INSOL INTERNATIONAL

THE RESTRUCTURING OF CORPORATE GROUPS

A GLOBAL ANALYSIS OF SUBSTANTIVE, PROCEDURAL AND SYNTHETIC GROUP PROCEDURES

International Association of Restructuring,
Insolvency & Bankruptcy Professionals

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PRESIDENT'S INTRODUCTION

Rapid technological and digital change and innovation have enabled business to be conducted across borders, very often making use of complex corporate group structures with various group entities, assets and creditors located in different jurisdictions across the world.

In this business and economic setting, there has never been a greater need for a consistent, predictable and uniform international framework for recognition, coordination and enforcement in relation to cross-border restructuring processes for group enterprises.

This has become a key focus point for the United Nations Commission on International Trade Law (UNCITRAL) through the activities of its Working Group V (Insolvency). In July 2019, UNCITRAL released the Model Law on Enterprise Group Insolvency (MLEGI), designed to address the specific needs of cross-border restructuring and insolvency processes impacting multiple group members, as distinct from the Model Law on Cross-Border Insolvency (MLCBI) which only deals with the insolvency context of a single debtor. The MLEGI draws upon some of the features identified in the European Insolvency Regulation Recast, and is also intended to operate in conjunction with Part 3 of the UNCITRAL Legislative Guide on Insolvency Law dealing exclusively with the treatment of enterprise groups in insolvency.

The adoption and implementation of the MLEGI – along with the further uptake of the MLCBI – will be priority areas for UNCITRAL, INSOL International, the World Bank and other international insolvency regulatory and policy bodies in the years ahead.

However, in the interim – and given that no jurisdiction has yet adopted and implemented the MLEGI – it is important to understand and analyse the various approaches taken by different countries to corporate group restructuring involving entities, assets and creditors across borders. It is also important to consider the potential for cooperation through novel means such as synthetic restructuring, taking after the cross-border undertakings offered by the joint English administrators in the landmark case of *Re Collins & Aikman Europe SA* [2006] EWHC 1343.

This new publication from INSOL International – *The Restructuring of Corporate Groups: A Global Analysis of Substantive, Procedural and Synthetic Group Procedures* – does precisely that. It consists of 18 country contributions, as well as a chapter looking specifically at how Brexit will shape corporate group restructuring recognition and cooperation in the United Kingdom and the European Union in future years. Each chapter identifies the potential for substantive, procedural and synthetic restructuring processes and draws attention to key cases, legislative provisions and international treaties. There is also a focus on future policy development that may shape the potential for coordinated proceedings and cooperation.

This book is an invaluable contribution to law reform and regulatory and policy development in relation to the implementation of a harmonised, consistent approach to cross-border restructuring processes in a manner that enhances efficiency, reduces costs and increases the prospect of viable enterprises being able to undergo successful corporate and business restructuring in the interests of debtors and creditors alike. Importantly, those outcomes also provide a broader benefit to financial stability and economic growth at this critical juncture in our global history.

I express my sincere thank you to each of our contributors for their time, expertise, commitment and patience in completing this project over a number of years, as well as to our team of INSOL International technical and administrative staff for their efforts in bringing the project to fruition.

I hope you enjoy reading this publication and will find it useful in your future pursuits.

Scott Atkins
President & INSOL Fellow
INSOL International
May 2022

FOREWORD

This book is a special INSOL International publication which explores and evaluates the legal, economic and practical benefits of substantive and procedural consolidation of corporate group restructuring processes in 17 jurisdictions across the globe.

In countries where consolidated group restructuring proceedings are not yet available, the book also explores whether the use of so-called "synthetic" consolidated group proceedings would be admissible under local legislation and could result in similar benefits to actual consolidation for all stakeholders involved. Synthetic, in this sense, is a term used to describe measures put in place to obtain the same or a similar result without following the normal procedure.

In addition to the 18 country contributions, Professor Dr Stephan Madaus from the Martin Luther University Halle-Wittenberg has analysed, in a separate chapter, the impact that the United Kingdom's departure from the European Union (EU) as a result of Brexit may have on established practices concerning the restructuring of international corporate groups, and the future of the United Kingdom as a European hub for global group proceedings.

Empirical studies have shown that, when a company is part of a group, there is a reduced prospect of the company becoming bankrupt in the first place (primarily on the basis of the reallocation of resources and risks across companies in the group, and the increase of debt-bearing capacity and the reduced cost of debt through the provision of intra-group debt guarantees) compared to where entities exist on a standalone basis.[1]

Those same studies show that, if one or more companies in a group do in fact become bankrupt, then the ability to use consolidated group restructuring or bankruptcy procedures can also significantly reduce costs (as compared to using insolvency processes for each individual entity) and therefore increase the potential return to creditors.

In that context, consolidated group restructurings can offer significant economic benefits. In cases where substantive and / or procedural consolidation options are limited, synthetic processes can achieve similar outcomes.

In fact, those very outcomes were achieved on a synthetic basis in the *Collins & Aikman* case, a main proceeding in the United Kingdom that was led by one primary administrator without opening secondary proceedings in the different EU Member States, after making a commitment that creditors in the other EU Member States would be paid dividends in a priority according to their local insolvency laws. The *Collins & Aikman* case resulted in a higher return for all the creditors in the different EU Member States, as compared to what restructuring on the individual legal entity basis would have achieved.

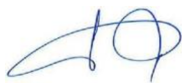
[1] N Dewaelheyns and Prof C Van Hulle, "Corporate Failure Prediction Modelling: Distorted by Business Groups' Internal Capital Markets?" (2006) *Journal of Business, Finance and Accounting*.

