

Groups of Companies in Insolvency: A German Perspective

Overcoming the Domino Effect in an (International) Group Insolvency[†]

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Abstract

Based on an analysis concerning the disadvantages of the previous understanding of handling groups of companies by means of consolidation of jurisdiction, the following article illustrates the basic idea of group-specialized proceedings (*konzernspezifisches Sachwalterverfahren*), avoiding ‘domino effects’ and thereby unnecessary insolvencies of profitable subsidiaries and preserving the assets of these parts of the group to a greater extent than an insolvency situation can. Copyright © 2013 INSOL International and John Wiley & Sons, Ltd

I. Introduction

A. Unregulated international group insolvency

In the international and European spheres, the law of group insolvencies is at an impasse.¹ According to the intention of the historical legislator, the central European Council Regulation on European and international insolvency situations explicitly does not govern the law of group insolvencies,² as the European designers of the European Council Regulation No. 1346/2000 of 29 May 2000 on insolvency

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[†]This article is a translation of an article published in Germany under the title “Der Konzern in der Insolvenz—Zur Überwindung des Dominoeffekts in der (internationalen) Konzerninsolvenz” in NZI 1-2/2013, pp. 1–11. The article has been translated by Ms Alix Wackerbeck, LL.M. (University of Aberdeen), an associate lawyer in the German law firm *Siemon*

Rechtsanwälte Steuerberater, Düsseldorf, Germany (www.kanzlei-siemon.de). For the convenience of readers, a list of abbreviations employed in the text and footnotes to denote German sources can be found at the end of the article.

1. Similar, in other words, to Paulus, ZIP 2005, 1948 f; see also Eidenmüller, NJW 2004, 3455.

2. Deyda, 2008, Der Konzern im europäischen internationalen Insolvenzrecht, p. 37; also Becker, 2012, Kooperationspflichten in der Konzerninsolvenz, p. 50 Rn 96.

proceedings did not have the intention to govern international group insolvencies.³ Against this background, the European Council Regulation on insolvency proceedings governs basically three complexes, namely the international jurisdiction, the effects of the opening of the proceedings on the assets, and the applicability of the substantive law in proceedings opened in the competent State.⁴

For a European practitioner seeking to establish an international law of group insolvencies, the jurisdiction rules of the European Council Regulation are nevertheless of central significance, as it has been necessary—because of insufficient rules concerning jurisdiction—to find a practical answer to the question of which court is competent for the insolvency proceedings of a number of affiliated companies. In the past years, the competent insolvency courts of the Member States have tried several times to provide solutions for these situations. It worked out to a greater or lesser extent—according to the particular circumstances. *Deyda* has worked out that in the case of an international insolvency⁵ of a group of companies, there is an ‘urge’ of national courts to assume the centre of main interest (COMI) of the subsidiary company to be at the registered office of the parent company, which consequently leads to the opening of the main proceedings of the subsidiary at the registered office of the parent company.⁶

If the subsidiary has its administrative headquarters abroad or if the operative focus lies abroad, there is regularly a sort of ‘defence behaviour’ of the national creditors calling for the opening of secondary proceedings.⁷ This behaviour on the other hand often leads to counter-reactions reducing the assets in the insolvency. By order of, for example, the *English High Court (Birmingham Registry)* on 30 March 2006,⁸ the payment of employees’ claims in favour of the employees of MG Rover in Belgium has been approved, to prevent these employees from filing for secondary insolvency proceedings. This decision was justified by an interpretation of the discretionary standard of the English insolvency law governing company administrations, under the provision in paragraph 65 (3) of Schedule B1 of the Insolvency Act 1986. Mankowski⁹ considered it as a ‘successful and even judicially approved blackmail’. A prerequisite is that the insolvency statute of the State opening the main proceedings permits such ‘special payments’. Mankowski considered such payments as void according to German law—in analogous application of Section 294 II of the German Insolvency Code (‘InsO’),¹⁰ in the opening proceedings as contestable.¹¹

3. Explanatory report, Council document 6500/1/95 REV 1, No. 76; Deyda, (supra, fn.2), p. 37; Balz, ZIP 1996, 949; Eidenmüller, IPRax 2001, 4; Paulus, ZIP 2005, 1948, 1950; Wimmer, ZInsO 2005, 119, 123; Pleister/Theusinger in Kübler, Hdb. Restrukturierung in der Insolvenz, 2012, Section 51 Rn 2.

4. Ahrens/Gehrlein/Ringstmeier, FachanwaltsKomm. InsolvenzR 2012, Anh. I Rn 1 ff., 6.

5. At least in larger cases, the group insolvency might frequently have cross-border elements and might lead to the application of international insolvency law.

