



INTERNATIONAL INSOLVENCY INSTITUTE

Eighteenth Annual International Insolvency Conference

New York, NY

***III NextGen Leadership Program and
Class VII Induction***

**SUBSTANTIVE CONSOLIDATION AND OTHER ASPECTS OF CROSS-
BORDER INSOLVENCIES OF GROUPS OF COMPANIES**

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September 23 – 25, 2018

III NextGen Leadership Program and Class VII Induction

Time/Place: Sunday, 23 September 2018, New York

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SUBSTANTIVE CONSOLIDATION AND OTHER ASPECTS OF CROSS-BORDER INSOLVENCIES OF GROUPS OF COMPANIES

I. INTRODUCTION

Insolvencies of groups of companies are arguably one of the trickiest legal issues to deal with. This is particularly true where the group of companies has operational entities in various countries and jurisdictions. The approaches taken in different jurisdictions vary considerably and this often has a considerable impact on the overall insolvency proceedings as well as the creditors' likelihood of recovery. In this session, insolvency and restructuring experts from the Peoples' Republic of China, the Netherlands and Brazil will elaborate on the approach taken and potential solutions offered in their individual jurisdictions with a view to addressing these challenges.

Substantive consolidation in its strict meaning is typically understood as a concept of US Bankruptcy law and can be described as follows:

"the intercompany claims of the debtor companies are eliminated, the assets of all debtors are treated as common assets and claims of outside creditors against any of the debtors are treated as against the common fund..."¹

What the panel will be looking at, however, needs to be understood in a broader context. We will focus on particular areas of importance for groups of companies in insolvency proceedings from the viewpoint of each of the individual jurisdictions represented on the panel and also in consideration of cross-border aspects. With this in mind, we will be looking at aspects of consolidation in substantive law; such as theories regarding the piercing of the corporate veil (and other reliefs granted under non-bankruptcy law) and other rules which partially or completely disregard the existence of a separate legal entity.

Under German law, for example, there is no formal doctrine of substantive consolidation. From the date of incorporation of a German company, it is a corporate body capable of exercising all the functions of a natural person of full capacity. This includes the ability to own assets in its own name as a separate legal person and distinct from its shareholders. On the

¹ *Chemical Bank N.Y. Trust Co. v. Kheel*, 369 F.2d 845, 847 (2nd cir. 1966)

basis of German law and rulings of the German court, it is evident that, so long as the directors act in the best interests of the company at all times, it is only in exceptional circumstances that the separate legal personality principle of a company can be ignored.

There are, however, exceptions available in Germany, such as the already mentioned doctrine of piercing the corporate veil, or a so-called fiscal tax unity which can be set up between a parent company and its subsidiary to net profits with losses.

II. GERMANY'S ANSWER TO THE COMPLEXITIES OF INSOLVENCY PROCEEDINGS FOR GROUPS OF COMPANIES

The German legislature recognized the complexities of insolvencies of groups of companies and decided to try and resolve them with the new law for the facilitation and management of the insolvencies of groups of companies (*Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen*), which came into force on 21 April 2018. Although, and despite pressure from German legal theorists, the new law does not allow for the consolidation of insolvency estates, the new German law does aim to achieve a better coordination of the various insolvency proceedings.

A single court for the group

One way that the new German law addresses the complexities of insolvencies of groups of companies is by allowing for the establishment of a single court for all group companies. This is particularly useful as it prevents disputes between the differing local insolvency court jurisdictions. Upon application by any of the group companies (application by creditors is not possible), legally unified proceedings, centralized in a single insolvency court and with a single insolvency judge, take place where such proceedings are in the creditors' interest. It is also required that the applying group company is not inferior to the other group companies in respect of how many employees it has, its balance sheet and its sales revenue. If the establishment of such unified proceedings fails, then the new law provides for information and cooperation obligations between the various insolvency courts.

Choice of insolvency administrator

Where the establishment of a single insolvency court for all proceedings has been achieved, the selection and appointment of a single insolvency administrator, although not a necessity, becomes considerably easier. However, in cases where a single insolvency court appoints a number of insolvency administrators, the new German law provides once again for information and cooperation obligations between the various insolvency administrators. Where such an obligation to share information risks a potential reduction in the insolvency estate, however, the obligations are limited.