The *ratio legis* to this book was also meant to collect materials to support the proposal on consolidated group proceedings made by INSOL Europe on the Revision on the European Insolvency Regulation (EIR) in May 2012.[2] There, the idea was put forward that, regarding groups of companies, the centre of main interests (COMI) of the ultimate parent company ought to be deemed to be the COMI of the subsidiaries. The advantage would have been that, in the event of group insolvency, the court of the COMI would be able to safeguard the coordination of the main insolvency proceedings with respect to all the group companies and, secondly, the latter would in turn safeguard the application of the EIR then (the EIR Recast now) whenever the ultimate group COMI was located outside the EU.

My aspiration with this book is to provide an objective analysis of the current practices in different countries globally in relation to consolidated group restructuring and to make critical comments as to whether, even in the absence of legal options for substantive and procedural consolidated restructuring, synthetic legal group restructuring proceedings could be effectively used to achieve a more beneficial result than general coordination and cooperation procedures used in particular cases.

It is hoped that this book will be a valuable tool for practitioners, academics and the judiciary across the world and that the conclusions reached may serve as the basis for future law reform locally, regionally and globally.

This project would not have been possible without the help and support of many others. The initial acknowledgement must however go to the Technical Research Committee of INSOL International and Dr Sonali Abeyratne, Dr Kai Luck and Ms Waheeda Lafir in particular for all their assistance throughout the completion of the project, Ms Marie Selwood for the English language revision, and of course to all the chapter contributors to the book globally for their time, expertise and commitment. My final thanks go to Mr Neil Cooper, my mentor for over 30 years, who provided me with valuable insights in relation to the *Collins & Aikman* case and taught me to think out of the box and to always try and provide practical solutions to the benefit of all the stakeholders concerned in an insolvency or restructuring proceeding.



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[2] R Van Galen, M Andre, D Fritz, V Gladel, F Van Koppen, D Marks QC and N Wouters, "Revision of the European Insolvency Regulation", Proposal INSOL Europe, 2012, 92-93.

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THE NETHERLANDS

1. Consolidated group restructurings versus cooperation or coordination procedure

- **National cases**

The Dutch Bankruptcy Act (DBA) provides for three types of insolvency proceedings for legal entities: (i) bankruptcy (*faillissement*), which is aimed at liquidation of the company; (ii) suspension of payment (*surseance van betaling*), which assumes business continuity, and (iii) court confirmation of extrajudicial restructuring plans (*homologatie van een onderhands akkoord,* or WHOA), which is technically not an insolvency proceeding but instead a restructuring procedure outside of bankruptcy.

Traditionally, the DBA did not provide a legal basis for substantive or procedural consolidated group restructurings or insolvencies. This changed to a certain extent when the WHOA entered into force on 1 January 2021.

A statutory framework for a consolidated group insolvency in bankruptcy or suspension of payments proceedings is still lacking. However, Dutch courts have, to some extent, in practice allowed the consolidation of bankruptcy proceedings. The option, and extent, of consolidation is discussed below for each type of insolvency proceeding.

Suspension of payments proceedings

As far as we know, consolidation of suspension of payments proceedings has never occurred. This is not surprising as the most prominent legal ground for consolidation has long been that the assets of the relevant companies have commingled in a way that does not allow a reasonable attribution of these assets to the individual companies. This implies a lack of proper bookkeeping that is incompatible with suspension of payments proceedings. Under Dutch law, one of the requirements for the final granting of a suspension of payment to a company is the favourable vote of its creditors on the company's request for such proceedings. In order to obtain a favourable vote, the company has to convince its creditors that it is essentially viable. This requires the books to be correct and in order, which is evidently irreconcilable with the main legal ground for a consolidated insolvency (specifically, an untraceable commingling of assets).

Bankruptcy proceedings

As noted above, case law does sometimes allow substantive consolidation of the assets and liabilities of a bankrupt company. The Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) allowed the consolidated liquidation of two bankrupt companies *in re VKB / Trustees Zilfa and DCW*.[1] From this latter case, it follows that the main requirement for allowing the consolidated liquidation of a group of companies is that their assets have commingled in such a way that they cannot be attributed to the individual entities in a reasonable way. If this is the case, all assets and all liabilities are considered to be part of one and the same joint estate. Creditors file their claim as if there was only one insolvency, regardless of their original or formal debtor. All creditors share in

[1] Dutch Supreme Court, 25 September 1987, ECLI:NL:PHR:1987:AC9980 (*VKB c.s./Trustees Zilfa and DCW*).

the joint bankruptcy estate. In *Re Infotheek*,[2] additional grounds for consolidation were formulated. The court held the following arguments to be conclusive:

- a lack of administrative implementation of the legal structure of the companies;
- the occurrence of a number of intercompany transactions, which had been documented improperly or at least in an unclear way;
- insufficient distribution of costs among the companies;
- as a result of the joint and several liability of the companies towards the lenders, the ordinary creditors would not receive any distribution from the individual bankruptcy estates;
- the lack of separate financial statements and the impossibility of compiling those, in combination with the declaration of joint and several liability by the reporting parent company based on article 2:403 of the Dutch Civil Code (DCC);[3] and
- the lack of non-arbitrary standards for the allocation of an important part of the assets.

In *Re Van Boven q.q. / Leenhouts' Aannemingsbedrijf,*[4] the court ruled that, because a single legal basis for consolidation was lacking, the detailed consequences of a consolidated restructuring or insolvency are to be determined based on the specific circumstances of the case, provided that these consequences are in compliance with the existing legal regulations.

Because of the abovementioned far-reaching consequences of consolidated liquidation of group companies, substantive consolidation hardly ever occurs.

