INTERNATIONAL INSOLVENCY INSTITUTE

Tenth Annual International Insolvency Conference

Rome, Italy

COORDINATION OF MULTINATIONAL CORPORATE GROUP INSOLVENCIES: SOLVING THE COMI ISSUE

Insolvencies of Corporate Group under the E.C. Regulation

By

Gabriel Moss, Q.C.
3-4 South Square
London

Professor Christoph G. Paulus
Humboldt University
Berlin

June 7-8, 2010

Insolvencies of Corporate Group under the E.C. Regulation

Gabriel Moss, Q.C.
Professor Christoph Paulus

Group insolvencies

As mentioned above, paragraph 76 of the Virgos-Schmit report points out that no rule is provided for groups of affiliated companies. This is a significant weakness of the Regulation.

It is true that all the Member States accept the strict separation of different legal persons, especially in the context of insolvency proceedings. However, such separation is often unrealistic in the light of modern trading conditions. Trading in modern global businesses often takes place across or without full regard to separate legal personalities of different companies. For example, some global businesses trade in "divisions" which cut across different legal entities.

The problem is particularly acute in the case of reorganisation proceedings. Unfortunately, the Regulation, perhaps because it largely reproduces a Convention negotiated over many years and largely prior to the vigorous recent movement of Member States in favour of reorganisation, adheres to the old-fashioned approach of ignoring group structures.

Where companies have been run together in a group, it may well be beneficial for at least reorganisation and if possible insolvency proceedings to recognise and give effect to the existence of the group or to the real mode in which the group business has been conducted, if it had cut across different legal personalities. Thus, in the United States, not only can the insolvency proceedings for different companies in a group be dealt with together for administrative convenience, the assets and liabilities can be treated together by way of "substantive consolidation" in appropriate cases.

Accordingly, it would be beneficial if the Regulation were to recognise the modern realities of business and make special provision for situations of groups of companies which were involved in the same business. Such provisions could involve the ability of one Member State, if appropriate, to open main proceedings for all the companies in the group if the business of the group was run as a single entity or without due respect to the separate legal personalities of each company. It is likely that if the proposed definition of centre of main interests referred to above were adopted, that the centre of main interests for all the companies in a group administered from a common central location would be at that location. This would enable main proceedings to be opened at that location for all the companies without any special further provision in the Regulation.

However, in some cases, the place of the centre of main interests of each company in a group may be subject to factual or other controversy. It would be better, therefore, if it is established that relevant companies belong to a group and that the reconstruction, rescue or insolvency proceedings would more beneficially be conducted for the group as a whole, using either administrative or substantive consolidation, this option should be available to the Member State which has the centre of main interests of the top company in the group.

However, where other Member States had opened main proceedings first in relation to a group company, an amendment to the Regulation could provide that the liquidator of a parent company could apply to a court which has opened main proceedings in respect of a subsidiary to convert those main proceedings into secondary proceedings and to agree to the opening of main proceedings in the Member State where the parent has its centre of main interests. Such a process would be assisted by the ability to have court to court communications as suggested above.