New coordination proceedings

The new German law also provides for coordination proceedings, disassociated from the individual proceedings, which allow for an independent third party to take on the role of proceedings coordinator (*Verfahrenskoordinator*) and comprehensively manage and coordinate all group proceedings in the interest of all group company creditors. Where there is a conflict of interests between the various individual group companies, the proceedings coordinator will also take on a dispute resolution function. The proceedings coordinator also enjoys the comprehensive and vested right to information and involvement in proceedings (i.e. the right to attend creditors' committee meetings). The proceedings coordinator's primary goal, however, is the implementation of a coordination plan that ensures the collective restructuring of the group. Due to the absence of a formative part, the coordination plan lacks a binding effect in individual proceedings until it has been 'integrated' into the insolvency plans of the respective individual insolvency proceedings.

Comment

Despite the best intentions of the German legislator, the new law neither accelerates the insolvency proceedings nor downsizes the multiple proceedings that occur within the group. Moreover, the proceedings coordinator is entitled to remuneration based on the cumulative assets of each insolvency proceedings, which leads to a further risk of unnecessary financial burden on the insolvency estate. Finally, despite the interlinked nature of the global market, the new German law applies exclusively to German companies. Where there is a cross-border issue, the new version of the European Insolvency Regulation must be observed.

III. SUBSTANTIVE CONSOLIDATION IN CROSS-BORDER CASES FROM A PCR PERSPECTIVE

1. Legislation to substantive consolidation and cross-border rules in China

1.1. Legislation to substantive consolidation

- a) No provision of substantive consolidation in Enterprise Bankruptcy Law of the People's Republic of China.
- b) Provisions of substantive consolidation in Notice of the Supreme People's Court on the Promulgation of the Minutes of the National Court Work Meeting on Bankruptcy Trials (Notice) on Mar. 4, 2018 by Supreme People's Court.

When trying enterprise bankruptcy cases, the people's courts shall respect the independence of the legal personalities of enterprises and take several judgment of the reasons for the bankruptcy of related enterprises and application of single bankruptcy as the basic principle. Substantive consolidation is applied as an exception.

Tests for substantive consolidation according to the Notice:

- i. related enterprises in bankruptcy
- ii. high-level confusion of legal personalities among related enterprises: degree for and duration of confusion of employee, assets, finance, operation, management of related enterprises
- iii. too much costs to distinguish the properties of related enterprises
- iv. interest relationship among all enterprises
- v. the overall satisfaction interests of creditors
- vi. more likely to reorganize the enterprises
- vii. with serious prejudice to the fair satisfaction interests of creditors

Applicant: no specific rules on this point

- i. receiver (common in practice)
- ii. enterprise
- iii. creditor
- iv. shareholder

Jurisdiction:

- i. The people's court in the place where the **essential controlling enterprise** among the related enterprises is located shall have jurisdiction.
- ii. If the essential controlling enterprise is ambiguous, the people's court in the place where the **major property of related enterprises** is located shall have jurisdiction.
- iii. If more than one court disputes jurisdiction, **a common superior people's court shall be requested to appoint jurisdiction.**

Hearing on substantive consolidation:

- i. A people's court shall, on receipt of an application for substantive consolidation, **promptly notify the related interested parties** and organize a hearing.
- ii. Deciding within 30 days from the day of receiving the application whether to conduct the trial by substantive consolidation.

Legal consequences:

- i. The claims and debt of all related enterprises shall be distinguished.
- ii. The property of all related enterprises, as the consolidated and unified bankruptcy property.
- iii. Fairly paid to the creditors of all related enterprises in the same procedure.
- iv. In the event of reorganization by substantive consolidation, the draft reorganization plan shall specify unified claims classifications, claims adjustment, and payment of claims.
- v. Each related enterprise shall be deregistered upon termination of the bankruptcy. In the event of compromise or reorganization by application of substantive consolidation rules, all related enterprises shall be integrated into one enterprise in principle. If it is necessary to maintain the independence of few enterprises according to the compromise or reorganization plan, several disposition shall be made under the rules relating to split of enterprises.

