under the INSOL Europe proposal a European Rescue Plan may only be submitted by the ultimate parent company (when the insolvency proceedings are commenced) or (after such proceedings are commenced) by the liquidator of the group main proceedings. In U.S. bankruptcy proceedings creditors are also entitled to submit a plan after the so-called exclusivity period has ended. Professor Madaus is of the opinion that creditors should likewise be entitled to submit a European Rescue Plan where a company enters insolvency proceedings without preparation (VI.1). In his view this would equalise the relevant parties' bargaining positions. The main reason why INSOL Europe rejected this possibility is that in group situations a consolidated rescue plan can include different combinations of group companies subject to insolvency proceedings and therefore involve different groups of creditors, as has been illustrated above at 96 and 97. If creditors could submit competing plans, these plans could in part involve different companies and would then need to be voted on by different groups of creditors. In INSOL Europe's view, this would make the situation too complicated.

116. A third issue raised by Professor Madaus is that, in his view, the European Rescue Plan should not replace reorganisation plans under domestic law; the rules should therefore also deal with a situation in which a European Rescue Plan and a single-company plan under domestic law are proposed at the same time (VI.2). For example, it may be necessary to stay the proceedings on the domestic plan as soon as a European Rescue Plan is submitted and until the proceedings on the latter plan have been completed. On this issue I agree with Professor Madaus. See also above at 109.

117. Fourthly, Professor Madaus objects to the fact that if the confirmation of a European Rescue Plan is not opposed, the court will confirm the plan without further investigation (VI. 6.a). In his view that would "*disregard the honour of the court and (*the*) purpose of its participation*". It seems to me that if there is no

opposition to the confirmation of a plan there is no need for a confirmation hearing on or further investigation of that plan. At least in the Netherlands, the courts never refuse to confirm a plan unless requested to do so. In most cases, the court would lack the knowledge to determine whether there are grounds for such a refusal if there is no dispute. As I see it, confirmation proceedings should function as a limited form of appeal against the acceptance of the plan.

118. A fifth comment by Professor Madaus relates to what he views as an underlying premise of the European Rescue Plan: that shareholders should not receive anything under the plan and should therefore not be entitled to vote on it. He disagrees with this premise, because the participation of shareholders may be necessary for the restructuring of the group whereas they may be willing to participate in the restructuring (VI.3). I am afraid that there is a misunderstanding here. Under the INSOL Europe proposal, shareholders can receive value under a European Rescue Plan provided that all classes of creditors with claims against the relevant group company accept the plan. The absolute priority rule does not play a role in relation to confirmation (except where confirmation is opposed by classes of creditors that receive nothing under the plan or by impaired shareholders (see Art. 55(3)(b))

119. A sixth comment by Professor Madaus concerns the court procedure. In his view an acceptance hearing is unnecessary, particularly to the extent that its purpose is to decide on the allowance of disputed claims and establish the classification schedule (VI.4.b). With respect to the establishment of the classification schedule he recognises that if this were postponed until the confirmation hearing, the court would already know the outcome of the voting. That knowledge could tempt the court to decide the classification issues in a plan-friendly manner. However, Professor Madaus does not see this as a real problem. In his view the outcome of the vote is almost always known in advance. Moreover, he is confident that when making these decisions judges will not violate their duty to remain independent. I respectfully disagree with Professor Madaus on this point. I think it is important that the parameters with respect to both the allowance and classification of claims be set before the voting. I have seen two cases in the Dutch courts where the court tried to reverse the order so as to influence the outcome.

120. Finally Professor Madaus objects to the use of different cram down rules for, on the one hand, creditors who receive value and, on the other hand, creditors who receive no value and shareholders (VI.6.b). As I see it, there is no substantive difference between the two sets of rules. The difference is merely technical and is caused by the fact that creditors who receive no value and shareholders are not subject to cram down proceedings but can object to confirmation.

121. I would like to thank Professor Madaus for his thorough study of the proposal and his very well-considered comments. I hope that the debate on the European Rescue Plan will continue because in my view a consolidated plan of this nature is necessary in order to enhance the regenerating powers of international groups of companies in the European Union.

Section 4: Propositions:

I. The preferred regime in group insolvency proceedings is a regime in which the liquidator of the main proceedings of the ultimate parent company has the power (i) to request the courts of the main proceedings of the subsidiaries to take measures in the interest of the creditors of the group and (ii) to propose local rescue plans. In support of this regime, rules facilitating communication between different courts, between courts and liquidators and between different liquidators should be adopted.

II. It should also be possible to appoint the same liquidator(s) in the insolvency proceedings of two or more companies in an international group, as this is sometimes desirable from an efficiency perspective. However, special attention should be given to conflict-of- interest issues, which tend to become more pronounced in insolvency situations.

III. The possibility of adopting a pan-European rescue plan with respect to two or more group companies should be promoted because it will facilitate international reorganisations where the COMIs of several group companies are located in different jurisdictions. It will also enhance the regenerating powers of European conglomerates, which is necessary in a global environment.