Another, less far-reaching, form of consolidation is *procedural* consolidation, aimed at a fair distribution of the liquidation costs among the various group companies. This kind of consolidation occurs quite often in the Netherlands. In such cases, the courts appoint one and the same bankruptcy trustee in the bankruptcy proceedings for all related entities. For any liability other than the liquidation costs, the bankruptcies are handled as individual bankruptcies. This means that creditors have to lodge their claims in the individual bankruptcy of their debtor and share only in the proceeds – if any – of the bankruptcy estate of their specific bankrupted debtor. The liquidation costs, however, are aggregated from all related bankruptcies rather than being allocated to the individual bankruptcies. Subsequently, the costs are arbitrarily paid out of the bankruptcy estate(s) containing sufficient funds. The legal reason for this type of procedural consolidation is that the liquidation costs are made on behalf of all

[2] District Court The Hague, 27 December 1995, *JOR* 1996/87 (*Infotheek*).
[3] Under art 2:403 of the DCC, a subsidiary is exempt from publishing its individual annual accounts if, among other things, its financial statements are consolidated into the annual accounts of its parent company and that parent company has declared itself to be jointly and severally liable for the subsidiary's liabilities arising from legal acts.
[4] Court of Appeal The Hague, 22 November 2011, ECLI:N:GHGR:2011:BU8621 (*Van Boven q.q./Leenhouts' Aanemingsbedrijf*).

group companies and cannot be reasonably allocated to individual bankruptcies. For example, if one group company is party to the lease contract but all group companies use the real estate, the costs incurred for the termination of this lease and the vacation and transfer of the real estate cannot be allocated solely to the lessee. Those costs have to be borne by all group companies that benefited from the lease, so consolidation of costs is obvious. Furthermore, quite often there is a negative (group) balance, so without consolidation the insolvency practitioner (IP) would not be able to settle the liquidation costs. This is related to the fact that, under Dutch law, the liquidation costs, including the IP's salary, are paid out of the bankruptcy estate. If the bankrupt company is devoid of any assets, there are no funds to cover the liquidation costs. In that case, the IP receives no salary. As the majority of bankruptcy estates in the Netherlands end up with a shortfall and group companies are no exception to those rates, consolidation of liquidation costs regularly occurs in the Netherlands.

Another phenomenon, somewhat related to the procedural consolidated liquidation of group companies, is consolidated reporting by the IP. The DBA obliges an IP to regularly publish a bankruptcy report. Almost every IP appointed in a bankruptcy of two or more group companies will file consolidated bankruptcy reports from an efficiency and cost-reduction perspective. As this does not in any way result in substantive consolidation, this form of consolidation will not be discussed in this paper.

Since there currently is no legal basis for substantive consolidation for group companies through bankruptcy proceedings, there are no hard and fast rules regarding the cooperation and coordination between courts and IPs. Usually, the bankruptcy orders are given per individual company, but the appointed IP and appointed supervisory judge are the same in all related bankruptcy proceedings.[5] Hence, there is no need for specific cooperation and communication among the various bankrupt estates. If group companies are declared bankrupt at different times, the court will usually appoint the same IP as has been appointed in the previously ordered bankruptcies. If a group company needs to file for bankruptcy with another court due to jurisdictional issues, this court will usually refer the follow-up treatment of the bankruptcy to the court that handles the other bankruptcies, and the same IP and supervisory judge will be appointed. This makes cooperation and coordination between different courts and IPs in a group insolvency unnecessary. An exception to the appointment of a single IP with regard to group companies is the existence of a possible conflict of interest between the companies, for example where there are disputed intercompany claims. In this case, in order to enhance coordination and cooperation between the court and the different IPs, the appointed supervisory judge will be one and the same person. In case of a conflict of interest, coordination and cooperation between IPs is often complex. Should cooperation and coordination be opportune for certain aspects of the bankruptcies, the supervisory judge will put the IPs in touch with each other on these issues. We are unaware of any Dutch bankruptcies in which a group coordinator has been appointed. This is, however, an option under the

[5] As a general rule, only one IP is appointed. However, if the nature and size of the (group of) companies so demand, two IPs can be appointed (DBA, art 14(1)), especially if conflicts of interests between one or more group companies are envisaged.

European Union (EU) regulation on insolvency proceedings (EIR Recast),[6] as will be discussed below.

The WHOA

The WHOA provides a legal basis for specific consolidated restructuring of group companies with respect to their obligations to perform or to grant security to creditors of the main debtor for its obligations. The WHOA introduces extrajudicial restructuring through a restructuring plan that can become binding on all affected creditors and shareholders through court confirmation of the plan once it has been approved by at least one class of in-the-money creditors (cross-class cram down). An extrajudicial restructuring plan in accordance with the WHOA may include the obligations of group companies towards the performance or security for the main debtor's creditors if the following requirements are met:[7]

- the group company whose obligations are to be included in the restructuring plan has to meet the light insolvency test applied by the WHOA – so that the debtor considers it reasonably plausible that it will be unable to pay its future debts as they fall due;
- the Dutch court would have jurisdiction if the group company itself were to offer a restructuring plan under the WHOA; and
- the group company has agreed to the restructuring of its obligations towards the main debtor's creditors, or the restructuring plan is offered by a court-appointed plan expert.

If these conditions are met, group finance obligations, such as parent guarantees or sureties, can be included in the restructuring plan without the guarantors themselves going through a WHOA restructuring. For instance, if a company's debt has been secured by an upstream or a downstream guarantee, a claim based on this guarantee can be included in the restructuring plan of the original debtor. This prevents creditors of groups of companies from a practice often referred to as double dipping.

There is no framework for cooperation and coordination of courts and IPs in WHOA proceedings. If a group of companies wishes to consolidate all or some of the obligations of a group company towards the main debtor's creditors, the consolidation is limited to only these selected obligations. The consolidation of these obligations in the main debtor's WHOA's proceedings does not result in WHOA proceedings for the group company itself. Therefore, there are no conflicting proceedings and there is no need for any cooperation or coordination between courts and IPs.