1.2. Legislation to Cross-Border Rules in China

a) Article 5 of the Enterprise Bankruptcy Law of the People's Republic of China:

Once the procedure for bankruptcy is initiated according to this Law, it shall come into effect in respect of the debtor's property outside of the territory of the People's Republic of China.

Where the final judgment or ruling entered into by foreign court involving the debtor's property within PRC's territory requires the recognition and enforcement by Chinese Court, Chinese Court shall, based upon relevant petition or requests, check the foreign judgment or ruling and render the ruling of acceptance and execution in accordance with the international agreements to which PRC is a party or based on mutual reciprocity principle after ascertaining that there is no violation of basic principles of PRC Laws, no detriment to state sovereignty, security and social public interests, no harm to the legitimate rights and interests of creditors in PRC.

Mutual reciprocity principle: presumptive reciprocity VS virtual reciprocity

b) According to the Notice:

- i. When handling cross-border bankruptcy cases, people's courts should properly resolve legal conflicts and contradiction in cross-border bankruptcy, and **reasonably determine the jurisdiction of cross-border bankruptcy cases**.
- ii. Adhering to the principle of equal protection for creditors' rights of the same category, people's courts should coordinate and balance of interests of foreign creditors and interests of China's creditors, and reasonably protect the interests in repayment of employee creditors' rights, tax creditors' rights and other security interest holders' rights within the territory of China. After a people's court recognizes a judgment or ruling of a bankruptcy case made by a foreign court, the debtor may, after paying off holders of security interests, employee creditor's rights and social insurance expenses, outstanding taxes and other priorities within the territory of China with its property within the territory of China, distribute the remaining property according to requirements of the foreign court.

2. Practice

2.1. Domestic Substantive Consolidation Cases

Before or after the issuance of the Notice by the Supreme Court, there exists the cases applying the substantive consolidation. The recent big cases are:

- a) Xilin Steel Group restructuring case: The competent court ruled that the 40 related companies conduct the substantive consolidation in the restructuring procedure. In this case, my firm, Junhe, is appointed as the receiver by the competent court.
- b) Huishan dairy Group restructuring case: The competent court ruled that the 83 related companies conduct the substantive consolidation in the restructuring procedure. In this case, my firm, Junhe, represents the Huishan dairy Group.
- c) Bohai Steel Group restructuring case: Around 48 related companies restructuring cases were accepted by the competent court on Aug. 24, 2018. In this case,

my firm, Junhe, represents the financial creditors committee, over 70 financial institutions, including banks, trust companies, finance companies etc.

2.2. Cross-border Cases

- a) In 2013, a trustee appointed by US Bankruptcy Court for the Northern District of California filed an application based on reciprocity requesting Shanghai No. 2 Intermediate Court to recognize and enforce a US Bankruptcy Court's order concerning debtor's asset in Shanghai in Eunice Lynn Schoenmann VS George Quinn. Chen case. This is the first case in Shanghai regarding recognition of foreign bankruptcy related proceeding. This case was finally settled in June, 2015.
- b) In 2014, US Bankruptcy Court District of New Jersey (case 14-24549-Gmb 08/12/14) recognized and enforced a PRC bankruptcy proceeding for the first time in the Zhejiang Topint Photovoltaic Co., Ltd.

3. Offshore Structure

3.1. Foreign company holding shares of Chinese company, if the foreign company goes bankrupt, how the trustee deal with the shares of the Chinese company?

In Sino-Environment case, the PRC Supreme Court recognized the foreign shareholders' (represented by trustee) control over the Chinese company, defined the formalities replacing the legal representative, clarified a previously grey area regarding indirect takeover of the Chinese company by overseas trustee. There is no automatic stay effect to the Chinese company.

- 3.2. Overseas entities and overseas entities' creditors may not be included in the Chinese domestic insolvency proceeding. In Wuxi Suntech restructuring case, the overseas entities and overseas' entities' creditors did not included in the restructuring proceeding.