Robert van Galen

Appendix: provisions of INSOL Europe proposal

CHAPTER VI: THE EUROPEAN RESCUE PLAN

Article 47

Filing of a European Rescue Plan

1. The liquidator of the group main proceedings may submit a draft European Rescue Plan (a "Plan") with respect to two or more group companies to the courts of the Member State where proceedings have been opened with respect to the ultimate parent company under Article 3 paragraph 1.
2. The ultimate parent company may also submit a draft Plan jointly with its request to open insolvency proceedings under Article 3 paragraph 1 or pending opening proceedings.
3. The draft Plan shall be accompanied by
   (i) a draft schedule placing all known claims in classes (the "class schedule");
   (ii) a draft memorandum to the creditors of the group companies included in the Plan and to the shareholders of these group companies who are not group companies included in the Plan (the "information memorandum").

Article 48

The Class Schedule

The draft class schedule may place a claim in a particular class only if such claim is similar to the other claims of such class and provided that all claims in one class are claims against the same debtor. If several group companies included in the Plan are liable for the same debt the claim will be placed in one class for each of the group companies.

Article 49

The Information Memorandum

The information memorandum shall contain information of a kind and in sufficient detail as far as is reasonably practicable that would enable each creditor of a group company included in the Plan as well as the shareholders of each group company included in the Plan, to make an informed judgment about the Plan and the class schedule.

Article 50

Contents of the Plan

The Plan may contain provisions which

(a) modify, cancel or decrease claims against all or any of the group companies included in the Plan;
(b) modify, cancel or decrease shares held in the group companies included in the Plan and modify or cancel rights held in such shares;

(c) modify or cancel security rights with respect to assets of the group companies included in the Plan;
(d) terminate agreements or transfer of enterprises or parts of enterprises belonging to group companies included in the Plan or sell all or part of their assets;
(e) constitute or provide for any other legal act on behalf of the group companies included in the Plan.

Article 51

Approval of the information memorandum and setting of a date for the acceptance hearing

Provided that the court deems the information memorandum adequate it sets a date for a hearing of the shareholders and creditors of the group companies included in the Plan (the "acceptance hearing"). If it finds that the information memorandum is not adequate it will instruct the proponent of the Plan how to improve it or reject the request for proceedings on the Plan. The court sets a time at which the draft Plan, the approved information memorandum and the class schedule must be sent to the creditors and the shareholders of each of the group companies included in the Plan.

Article 52

Convocation and order of acceptance hearing

The law of the member state where the group main proceedings have been opened applies to the convocation of the creditors and shareholders, the filing of claims and the order of the acceptance hearing.

Article 53

Recognition of creditors and determination of class schedule

At the acceptance hearing, each of the group companies included in the Plan, each of the liquidators of such group companies, the ultimate parent, the liquidator of the parent company, each shareholder of a group company included in the Plan who is not itself a group company and each of the creditors of each group company may dispute each claim. The court decides if and to what amount a disputed creditor is allowed to vote on the Plan. The court furthermore establishes the class schedule after hearing the creditors and the shareholders.

Article 54

Acceptance of the Plan

1. At the acceptance hearing the creditors of the group companies included in the Plan vote on the Plan. The proponent of the Plan may adapt the Plan until the voting commences.
2. Classes of creditors who are not impaired under the Plan do not vote on the Plan.
3. Classes of creditors who do not receive or retain any value under the Plan do not vote on the Plan.

4. Classes of creditors who do receive or retain value under the Plan shall vote and shall have accepted the Plan if creditors vote in favour of the Plan who represent more than two thirds of the amount of the claims voting in such class and constitute the majority of the creditors voting in such class.
5. If a class of creditors who do receive or retain value under the Plan does not accept the Plan, the court may determine that such class of creditors is deemed to have accepted the Plan nevertheless provided (i) that the rejection is not in good faith and (ii) that the creditors of such class do not receive less than they would receive if no Plan was adopted and (iii) that no creditor that is junior to such class of creditors with respect to the relevant company and no shareholder of that company receives or retains any value under the Plan.
6. If one class of creditors as defined in paragraph 4 has rejected the Plan and is not deemed to have accepted the Plan under paragraph 5, the court establishes that the Plan has been rejected.

Article 55

Confirmation

1. If the Plan is not rejected the court will confirm the Plan unless (i) a creditor of one of the group companies included in the Plan or (ii) a shareholder who is not a group company included in the Plan or (iii) a liquidator of the ultimate parent or one of the group companies included in the Plan, commences objection proceedings within a period of time determined by the law of the member state of the group main proceedings.
2. If the Plan is not rejected and objection proceedings have been opened the court will hold a hearing at which the creditors, shareholders and liquidators of the group companies included in the Plan and of the ultimate parent company will be heard.
3. The court will confirm the Plan unless objection proceedings have been opened and
   (a) the Plan unfairly favours one or more creditors or shareholders; or
   (b) a creditor or shareholder who in relation to the relevant company is junior to a creditor as referred to in Article 54 paragraph 3 objecting to the Plan or to an impaired shareholder objecting to the Plan receives any value under the Plan; or
   (c) the creditor or shareholder objecting to the Plan receives less value than he would receive if the Plan was not adopted; or
   (d) there is insufficient certainty that the Plan can and will be implemented.

Article 56

Appeal proceedings

The law of the Member State of the court which decides on the confirmation determines whether the judgment in which confirmation is rejected or granted is subject to appeal and the same law applies to such appeal.

Article 57

Default under the Plan

The law of the Member State of the court which decides on the confirmation determines the consequences of any failure to observe the provisions of the Plan.