Additionally, a WHOA restructuring is a debtor-in-possession proceeding. As a starting point, the debtor itself offers the restructuring plan to all or some of its creditors and shareholders without the involvement of any IP. Another option is that the restructuring plan is offered on behalf of the debtor by a plan expert,

[6] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[7] DBA, art 372(1).

who is appointed at the request of either the debtor or its creditors, shareholders, works council or employees' representative. However, even then, the plan expert does not have any power other than to design and negotiate the restructuring plan, and to obtain court confirmation thereof. So also in this case, no IP who can exercise control over the debtor's assets is appointed. Consequently, there is no need for any rules on cooperation and coordination between courts and IPs.

In theory, a court could appoint a plan expert for company A whose obligations towards company B are being consolidated in the plan expert-led WHOA proceedings of company B. To prevent conflicting offers being made in regard to the same obligations of company A, some sort of cooperation and coordination between IPs (in this case, the plan experts) would be helpful. We are currently not aware of any case law on this topic. We expect the plan experts to easily solve any issue that may arise as companies A and B are part of the same group of companies and they have the same goal: the restructuring of the obligations of main debtor company B, for which co-debtor company A is also liable.

- **Cross-border cases**

EU cases

For a restructuring or insolvency of a group of companies incorporated under different EU jurisdictions, the EIR Recast applies.[8] According to article 7(1) of the EIR Recast, the principle applicable law to insolvency proceedings is the *lex fori concursus*. Therefore, if insolvency proceedings are opened in the Netherlands, the DBA is applicable, and the process described in this section under the heading “National cases” above applies.

In addition, the EIR Recast provides for cooperation and communication between IPs that have been appointed in the insolvency proceedings of two or more group companies. According to the EIR Recast, IPs need to cooperate to such an extent as: (i) is appropriate to facilitate the effective administration of the insolvency proceedings of the group companies; (ii) is not incompatible with the rules applicable to the proceedings; and (iii) does not entail any conflict of interest. Cooperation may take any form, including through agreements or protocols. Cooperation of IPs may include the grant of additional powers to one IP or the allocation of certain tasks among IPs, provided this is not incompatible with the rules applicable to the insolvency proceedings at hand.

Furthermore, the EIR Recast provides for cooperation and communication between courts. If a court has opened insolvency proceedings relating to one or more group companies, it has to cooperate with any other court before which a request to open proceedings in relation to another group member is pending or which has opened such proceedings. The extent of this cooperation is the same as for IPs, so that the cooperation: (i) needs to be appropriate to facilitate the effective administration of the proceedings; (ii) cannot be incompatible with the applicable rules; and (iii) may not entail any conflict of interest.

[8] Insolvency proceedings that have been opened before 26 June 2017 are governed by Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (EIR).

To enhance the cooperation and communication between courts, they may appoint an independent person or body to act on their instructions. The courts (or appointees) may communicate directly with, and request information or assistance directly from, each other, provided that the procedural rights of the parties to the proceedings and the confidentiality of the information is respected.

Finally, under the EIR Recast, IPs and courts have to cooperate and communicate together. An IP appointed in the insolvency proceedings of one group member may also request information from a court concerning the proceedings of another group member, or request assistance concerning the proceedings in which the IP has been appointed. This type of cooperation and communication between the IP and the court is also restricted to the extent that it: (i) is appropriate to facilitate the effective administration of the proceedings; (ii) does not entail any conflict of interest; and (iii) is not incompatible with the rules applicable to the proceedings.

The EIR Recast provides an IP, appointed in the insolvency proceedings opened in respect of a group company, with certain powers relating to insolvency proceedings of other group companies. For instance, the IP may be heard in any of the proceedings opened in respect of another group company, may (under limited conditions) request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to another group company, or can apply for the opening of group coordination proceedings.

If this type of proceeding is opened, a coordinator will be appointed. The coordinator is someone eligible under the law of an EU member state to act as an IP. The coordinator cannot have already been appointed as IP in respect to any of the group companies and must be without conflict of interest concerning any of the related parties (group companies, creditors and so forth). The coordinator has certain powers, including powers to make recommendations or propose a plan for the coordinated approach of the insolvency proceedings of the group companies. The coordinator can also mediate disputes between IPs and request a stay of proceedings opened with respect to a group company if this is necessary for the implementation of a group coordination plan. The coordinator’s recommendations and group coordination plan are, however, non-binding for IPs handling insolvency proceedings of group companies.

Exception: undisclosed WHOA

A relevant exception to the above applies to the undisclosed variant of a WHOA procedure. The WHOA is available in two variants: an undisclosed one and a public one. The public WHOA has been added to annex A of the EIR Recast and is consequently subject to the EIR Recast. The undisclosed WHOA does not meet the EIR Recast's publicity requirement as the proceedings remain undisclosed to the public and hearings are held in chambers. These proceedings are therefore not governed by the EIR Recast but solely by Dutch law – so no provisions for cooperation and coordination between courts and IPs apply.

Non-EU cases

Dutch law does not provide for any rules regarding the consolidation of Dutch restructuring or insolvency proceedings with restructuring or insolvency

proceedings opened in a jurisdiction outside of the EU. In *Re Oi Coop / Citadel*[9] and *re PTIF / Citicorp,*[10] the Supreme Court held that, if national or international rules are lacking, the DBA is applicable to the restructuring of a company incorporated under Dutch law, even if the company is part of an international group of companies that has a foreign centre of main interests (COMI) and is subject to foreign restructuring. However, in so far as the DBA allows for this, the foreign restructuring process can be taken into account. This means that a Dutch IP may keep the group interest and the interest of the group creditors in mind when determining his or her course of action.