4. Trend

- 4.1. In the Notice, the Supreme Court urges that efforts should be made to actively participate in and promote the negotiation and conclusion of international treaties on cross-border bankruptcy, to explore new approaches for applying the principle of reciprocity, and to strengthen the cooperation of Chinese courts and administrators in cross-border bankruptcy to promote the healthy and orderly development of international investment.
- 4.2. China is the world's most populous country and the fastest growing economy since 1978. The PRC is a member of the WTO and is the world's largest trading power, with a total international trade value of USD 3.87 trillion in 2012. Its foreign ex-

change reserves reached USD 2.85 trillion by the end of 2010, an increase of 18.7% over the previous year, making its reserves by far the world's largest. In 2012, China was the world's largest recipient of inward foreign direct investment (FDI), attracting USD 253 billion. In 2014, China's foreign exchange remittances were USD 64 billion making it the second largest recipient of remittances in the world. China also invests abroad, with a total outward FDI of USD 62.4 billion in 2012, and a number of major takeovers of foreign firms by Chinese companies. In 2009, China owned an estimated USD 1.6 trillion of US securities and was also the largest foreign holder of US public debt, owning over USD 1.16 trillion in US Treasury bonds. According to consulting firm McKinsey, total outstanding debt in China increased from USD 7.4 trillion in 2007 to USD 28.2 trillion in 2014, which reflects 228% of China's GDP. In 2017 the Institute of International Finance reported that China's debt had reached 304% of its GDP. In 2014, Fortune's Global 500 list of the world's largest corporations included 95 Chinese companies, with combined revenues of USD 5.8 trillion. The same year, Forbes reported that five of the world's ten largest public companies were Chinese, including the world's largest bank by total assets, the Industrial and Commercial Bank of China. In 2017, Chinese entities conduct the overseas investments in over 6000 companies which are in 174 countries.

- 4.3. Therefore, there will be more and more Chinese companies which will be involved in overseas bankruptcy proceedings. In order to exchange the equal protection of the Chinese creditor in other countries, it will then prompt the Chinese courts to equal treat the overseas creditors.

IV. THE DUTCH APPROACH TO GROUP CONSOLIDATION IN CROSS-BORDER CASES (OR RATHER, ABSENCE THEREOF)

Unlike Germany for example, the Netherlands has no rules in place for the administration of the bankruptcy of a group of companies in its entirety. Instead, Dutch bankruptcy law operates on an entity-by-entity basis: insolvency proceedings concern one legal entity at a time and each entity has its own creditors for whose benefit its assets may be disposed of.

A downside of this entity-by-entity approach is the loss of synergy value: the value of (the assets of) every separate group company may be less than the going concern value of the whole group. In practice, Dutch courts overcome these problems by appointing the same administrator for each bankrupt group entity. The administrator can take the interest of the whole group into account in the administration of the assets of each group company. Additionally, the Dutch Supreme Court ('Hoge Raad') has provided some leeway for the joint administration of the insolvent estates of separate entities if a separate administration of these estates would be onerous.² In such cases, the administrator can elect to combine all the estates and thus run the case as if all assets and liabilities are consolidated.

² HR 25 September 1987, ECLI:NL:HR:1987:AC9980, NJ 1988/136 (Zilfa).

In cross-border cases, in which the groups' entities are established in different countries, it is unlikely that the same administrator can be appointed for each group company. Moreover the problems of the entity-by-entity approach are exacerbated due to the differences in substantial insolvency laws of different countries. Some countries, most notably those that have implemented (their version of) the UNCITRAL Model Law on Cross-Border Insolvency, readily recognize foreign insolvency proceedings. The Netherlands, however, does not formally recognize insolvency proceedings opened outside of the EU.³ The absence of formal recognition extends to foreign group restructuring proceedings as illustrated by the Dutch Supreme Court's recent decision in the Oi Coop and PTIF cases. This case concerned Rio de Janeiro-based Oi, a large Brazilian phone company, which filed for court protection in Brazil to restructure 65.4 billion reais (\$19.4 billion) in debt. During these Recuperação Judicial Proceedings, Brazil's largest ever, the Dutch debtors, Oi Coop and PTIF, offered a plan that basically envisaged to consolidate the Dutch proceedings into the Recuperação Judicial Proceedings in Brazil. In opposition to this plan, a group of bondholders filed for Oi Coop and PTIF, even though it had filed for court protection in the form of Dutch suspension of payments proceedings.