6. Deyda (supra, fn. 2), p. 184, fn. 831, also Becker (supra, fn. 2), p. 51, Rn 96 f; Paulus, ZIP 2005, 1948, 1952; Wimmer, ZInsO 2005, 119, 123; Verhoeven, 2011, Die Konzerninsolvenz, Section 156, with plenty of quotes

and references; Pleister/Theusinger in Kübler (supra, fn. 3) Section 51 Rn 9 with plenty of quotes.

7. Deyda (supra, fn. 3), p. 184, fn. 831; instructive Penzlin/Riedemann, NZI 2005, 517; see AG Köln, NZI 2004, 151 f; AG Düsseldorf, Beschl. v. 07.11.2005-502 IE 1/05 und ZIP 2003, 1363; see also High Court of Justice Birmingham, NZI 2006, 416-MG Rover.

8. High Court of Justice Birmingham, NZI 2006, 416.

9. Mankowski, NZI 2006, 418.

10. German Insolvency Code (*Insolvenzordnung*), hereinafter referred to as ‘InsO’.

11. Ehrlicke, in MünchKomm-InsO, 2. Aufl. (2007), Section 294 Rz.28; Streck, in: Hmb-InsO, 4.Auflage (2012), Sections 294 Rz.8–294 Abs.2 of InsO should also apply in the opening proceedings.

By order of the *High Court (London)* dated 9 June 2006,¹² the insolvency administrator of the main proceedings concerning the assets of *Colins&Aikman* was allowed to satisfy the creditors according to the applicable insolvency law of each Member State in the same way as if secondary proceedings had been opened in the respective State. This is happening against the Article 4 of the EC Regulation in derogation from the English insolvency law. The decision was justified with reference to paragraphs 59 and 66 of Schedule B1 of the Insolvency Act 1986 (flexible distribution of moneys). With regard to the significantly higher total proceeds being gained in case of a collective liquidation of the assets, the English creditors—at least the substantial, discriminated ones—agreed to this.¹³ The authors of this article point out that in Germany, such a distribution diverging from Section 187 ff. of InsO would not only be feasible—but also possible—within the scope of an insolvency plan according to Section 217 of InsO (in the proceedings concerning the assets of the parent company).¹⁴

*Bork*¹⁵ reported, on two decisions of the English insolvency courts based on the ‘discretionary standard’ being effective at that time for the ‘promotion’ of two insolvency claims to preferential claims by the insolvency court, that the payment of the creditors of a pre-packed plan of the parent company had been raised to the level of a preferential claim in case of a sale to competitors, whereas it would have been refused in case of a sale to the management.¹⁶

The aforementioned constellations often lead to a discrimination of the subsidiary’s operative creditors and frequently to a stalemate in a reorganizational sense.¹⁷ The stalemate is characterized through the fact that in the main proceedings opened at the registered office of the parent company, there are typically fewer assets to be found and these are usually barely sufficient for the purposes of its own reorganization.¹⁸ The main operative activity is carried out by subsidiaries in other Member States, where secondary proceedings according to the current terms of the EC Regulation have to be liquidation proceedings. In Germany, however, an insolvency plan is—according to the prevailing opinion—also allowed in secondary proceedings.¹⁹

The stalemate of these situations often found in practice results from the different legal effects of main and secondary proceedings. The main proceedings are subject to the principle of universality.²⁰ On the contrary, the secondary proceedings have a territorial effect according to Article 3 II of the EC Regulation,²¹ or otherwise—

12. High Court of London, NZI 2006, 654.

13. Meyer-Löwy/Plank, NZI 2006, 622.

14. Different view of Köhler-Ma/Burkhard, DZWIR 2007, 410: basically possible with consent of the creditors.

15. INDAT-Report 8/2010, 26

16. According to Bork, the English discretionary standard has recently been modified, and the court is now only allowed to decide subsidiary to the board and the meeting of creditors. However, from the subsidiary’s point of view, this is not reassuring.

17. As an example, High Court of Justice Birmingham NZI 2005, 515; instructive Ehrlicke, ZInsO 2004, 633 f, from whose description one can gather the complexity of the respective legal position. This has a destructive effect on the reorganization; the AG Köln, NZI 2004, 151, 154 rightly refers to the significant complications;

Mayer-Löwy/Poertzgen see a struggle of power between the administrators; Wimmer, ZInsO 2005, 119, 124 points out that the secondary proceedings block the main proceedings; as to the complex relationship between main and secondary proceedings, see Staak, NZI 2004, 480 f; instructive Beck, NZI 2006, 611 f; see also Eidenmüller, NJW 2004, 3455 f; as to the difficulties, see LG Loeben, ZIP 2005, 1930.

