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Proposal for Group COMI and its Consequences

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Introduction

Both the EC Regulation on Insolvency Proceedings (1346/2000) and the UNCITRAL Model Law are based on an entity approach which is outdated in the case of modern business groups[1]. The approach of the Model Law is largely based on the fundamental concepts of the Regulation. The text of the Regulation and its concepts were already out of date when the Regulation came into effect in 2002. The Regulation had been argued and debated over for more than 25 years. The language and concepts reflected a previous age of exchange controls and nation-centric business in Europe. Corporations tended to trade and become insolvent in the countries in which they were incorporated. Headquarters were usually in the same country. Where there was a group, it was usually careful to do business in different jurisdictions through local subsidiaries.

Trading in groups by the time the EC Regulation came into effect, and even more so by the time the Model Law started to be adopted, had changed radically. Groups now often traded in "divisions"[2] which cut across different legal entities incorporated in different

[1] See Moss, Group Insolvency - Choice of forum and law: the European experience under the influence of English pragmatism, 32 Brooklyn Journal of International law 1005 (2007).
[2] A notable example in terms of insolvency proceedings was Federal Mogul/T&N, which had parallel proceedings in the US and UK.

jurisdictions. Incorporation now is often based not on the place of business or the place of the headquarters but on jurisdictions which provide the best fiscal or regulatory context.

Generally speaking, running a group which has fallen into financial difficulties with a view to reorganisation or rescue or with a view to a beneficial disposal, is best carried out from the same place from which the group was run whilst solvent. The only real exception is where that jurisdiction is unfriendly to rescue or reorganisation, and in such a situation a move to a more user-friendly jurisdiction, with a view to a better outcome for creditors, is desirable.

The present position

Both the EC Regulation and the Model Law are based on an entity approach. Neither has any provisions at all for group situations or group trading. In the absence of legislation, practitioners and judges have in several European jurisdictions, including the UK, Germany, France, Italy and Hungary found partial, case-law solutions to the group problem.

One such partial solution is to allow the presumption based on the place of registered office to be rebutted by the "head office functions" test[3]. This allows the co-ordination of all or at least all the trading entities in a group into one series of main proceedings in one jurisdiction. However, the counterpart is that in order to avoid local proceedings disrupting the reorganisation, rescue or beneficial realisation, local creditors need to be dissuaded from requesting the opening of local proceedings in return for local law priorities being respected, and this has been achieved in the cases of *Collins* & *Aikman* and *Nortel*, through the flexibility of English law in this regard.

These partial, case law fixes are insufficient for a number of reasons. First, the European Court of Justice in the *Eurofood* case has established that the presumption based on the place of registered office is a strong one which can only be displaced by facts which are both objective and ascertainable by third parties. Secondly, it is not clear whether even

[3] Devised by a junior colleague, Felicity Toube and myself in the Enron Directo case on the basis of paragraph 75 of the Virgos-Schmit report.

all European jurisdictions have the flexibility required to respect local law priorities in other countries in return for local creditors not requesting the opening of local proceedings.

A proposal

My suggestion is that in certain defined circumstances, namely where all or a number of corporations within a group trade as one entity or one economic unit, the court where the head office functions are carried out for the group or sub-group should have the ability to open main proceedings which would take effect, subject to exceptions similar to those to be found in Articles 5-15 of the EC Regulation and, as a counter-balancing factor, the jurisdiction opening such main proceedings should have the power and the obligation (unless local creditors vote to the contrary) to respect local law priorities in those other jurisdictions where assets are located.

In any case where there are rival applications to open such "group" or "sub-group" proceedings, the court which has received the first request to open group or sub-group proceedings should be allowed to make the first decision, after suitable court to court communications with any other jurisdiction in which such an application is pending.

Any jurisdictions in which a non-group COMI based application is pending, should adjourn it, communicate with the court opening or requested to open main group or sub-group proceedings, and co-ordinate in a way which maximises the value of the group or sub-group proceedings for creditors.

The EC Regulation deals with jurisdiction, choice of law and recognition/enforcement/co-ordination. In the context of the EC Regulation, therefore, I would suggest that this proposal be brought in by a suitable amendment to the rules relating to jurisdiction and co-ordination. Once a proceeding within the Regulation is opened as a main proceeding, recognition and enforcement, subject to the exceptions in Articles 5-15, follow automatically under Articles 16, 17 et seq.

The UNCITRAL Model Law deals with recognition, which is in reality judicial assistance in this context. I suggest that in this context a special provision be added for recognising this type of group or sub-group opening and giving it suitable judicial

assistance in other countries along the lines indicated above. The Model Law would also have to be amended to introduce into the domestic law of any country opening main group or sub-group proceedings a provision to the effect that local law priorities will have to be respected in relation to local assets, unless the creditors locally vote otherwise. There will also need to be some provision as to translating notices to local creditors into the local language(s), such as those contained in the Regulation.