An example of a Dutch bankruptcy trustee taking a non-EU restructuring into account is the Cross-Border Insolvency Protocol agreed upon by the Dutch bankruptcy trustee and the Indian resolution professional of Jet Airways. This protocol had been ordered by the Indian National Company Law Appellate Tribunal, after recognising the Dutch bankruptcy proceedings and the authority of the Dutch bankruptcy proceedings regarding the Dutch Jet Airways company.[11]

1.1 Corporate group versus individual legal entity

1.1.1 The insolvency and restructuring systems that are in force

The DBA only applies to the company that is the formal subject of the relevant provisions. If a legal entity enters any of the insolvency proceedings provided for in the DBA, that does not affect any other legal entity under control of the same entrepreneur.

1.1.2 Definition of a corporate group

Article 2:24b of the DCC contains a definition for a corporate group, being "an economic entity in which legal entities and companies are organisationally linked." Furthermore, it states that "[g]roup companies are legal entities and companies that are linked in a concern." This definition is used throughout all corporate legislation; its use is not limited to provisions on fraud or abuse of goods. The definition of article 2:24b of the DCC is not limited to Dutch companies either, so that companies incorporated under foreign law can also be a group company in accordance with article 2:24b of the DCC.

1.1.3 Legislation relating to corporate groups

There is no draft legislation regarding this issue.

1.2 Corporate group versus individual corporate benefit

1.2.1 The existence and relevance of "corporate group benefits"

The corporate group benefit concept does not exist in the DCC, but it is recognised in case law. One of the first decisions in which the group benefit is mentioned is a tax case dating back to 1978.[12] In this case, a parent company had issued an

[9] Supreme Court 7 July 2017, ECLI:NL:HR:2017:1280 (*Oi/Citadel c.s.*).
[10] Supreme Court 7 July 2017, ECLI:NL:HR:2017:1281 (*PTIF/Citicorp*).
[11] National Company Law Appellate Tribunal New Delhi 26 September 2019 (*Jet Airways*).
[12] Supreme Court 31 May 1978, ECLI:NL:PHR:1978:AX2866 (*Zweedse grootmoeder*).

interest-free loan to a subsidiary. The Dutch tax authorities considered this to be a tax profit for the subsidiary. The Court of Appeal dismissed this view by accepting the argument that the parent company did not calculate interest because this was in the interests of the corporate group as a whole. The Supreme Court sanctioned this decision, thus accepting the corporate group benefit as a stake to be taken into account by a group of companies. Ever since this decision, both the lower courts (especially the Netherlands Enterprise Court, *Ondernemingskamer*) and the Supreme Court have accepted the corporate group benefit as a concept in multiple cases.

1.2.2 Director liability

Under Dutch law, the corporate group benefit is *contributory* to the individual corporate benefit but cannot overrule the individual corporate benefit or prevail over the other interests at stake.[13] In so far as Dutch law allows this, the fact that a company is part of a group – and the interest of that group and the group's creditor body – can be taken into account when determining a group company's policy.[14] Nevertheless, the individual corporate benefit must always be regarded as primary, which means that directors' liability has to be judged per legal entity. Therefore, in the end, a director's primary duty is towards the legal entity and not the group as a whole. However, in case of a holding company, case law suggests that its individual corporate benefit includes the benefit of its subsidiaries because in itself, a holding company does not have any undertaking. Consequently, the undertakings of the subsidiaries should be deemed to be included in the holding company's individual corporate benefit. When in distress, a holding company should therefore still consider the interests of its subsidiaries and their stakeholders, and not just its own interests and the interests of its own stakeholders.

1.2.3 "Early warning systems"

Under Dutch law, directors of a public limited company (NV) are obliged to convene an extraordinary shareholders' meeting as soon as it becomes plausible that the net assets of the company have dropped to or below half of the paid and called-up part of the capital.[15] The purpose of the meeting is to discuss whether the company should be dissolved or whether special measures need to be taken to amend the situation. If the directors do not fulfil their obligation to convene a shareholders' meeting, this can be used to argue that they have mismanaged the company.[16]

1.2.4 Pending or draft legislation

There is no draft legislation regarding this issue.

[13] Dutch Supreme Court 31 January 2002, ECLI:NL:HR:2001:AD4508 (*Juno*) and Supreme Court 4 April 2014, ECLI:NL:HR:2014:797 (*Cancun*).
[14] Supreme Court 7 July 2017, ECLI:NL:HR:2017:1280 (*Oi/Citadel c.s.*) and Supreme Court 7 July 2017, ECLI:NL:HR:2017:1281 (*PTIF/Citicorp*).
[15] DCC, art 2:108a.
[16] Netherlands Enterprise Chamber 7 January 1988, ECLI:NL:GHAMS:1988:AB9641 (*Bredero*).

1.3 Universalism versus territorial principle

1.3.1 Application of the modified universalism rules

As the EIR and EIR Recast apply in the Netherlands, the modified universalism rule is applicable, meaning that ancillary proceedings can be opened in accordance with the EIR and EIR Recast. For non-EU (including Danish) cross-border restructurings or insolvencies, the territorial principle prevails, although the effects of this principle have been strongly limited.[17] According to the Dutch Supreme Court, this means the following:[18]

- Dutch assets are not part of the foreign bankruptcy attachment;
- the legal consequences of the foreign insolvency, as provided for in the foreign insolvency law, cannot be invoked in the Netherlands in so far as this would limit unpaid creditors in their recourse on Dutch assets; and
- any other legal consequence of the foreign insolvency can be invoked in the Netherlands.