18. Also, Sabel, NZI 2004, 126, 127; Deyda (supra, fn. 2), p. 183.

19. See Wimmer, ZInsO 2005, 119, 124; doubting Penzlin/Riedemann, NZI 2005, 517, 518.

20. Ahrens/Gehrlein/Ringsteiner (supra, fn. 4), 2012, Anh. I Rn 8; Wimmer, ZInsO, 2005, 119, 121.

21. Deyda (supra, fn. 2), p. 197; Wimmer, ZInsO 2005, 119, 124.

beyond the EC Regulation—are limited in the same way (Sections 344 (1) and 354 (1) of InsO). Although often almost the entire assets are subject to the secondary proceedings, a universal debt regulation is not possible under the secondary proceedings. Deyda rightly pointed out that the drafters of the EC Regulation evidently have not considered this special case, although it is of significant practical relevance.²² A universal debt regulation thus requires a uniform insolvency plan for main and insolvency proceedings,²³ which calls for considerable cooperation and coordination (Article 34 of the EC Regulation).²⁴

B. Group insolvency is also unregulated by national law

The national German insolvency law for groups of companies does not regulate the insolvency of groups, either.²⁵ In Germany, there is no codified insolvency law for groups of companies.²⁶ The German Insolvency Code proceeds from the principle of a single company, where each company is—regardless of its affiliation to the group—wound up in its own insolvency proceedings.²⁷

Even when considering the rules of jurisdiction stipulated in the German Insolvency Code from a mere national, German viewpoint, they are of central importance. However, there was no intention of creating a uniform place of jurisdiction for groups through Sec. 3, InsO.²⁸ Nevertheless, the answer has to be found in practice to the question of which courts shall be competent for insolvency proceedings of a number of affiliated companies. In this respect, these constellations, highly relevant for the practice in national insolvency proceedings of groups of companies, will meet a law that does not provide for the regulation of such constellations. The German national courts have met this challenge and tried to master the situation.²⁹ As a result, an interpretation of the term ‘economical centre’ leads only to insufficient, partly doubtful solutions, which are often aimed at establishing uniform proceedings through uniform jurisdiction without appreciating the different qualities of the proceedings of a group of companies.³⁰ This results in a claim for an ‘insolvency forum for groups of

22. Deyda (supra, fn. 2), pp. 197 and 184, fn. 831.

23. Pleister/Theusinger in: Kübler (supra, fn. 3), Section 51, Rn 64: Between the main and secondary proceedings, there is only room for a uniform insolvency plan.

24. The complex courses of action are described comprehensively by Dreschers in: Kübler (supra, fn. 3), Section 20, Rn. 68–113; as to the suspension of the realization, see Vallender in FS Krest S. 565 f.

25. Comprehensively, Becker (supra, fn. 2), Section 54, Rn 104 ff.

26. Becker (supra, fn. 2), Section 55, Rn 106; Pleister/Theusinger in: Kübler Section 50, Rn 4.

27. Becker (supra, fn. 2), Section 55, Rn 106.

28. Becker (supra, fn. 2), Section 56, Rn 108.

29. As an example, one can refer to the decision of the AG Köln, ZInsO 2008, 215 ff. In this decision, the court determined the local jurisdiction to be at the place of a ‘Steering Committee’. This decision caused an intense scientific debate: Knof/Mock, ZInsO 2008, 253; Frind, 2008, 363; now Vallender, DB 2012, 1609, 1611, who describes instructively which challenges the insolvency judge is faced with.

30. Knof/Mock, ZInsO 2008, 499, are pleading for an economic interpretation of jurisdiction according to Section 3 InsO. Accordingly, a notified reorganization and a conjunction of several companies should be sufficient for an organized achievement of an item of production to establish the jurisdiction of the court for all the companies (refusing Frind, ZInsO 2008, 614; approving Schwemmer, NZI 2009, 355, 358).

companies'.³¹ The term reflects the aim and assumes an insolvency of all affiliated companies. This is precisely the problem.³²

C. Previous solution models

For a solution of the aforementioned problems in national and international (European) group insolvencies, different solution models³³ are discussed, which refer to the following:

- issues of jurisdiction³⁴
- questions concerning the appointment of a uniform insolvency administrator
- the order of debtor in possession proceedings for the purpose of overcoming the legal diversity³⁵
- questions concerning the existing obligations of the coordination of proceedings and the cooperation of parties to the proceedings³⁶
- the pooling of all the assets in insolvency of the group into a uniform estate (substantive consolidation)³⁷

On the occasion of the 9th Insolvency Law Convention in 2012, the German Government laid out its ideas concerning a new regulation for group insolvency.³⁸ At a central point, the minister outlined the following:

Starting point of our considerations is the finding that in the national as well as in the international context of regulation, the opening of a variety of insolvency proceedings concerning affiliated companies can complicate or even thwart the implementation of value-maximizing realization strategies. The more proceedings are opened, the more decentralised the administration of the insolvencies becomes, and hence the more there is a risk of losing sight of the group-dimensional perspective.³⁹