The petition for bankruptcy was ultimately granted by the Amsterdam Court of Appeals. Oi Coop and PTIF subsequently challenged the decision on the appeal before the Dutch Supreme Court, arguing that Dutch bankruptcy proceedings should be subordinate to the restructuring proceedings in Brazil in the interest of the success of the Brazilian proceedings, and thus in the interest of the group as a whole. The Supreme Court rejected this argument:

'This view cannot be accepted. It has been established in these proceedings that Dutch bankruptcy law applies to PTIF and Oi Coop, as these companies have their official seat in the Netherlands. (...) In the absence of an applicable international or a special domestic rule to the contrary, there are no grounds that merit an exception to this because PTIF and Oi Coop belong to an international group of affiliated companies that have the center of their main interests in a foreign country and in respect to which restructuring proceedings are pending in said foreign country, such as the Recuperação Judicial Proceedings.'

The Supreme Court's analysis would not be much different for group proceedings originating in another EU Member State. The European Insolvency Regulation, which obligates Dutch courts to automatically recognize insolvency proceedings opened elsewhere in the EU, does not provide for a group insolvency regime, probably because instituting such a regime would impact the substantial insolvency law of the various EU member states. Instead it also opts for an entity-by-entity approach, meaning that the bankruptcy of a German subsidiary and the bankruptcy of a Dutch company are usually separate affairs. It is possible for a company with its center of main interest ('COMI') in one Member State to open secondary proceedings in another Member State to run in parallel with main proceedings if it operates an establishment

³ This lack of formal recognition does not preclude the foreign administrator from disposing of assets situated in the Netherlands. See HR 19 December 2008, ECLI:NL:HR:2008:BG3573, NJ 2009/456 (Yukos I) & HR 13 September 2013, ECLI:NL:HR:2013:BZ5668, NJ 2014/454 (Yukos II).

in that state. If this establishment is incorporated in a separate legal entity, the opening of secondary proceeding is not an option.

The Insolvency Regulation, however, does provide for rules on cross-border cooperation and coordination between courts and administrators of different insolvent group companies. These rules have not been put into practice so far, or at least not in the Netherlands. Dutch practitioners have in large international bankruptcies formulated their own set of rules in conjunction with the administrators of foreign group companies. An example of this is the cross-border insolvency protocol for the bankruptcy of the Lehman Brothers group⁴, which provides a framework for the coordination of the management of the bankruptcies of all Lehman Brother entities in order to maximize recoveries for all creditors.

The absence of specific legislation on group insolvency proceedings in the Netherlands is to be regretted. Dutch subsidiaries feature prominently in-group insolvencies, because of the Netherlands' status as an important financial and tax hub, and the absence of any legislation on this issue therefore has a disproportionate impact on the management of group proceedings worldwide. The lack of a specific framework for group insolvency proceedings has been decried by the administrator of Oi's Dutch subsidiary among others. A Dutch MP has picked up on this criticism and asked the Dutch government to consider taking legislation action. Fortunately, there is a ready-made solution: a draft for rules on both consolidation on a national level and the recognition of non-EU insolvency proceedings was prepared by a group of academics in 2007 which has been gathering dust since then.

V. SUBSTANTIVE CONSOLIDATION IN BRAZIL

Background – BBL and Judicial Reorganization

The Brazilian Bankruptcy Law – Law No. 11,101 of 2005 (“BBL”) – governs the insolvency proceedings of companies in Brazil. It gives distressed companies opportunities and tools to restructure their obligations and operations and continue as a going concern through the use of rehabilitation and reorganization procedures, which include (a) in-court, or judicial reorganization (*recuperação judicial*); or (b) out-of-court, or extrajudicial/prepackaged reorganization (*recuperação extrajudicial*). If restructuring and rehabilitation are not feasible, then the business should promptly and efficiently be discontinued through a bankruptcy liquidation process (*falência*).