This means, in short, that an IP, appointed in a non-EU bankruptcy, can sell and dispose of Dutch assets and use all of the powers granted by the insolvency laws applying to the foreign bankruptcy (*lex concursus*) as long as this does not limit unpaid creditors in their recourse to Dutch assets and the foreign IP's actions are not contradictory to Dutch mandatory law. So, for instance, the declaration of a Dutch or an EU bankruptcy results in the automatic attachment of all assets of the bankrupt company (the bankruptcy stay). A non-EU insolvency will not have that effect because that would limit the recourse of unpaid creditors to the attached assets. This does not, however, prevent the foreign IP from selling the assets. But, until the moment the IP does this, the assets remain available for recourse by unpaid creditors, whereas in case of a Dutch or EU insolvency individual creditors would no longer be allowed to seek recovery from the assets of the estate, wherever these assets are located.

1.3.2 Bilateral and / or multilateral treaties in force

Apart from the EIR Recast, the Netherlands is not a party to any bilateral or multilateral insolvency law treaties.

1.3.3 Pending legislation

There is no draft legislation regarding this issue.

1.4 Competent court and applicable law

- **National cases**

Under the DBA, the competent court is the court of the place of business of the company, with "place of business" meaning the place of the company's

[17] Dutch Supreme Court 2 June 1967, ECLI:NL:HR:1967:AB3520 (*Hiret/Chiotakis*) and 31 May 1996, ECLI:NL:HR:1996:ZC2091 (*Coppoolse/De Vleeschmeesters*).
[18] Dutch Supreme Court 13 September 2013, ECLI:NL:HR:2013:BZ5668 (*Yukos*).

registered office.[19] As Dutch law does not contain any provisions for consolidated bankruptcy proceedings, the courts' competence has to be determined for each of the group companies individually. In case of a WHOA restructuring, the group of companies may address any court that has jurisdiction based on the place of business of either the main debtor or one or more of the co-debtors. Once a choice is made, this is final and from then on, the court addressed is the only competent court in regard to the entire group restructuring.[20]

- **Cross-border cases**

Under Dutch law, if the insolvent company is no longer located in the EU, the court of its last place of business within the EU is competent. If the company does not reside within the EU but does conduct business in the EU, jurisdiction lies with the court of its place of business.

In case of a restructuring or insolvency of a group of EU companies, the EIR Recast applies. For main insolvency proceedings, the courts of the EU Member State within the territory where the company's COMI is situated have jurisdiction. Under the EIR Recast, the COMI is the place where the company conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The place of the company's registered office will be presumed to be its COMI in the absence of proof to the contrary. However, that presumption only applies if the registered office has not been moved to another EU Member State within three months prior to the request for the opening of insolvency proceedings. If the company's COMI is situated within the territory of an EU Member State, the courts of another Member State will only be competent to open insolvency proceedings if the company has an establishment within the territory of that other Member State. The effects of those proceedings are restricted to the assets situated in the territory of the latter Member State, turning the proceedings into secondary insolvency proceedings.

The EIR Recast does not provide any rules regarding jurisdiction relating to the insolvency of a group of companies, except for the provision that group coordination proceedings can be opened by any court that has jurisdiction over the insolvency proceedings of a member of the group.

- **Exception: undisclosed WHOA**

As set out above, the undisclosed WHOA is not governed by the EIR Recast. We have argued[21] that the undisclosed WHOA is governed by the Recast Brussels Regulation.[22]

Under the Recast Brussels Regulation, a company has to be sued in the courts of

[19] DBA, art 2(1) in conjunction with DCC, art 2:10.
[20] *Idem*, art 369(8).
[21] Vriesendorp et al, *Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union*, NIPR 2021/182.
[22] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

its Member State.[23] In case of a consolidated group restructuring, the courts for the place where any of the group companies is domiciled will also have jurisdiction.[24] If our stance, that the Recast Brussels Regulation applies to the undisclosed WHOA does not hold true, because this issue has ultimately to be decided by the CJEU, the rules set out above for national cases apply.

1.4.1 Applicable law that falls outside of the lex fori concursus and related issues

National cases and undisclosed WHOA restructuring proceedings are governed solely by Dutch law which contains no exception to the *lex fori concursus*. The same applies to non-EU cross-border insolvencies, due to the fact that the universalism principle prevails in the Netherlands (as outlined above).

EU cross-border cases are governed by the EIR Recast. Under the EIR Recast, the basic principle is that the *lex fori concursus* applies to the insolvency proceedings and all of its effects.[25] The EIR Recast does, however, list several important exceptions to this rule, such as third-party rights *in rem*, a creditor's right to set off, a seller's right on a reservation of title, contracts relating to immoveable property and contracts of employment. Most exceptions do not specifically exclude the *lex fori concursus* from applying but, instead, introduce the law of a specific other EU Member State as an additional exclusive applicable law. Almost every exception is based on the basic principle that parties cannot be deprived of an entitlement following from the law which is applicable to their claim or right or to the assets at stake.

1.4.2 Harmonisation of substantive restructuring and insolvency laws

As there is no exception to the application of the *lex fori concursus* for non-EU cross-border cases and the undisclosed WHOA, other than Dutch mandatory rules of law, there is no need for harmonisation.

For EU cross-border cases, the exceptions contained in the EIR Recast could have the effect that the legal framework for certain assets differs substantially depending on the location of the assets or the party involved, while being covered by one and the same insolvency proceeding. These differences are detrimental to the legal certainty that is one of the main reasons for the adoption of both the original EIR and the EIR Recast. Harmonisation of the restructuring and insolvency laws of EU Member States could help in cross-border cases, as this would ease the handling of the insolvency proceedings and eliminate the – sometimes arbitrary – differences in treatment of assets and parties involved.