Judicial reorganization (“Judicial Reorganization”) is a court-supervised procedure somehow inspired by and analogous to a Chapter 11 case under the U.S. Bankruptcy Code. It is a tool essentially designed to promote effective restructuring and reorganization of viable companies in financial distress.

⁴ It's important to note that bankruptcy of bank falls outside of the material scope of the EU Insolvency Regulation.

In short, while protected against enforcement and other actions for a certain period (i.e., a stay period), the debtor is entitled to submit, negotiate and eventually have a plan of reorganization (“Plan of Reorganization”) approved by its creditors,⁵ through which it can generally adjust its operations and reprofile its debts (and perhaps its equity structure).⁶

Upon approval and confirmation of the Plan of Reorganization, pre-petition claims⁷ are generally discharged and the debtor can thus enjoy a fresh start. As a rule, the debtor itself and related management remains at the helm of the debtor’s activities during the life of the Judicial Reorganization proceeding (debtor in possession). A court-appointed trustee is designated to supervise the process, without any management powers.

Substantive Consolidation Cases – Past Cases and New Developments

Like many other jurisdictions, BBL neither governs nor contemplates the ability to substantive consolidation debtors that are part of a given economic group. Judicial Reorganization, for example, was initially designed based on the assumption that a single debtor would file for court protection. BBL does not address the many challenges that are brought by procedural and substantive consolidation. Lack of regulation, however, has not prevented the administration of bankruptcy cases involving group of companies.

Indeed, there are several cases in Brazil where joint filings were made by economic groups. Such proceedings were typically jointly administrated (*procedural consolidation*) and assets and liabilities were subsequently consolidated under the plan of reorganization submitted to creditors. A 2016 study, for example, concluded that between September 2013 and October 2015 close to 90% of the filings made by a group of companies to São Paulo specialized bankruptcy courts were ultimately substantially consolidated.⁸

⁵ Generally, the Plan of Reorganization is considered approved by the favorable vote of a majority of claims (i.e., dollar amount) and/or creditors (i.e., head count) present at a general meeting of creditors (a “GMC”) called and convened to deliberate and vote the plan, which must be approved by each impaired class of creditors (i.e., labor, secured, small companies or unsecured/general class). Under the labor and small companies’ classes, the plan is generally approved by the favorable vote of the majority of creditors in attendance at the GMC, and need not be approved by the majority of claims. The BBL also provides for cram down rules to confirm a contested Plan of Reorganization, provided that certain requirements are met.

⁶ As a rule, the Plan of Reorganization must contemplate all means the debtor will employ to reorganize and restructure its business. The BBL provides enough flexibility to accommodate any deal the parties in interest might find suits their needs (including sale of part of the business to third-party investors, free and clear). Normally, the Plan of Reorganization stipulates a scale-down of the pre-petition debt load with the consent of the requisite majorities of creditors.

⁷ Generally, all claims against the debtor on the date of filing for judicial reorganization, even if not due, are governed by the Judicial Reorganization procedure. The BBL, however, provides some safe harbors for certain claims, including those secured by fiduciary lien and those originated from a forward foreign currency agreement (ACC).

⁸ See CERZETTI, Sheila Christina Neder; SOUZA JÚNIOR, Francisco Satiro de. A silenciosa "consolidação" da consolidação substancial. *Revista do Advogado*, São Paulo, v. 36, n. 131, p. 216-223, 2016.

Disregarding the separate existence of companies, however, is the exception under Brazilian Law. Generally, each entity should account for its obligations and dispose of its assets. Such rule should apply even to companies that share a common parent. Notwithstanding, substantive consolidation in bankruptcy cases was rarely challenged by stakeholders. In most cases, granting the procedural consolidation would silently lead to a substantive consolidation. Indeed, it is a relatively new evolution of the bankruptcy practice the contestation by creditors of applications for substantive consolidation.