1.4.3 Relevant treaties or case law

These matters are discussed above.

1.4.4 Upcoming new legislation

There is no upcoming legislation regarding these issues.

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23 Recast Brussels Regulation, art 4(1).
24 *Idem*, art 8(1).
25 EIR Recast, art 7.

2. Substantive consolidated restructuring proceedings versus synthetic group restructurings

As discussed above in section 1, if certain strict criteria are met, case law allows substantive consolidation of bankruptcy proceedings of group companies. If these criteria are not met, a less far-reaching form of procedural consolidation often occurs: consolidation of the liquidation costs. There is some variety in the extent of this type of consolidation. For example, in the bankruptcy of Kroymans B.V. and its subsidiaries, all costs were consolidated; whereas in the bankruptcy of Phanos N.V. and its subsidiaries, the group companies were arranged in different categories of business activity (such as a group of "general companies", "real estate companies" and "asset management companies"). The costs are consolidated per sub-group of companies, thus differentiating by business activity.

With regard to the liquidation costs, the insolvencies of the group companies are considered as one. For any liability other than the liquidation costs, the bankruptcies are treated as single bankruptcies. Therefore, the only consequence of the consolidation of the liquidation costs for the creditors is that the liquidation costs are borne fairly by the estates of all group companies, instead of the costs bearing down on one or more group companies in an arbitrary way. In this way, a synthetic consolidation occurs. We are not aware of more far-reaching types of synthetic consolidation.

The most important obstacle for synthetic consolidation is that the starting point under Dutch law is that every company has its own separate assets and liabilities. A company has its own legal capacity and bears its own rights and duties. This starting point is also the basis of the DBA. The consolidation of insolvency proceedings goes against this basic principle. Dutch law presumes that a stakeholder / creditor engages with a certain company based on the determination of their own position relating to that specific company and its equity position. In case of (synthetic) consolidation, a stakeholder is suddenly confronted with parties and liabilities originating from other companies. This can have a substantial influence on the stakeholder's position, while the stakeholder concerned could not have foreseen this circumstance at the start of the relationship with the company. It could mean that a creditor, whose claim against a group company was well covered by the company's assets, suddenly finds itself without recourse because the company's estate is commingled with the estate of totally insolvent group members, and the creditor has to share "his" or "her" company's assets with creditors of other group companies. The aforementioned starting point of Dutch law and the potentially very negative consequences of (synthetic) consolidation for stakeholders or stakeholder groups, in addition to the lack of clear and undisputable criteria for determination when consolidation should occur, are the main obstacles for (synthetic) consolidation in the Netherlands.

3. Duty to initiate insolvency process

Dutch law has no obligation for a company or its directors to file for bankruptcy, so there are no examples available in relation to how a guarantee provided by a foreign IP would impact on that obligation.

4. Legal certainty and predictability

These issues do not arise under Dutch law as Dutch law has no obligation for a company or its directors to file for bankruptcy.

5. Consolidation of assets

5.1 Procedure with respect to the sale of the whole or part of a business

The WHOA provides for a debtor-in-possession procedure and does not contain any rules on asset sale. In regard to Dutch bankruptcy proceedings, the IP is charged with the administration and liquidation of the bankruptcy estate. As part of the liquidation process, the IP will sell the company's business and assets. The IP is authorised to conduct a public sale. However, the IP requires the consent of the supervisory judge for a private sale.[26] If a formal creditors' committee is installed, the IP needs to consult the committee on the intended sale. However, the advice of the committee is not binding for the IP. There is no difference in the sale process in case of single or consolidated insolvency proceedings, as in both cases the IP will have the same legal powers.

5.2 Difference in treatment with respect to tangible and intangible assets

If two or more insolvency proceedings are fully – substantively – consolidated, all assets and liabilities are commingled into one bankruptcy estate. No difference will be made between tangible and intangible assets.

If only the liquidation costs are – procedurally – consolidated, a difference is possible. For example, if one group company is party to the lease contract but all group companies use the real estate, the costs incurred for the termination of this lease, and the vacation and transfer of the real estate, cannot be allocated solely to the lessee. Those costs have to be borne by all group companies so consolidation of costs relating to the lease is obvious. If all other assets can be allocated to specific group companies, no further consolidation is needed; assets may be treated differently, but that difference is based on the allocation of the asset, or its liquidation costs to each group company, and not based on the type of asset.

5.3 Role of creditors and creditors' committees in a substantive consolidation

As there is no legal basis for consolidation of bankruptcy proceedings, a legal provision for a competent authority to allow for consolidation is lacking as well. In *Re Infotheek*,[27] the court held that the decision of the supervisory judge to allow for consolidation was within the supervisory judge's competence. The questions raised by one of the creditors on the competence of the supervisory judge were rejected by the court. In *Re Van Boven q.q. / Leenhouts' Aannemingsbedrijf*[28] the court explicitly held that a supervisory judge has the competence to allow for consolidation.[29] The creditors and the creditors' committee have no authority with

[26] Such consent is not required if the value of the goods subject to the private sale do not exceed EUR 2,000 (art 101(2) in conjunction with art 176(1) of the DBA).

[27] District Court The Hague 27 December 1995, JOR 1996/87 (*Infotheek*).

[28] Court of Appeal The Hague 22 November 2011, ECLI:NL:GHGR:2011:BU8621 (*Van Boven q.q./Leenhouts' Aanemingsbedrijf*).

[29] Because of the far-reaching consequences of substantive consolidation, a preliminary draft for a recast of the DBA in 2007 suggested that, instead of supervisory judges, district courts would be

regard to the allowance of consolidation. However, creditors and a creditors' committee have a statutory right to approach the supervisory judge in order to challenge any action from the IP, or invoke an order from the supervisory judge to the IP. Even though we are not familiar with any case law on this particular matter, we believe the creditors or creditors' committee could use this right in order to influence the supervisory judge's decision on the IP's request for consolidation.