Accordingly, there are few court precedents on this matter. Where petitions for substantive consolidation have been considered, challenged and granted in Brazil, courts have looked into factors including: (a) high levels of coordination of the activities of group members; (b) common management; (c) expectation of creditors and market in general that the group of companies ultimately act as a single entity; (d) significant comingling of assets and liabilities; and/or (e) whether substantive consolidation would be more effective and comprehensive than an individual restructuring in light of the characteristics of the economic group and respective operations. In general, this is still the approach taken by courts and those standards are consistently applied.

But courts are taking an innovative approach in some other cases. Indeed, upon challenge by stakeholders, courts are transferring to creditors the decision on whether the restructuring should be implemented under a substantive consolidated fashion or if each debtor company (and the respective Plan of Reorganization) should be individually considered. According to these decisions, creditors hold general meetings to vote on the substantive consolidation proposal and each debtor company must hold its own independent meeting of creditors.

Such decisions are generally based on the perception that creditors are the ones entitled to deliberate on debtor's indebtedness and the treatment to be given to their respective claims. The main instance in a Judicial Reorganization is precisely the general meeting of creditors. Courts, therefore, should have no or limited say on whether or not restructurings should be implemented in a substantive consolidation fashion.

Although such precedents are becoming increasingly common, it is early to say that this trend is already consolidated in the Brazilian local practice. Indeed, as of today the two approaches towards substantive consolidation – decision on courts' or creditors' hands – are both being applied.

Regretfully, such opposite treatments cause an undesired legal uncertainty that is detrimental to interested parties and the market in general. A regulatory reform seems necessary to address such situation and allow parties to anticipate what to expect from an insolvency process, a key aspect for the development of the business environment in general.

VI. THE EUROPEAN UNION'S APPROACH TO INSOLVENCY PROCEEDINGS FOR GROUPS OF COMPANIES

In recognition of the complexities of insolvency proceedings for groups of companies, the European Union has also introduced legislation, namely the Recast Insolvency Regulation,⁹ which aims to facilitate better cooperation between insolvency administrators and courts in various member states, as well as the possibility of coordination proceedings for the management of those proceedings.

Cooperation

With their introduction of the Recast Insolvency Regulation, the European Union has legislated to facilitate effective cooperation between all insolvency administrators and all insolvency courts involved in the numerous insolvency proceedings taking place in different member states.

Cooperation obligations for insolvency administrators arise under this regulation where two or more group companies of the same group have initiated insolvency proceedings. Under the Recast Insolvency Regulation they are required to (i) communicate relevant information with each other as soon as is practicable and insofar as confidentiality arrangements allow, (ii) cooperate, as is required, for the progression of the insolvency proceedings (insofar as doing so is not contrary to national law and does not give rise to conflict of interest issues), (iii) consider the possibility of a collective management of group affairs, and (iv) consider negotiating and drafting a proposal for a coordinated restructuring of the group.

Cooperation obligations for the insolvency courts arise under the same circumstances as those for insolvency administrators. The regulation stipulates that insolvency courts must communicate with and provide assistance to one another (insofar as confidentiality and procedural rights are respected) as appropriate. Such cooperation might include (i) coordination with regard to the appointment of insolvency administrators, (ii) the sharing of information, (iii) conducting hearings, (iv) cooperating with one another in the management of assets and affairs, and (v) approving protocols.

There are also cooperation obligations between the insolvency administrators and insolvency courts which, like the obligations set out above, require cooperation and communication (insofar as is legally permissible) for the achievement of effective administration across the group.

Coordination proceedings

With the introduction of the Recast Insolvency Regulation, the European Union has made it possible for an office holder of a group company to request a judicially recognized (but voluntary) arrangement for the appointment of an insolvency practitioner with the remit of presid-

⁹ Regulation (EU) 2015/848 of the European Parliament and Council of 20 May 2015 on insolvency proceedings (recast)

ing over, and achieving the coordination of, the various insolvency proceedings (provided at least two group companies of the same group have initiated insolvency proceedings).