In regard to consolidated WHOA proceedings, the only approval required is that of the group company whose obligations towards the main debtor's creditors are included in the restructuring. Creditors or other parties have no say in this matter.

5.4 Voting for or against a substantive consolidation

As noted above, creditors do not have a voting right with regard to consolidation of bankruptcy proceedings. They can only try to influence the supervisory judge through the use of their statutory right to approach the supervisory judge in order to challenge any action from the IP or invoke an order from the supervisory judge to the IP.

If a creditor's claim has been allowed by the IP, the creditor is eligible to approach the supervisory judge. However, if the creditor approaches the supervisory judge on a matter that is of no relevance to that creditor's interest because the creditor will not receive any distribution at all – regardless of the decision on the consolidation – the creditor's approach to the supervisory judge can be rejected based on lack of interest. This means that a creditor can only object to a substantive consolidation if this would result in a lower distribution to that specific creditor. If a creditor would not receive any distribution regardless of the bankruptcy being consolidated or handled on a standalone basis, the creditor lacks interest, and the creditor's objection would be denied based on that lack of interest.

As for consolidated WHOA proceedings, creditors do not have any way to prevent a consolidation. Their only power is to vote on the restructuring plan or, if the plan has been approved by at least one-in-the-money class or the class where the value breaks and court confirmation is requested, to ask the court not to confirm the plan. However, this will block the entire restructuring and not just prevent the consolidation.

6. Equitable distribution and accountability of IPs

Under Dutch law, if the proceeds of the liquidation of a company are insufficient to pay all debts and no restructuring plan is offered, the legal entity will be dissolved, and its unpaid debts will cease to exist. In such a situation, Dutch law does not allow for a cram down or bail-in in bankruptcy proceedings.

Under the WHOA, creditors and shareholders are placed in different classes in terms of voting. Creditors or shareholders may not be in the same class if their rights at liquidation or after adoption of the restructuring plan will differ so much that their exposure is not comparable. In any case, creditors or shareholders with a different statutory or contractual ranking will be placed in different classes. The plan is subsequently voted on by each class. Approval is obtained only if creditors

competent to allow consolidation. Since this preliminary draft never came into force, supervisory judges remain the competent authority with regard to consolidation.

or shareholders, representing at least two-thirds of the total debt (or in the case of shareholders, subscribed capital) exercising their voting rights within their class vote in favour of the plan. Once the restructuring plan has been approved by at least one in-the-money class of creditors or the class where the value breaks, court-confirmation of the restructuring plan may be sought. The approval of other classes of creditors or shareholders is not required. The court will test several general grounds – all of which are in line with market standard – for refusal of the request *ex officio*. Additionally, specific grounds for refusal may be invoked by creditors or shareholders who, in short, voted against the plan or were unjustly excluded from voting, or from voting in their rightful class. If the court confirms the restructuring plan, it becomes binding on all creditors and shareholders that were eligible to vote, i.e. those who are affected by the restructuring plan, including the out-of-the-money classes. The restructuring plan may include a debt-for-equity swap or any other cram down. The voting system and threshold for requesting court confirmation provides that this cram down can even take the form of a cross-class cramdown.

7. Intercompany claims

7.1 Order of priority

Dutch law does not provide for a general subordination of claims by a parent or affiliated company or a presumption of this. From *re P&O / Curatoren Wind,*[30] it could be argued that the enforcement of an intercompany claim as an ordinary claim could, under very specific circumstances, constitute a wrongful act towards the other creditors or be contrary to good faith. However, an intercompany claim, either secured or unsecured, cannot be deemed subordinated to other claims solely because it has been provided by a parent or affiliate company.

7.2 Concepts that can alter priority

There is no general concept of "re-characterisation" of intercompany debt as equity or "equitable subordination". Under Dutch law, intercompany debt has the same status as all other debt unless the parties agreed otherwise (either secured or subordinated). To change this status, the intercompany debt would have to be qualified as wrongful or contrary to good faith and, instead of monetary compensation for damages, the compensation would be "in kind" by such re-characterisation / equitable subordination.

8. Administering a complex estate in one single consolidated procedure

As noted, substantive consolidation in bankruptcy proceedings has only been allowed in exceptional cases. The only accepted reason for substantive consolidation is that the assets of the companies have been commingled and cannot be attributed to individual entities in a reasonable way. This could also occur within a part of a group of companies, or within more groups within a group. For instance, if a group of companies has two main business activities which are placed in two separate divisions or units, it is conceivable that the assets of the companies in both divisions or units will have been commingled and therefore cannot be attributed to any specific entity in a reasonable way. This could call for

[30] Court of Appeal Arnhem-Leeuwarden 10 March 2015, ECLI:NL:GHARL:2015:1695 (*P&O/Curatoren Wind*).

substantive consolidation of the companies within both divisions or units. In that way, two consolidated group restructurings would take place within one group of companies.

As to WHOA proceedings, the consolidation only affects those group companies that are liable towards the main debtor's creditors for all or some of that main debtor's debt. Typically, this applies to only one or a few group companies. That way, the WHOA restructuring will affect only a limited number of group companies, resulting in a group subject to the restructuring to exist within the group as a whole.

9. Handling an insolvent parent with a healthy subsidiary

Traditionally, a consolidation can only concern companies that have entered insolvency proceedings. A solvent (i.e. not bankrupt) company cannot be included. However, as noted above, the WHOA does allow a solvent group company's liability towards the insolvent group company's debtors to be included in the restructuring plan of that insolvent group company without the solvent company entering its own WHOA proceedings.

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