Subject to various conditions and the approval of a coordination plan proposal (details of which are out the scope of this overview), coordination proceedings will be opened after the 30 day notice period, assuming no objections have been received in that time, and a coordinator will be appointed. The coordinator must carry out his tasks and exercise his rights impartially and with due care. He must make recommendations for the coordination of proceedings across the group and propose a group coordination plan that:

- provides for an integrated approach to resolve the insolvencies of group members;
- re-establishes a positive economic performance of the group (or at least part of it);
- settles disputes between group members; and
- encourages the establishment of agreements between office holders.

It is also possible for the coordinator to request a stay of six months or lift an existing stay in the proceedings of any group member, insofar as it benefits creditors. The consolidation of the insolvent estates or insolvency proceedings are forbidden. Although the coordinator's plan is not binding on the participating group companies, the participating office holder must give consideration to its content.

European Court of Justice Judgment - Extension of insolvency proceedings to assets in another member state

European Courts have also been required to respond to issues arising from insolvencies of groups of companies. In *Rastelli Davide e C. Snc v Jean-Charles Hidoux*¹⁰, the European Court of Justice was presented with the question of whether insolvency proceedings opened in respect of a company established in one member state could be extended to a company with a registered office in another member state on the basis that the property of the two companies had been intermixed. In this regard the court found that a court of a member state that has opened main insolvency proceedings against a company (assuming the COMI of the debtor is situated in the territory of that member state) can join to those proceedings a second company whose registered office is in another member state, but only if the second company's COMI is also situated in the first member state. The European courts have therefore ruled that the European Insolvency Regulation¹¹ can be interpreted, under certain conditions, to allow for insolvency proceedings of a member state to cross borders (to a certain extent) and include another company from another member state.

VII. UNCITRAL'S LEGISLATIVE GUIDE ON ENTERPRISE GROUP INSOLVENCY

UNCITRAL has also addressed insolvencies of group companies with its legislative guide published in 2010. The guide suggests that states should legislate to allow for:

¹⁰ Case C-191/10 *Rastelli Davide e C. Snc v Jean-Charles Hidoux* [2011] ECR I-13209

¹¹ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

- two or more members of a group of companies to make a joint application for insolvency proceedings over the group companies that made the application;
- the promotion of coordination proceedings, overseen by a single insolvency practitioner, encompassing all insolvency proceedings of the group of companies and with a single creditors' committee;
- the consolidation of assets and liabilities across the group (a form of substantive consolidation) and the distribution of assets at a group level; and
- a legal basis for binding agreements between insolvency practitioners of different jurisdictions with regard to how they conduct their respective insolvency proceedings and the sharing of information relating thereto.

Although the guide itself has no legal effect, it is still particularly interesting as the suggestions contained therein may form the basis of future legislation in a number of jurisdictions.

VIII. FINAL COMMENT AND OUTLOOK

In consideration of the overviews set out above, it is clear that although progress has been made in many jurisdictions (some notably more than others), the issues that arise from cross-border group insolvencies are yet to be dealt with in a comprehensive manner and in a manner that reflects the demands of an interlinked and truly globalized market.

It appears that in a number of jurisdictions the principle of separate legal personality takes priority in most cases and despite the fact that it can hinder the chances of a successful restructuring or an efficient conclusion to insolvency proceedings with the best possible outcome for creditors, many jurisdictions are reluctant to allow for this principle to be compromised in any way. Although individual group companies are separate legal entities distinct from shareholders, the fact of the matter is that they are often merely cogs in an overall machine - the global group structure. Their individual values, therefore, in no way reflect their respective value in the overall group as a going concern. To continue with a practice of separate insolvency proceedings divided by jurisdiction is, therefore, in the interest of neither efficiency nor the achievement of an optimum outcome for creditors.

The current global situation with regard to insolvencies of groups of companies can therefore be summarized very simply. The law (with a few exceptions) is failing to reflect both the needs and the reality of the modern economy. Moreover, until reforms are put in place, insolvencies of group companies in different jurisdictions will continue to be complex, inefficient, expensive and a hindrance to the achievement of a successful outcome.