After having rejected the so-called substantive consolidation, the minister advocated a two-step approach. Accordingly, general cooperation rights and duties should be codified, clarifying in which way courts and administrators may or must cooperate to coordinate the insolvency administration concerning each group company. Secondly, mechanisms of coordination should be created. In this

31. Westphal/Janjuah, Beilage ZIP 2008, 7; Hirte, ZIP 2008, 444; Jaffe/Friedrich, ZIP 2008, 1849; Vallender, Festschr. f. Runkel, 2009, Section 373 with legislative proposal; Vallender/Deyda, NZI 2009, 825.

32. Critical with regard to the reorganization only by means of a unification of the place of jurisdiction, see Frind, ZInsO 2008, 363 (367).

33. Karsten Schmidt, ZIP 2012, 1053, 1054; Pleister/Theusinger in: Kübler (supra, fn. 3), Section 50, Rn 6 f, Section 51, Rn 2 f.; Verhoeven, 2011, Die Konzerninsolvenz, Section 134 f.; Paulus, ZIP 2005, 1948, 1951; Hirte, ZInsO 2011, 1788.

34. Comprehensively Splittgerber, 2011, Die örtliche Zuständigkeit in Insolvenzverfahren konzernverbundener Unternehmen.

35. AG Köln, ZIP 2005, 1566 as well as AG Köln, NZI 2004, 151; see Meyer-Löwy/Poertzgen, ZInsO 2004, 195; Blenske, EWiR 2004, 601; doubting Wimmer, ZInsO 2005, 119, 125; critical Dreschers in: Kübler (supra, fn. 3), Section 20, Rn 93 f.; Beck, NZI 2006, 611, 616.

36. Comprehensively, Becker (supra, fn. 2).

37. Becker (supra, fn. 2), Section 95, Rn 184 ff.; advocating Paulus, ZIP 2005, 1948, 1953; Verhoeven, ZInsO 2012, 1689, 1757 f.

38. The speech of the Minister of Justice Mrs. Sabine Leutheusser-Schnarrenberger on 22 March 2012, on the occasion of the 9th Insolvency Law Convention, Berlin, can be downloaded from the page of the Ministry of Justice.

39. Speech of the Minister of Justice Mrs. Sabine Leutheusser-Schnarrenberger (supra, fn. 38).

respect, primarily, the creation of separate proceedings of coordination is suggested, standing alongside the individual proceedings.⁴⁰

D. Outlining a solution via group-specialized proceedings

In the insolvency situation of a group of companies, it clearly makes more sense to find substantive rules concerning group insolvency, which are able to prevent the insolvency of all the group members, than to optimize the jurisdiction rules, leading to or at least not preventing the insolvency of all the group members. If substantive rules prevented the insolvency of particular members of the group, a lot of open questions concerning these members would be resolved or would be put differently.

The solution propagated by the German Ministry of Justice concerning group insolvency is incompatible with this approach. The creation of individual proceedings for coordination leads to a bureaucratization of the insolvency proceedings and to an increased complexity of the procedural situation.⁴¹ The creation of individual proceedings for coordination does not lead to fewer proceedings, but to more proceedings. The insolvency proceedings are characterized by urgent situations, calling for rules leading the parties to the proceedings in a way comprehensible in themselves. A bureaucratization of the proceedings fails to meet the procedural situation in the insolvency proceedings. The legal framework has to be designed in a way encouraging the parties to the proceedings by certain rules to cooperate in a procedurally specific and result-oriented way provided for, and not because of any extensive catalogue of rights and duties encouraging them to do so without any goal orientation.⁴²

In terms of methodology, a comprehensive analysis of the key problem concerning group insolvency has to precede a new regulation.⁴³ In the literature concerning the insolvency of groups of companies, scholars agree that the key problem of the group insolvency is the so-called domino effect.⁴⁴ The domino effect arises out of group-specific circumstances of facts and claims, which can be found with considerable regularity. According to the authors, it is necessary to create substantive rules that can solve the domino effect in such a way that a variety of insolvency proceedings concerning single group members—which are partly completely unnecessary—can be prevented. To prevent this variety of insolvency proceedings of group members, group-specialized proceedings should be possible, containing flexible rules essential in group insolvencies as a part of the commercial law. The creation and design of these specific substantive, group-specific national rules solving the domino effect should have priority over a further (Europe-wide) development of the existing rules.⁴⁵

40. Speech of the Minister of Justice Mrs. Sabine Leutheusser-Schnarrenberger (supra, fn. 38).

41. Becker discusses in his current, excellent dissertation the possibilities of cooperation and coordination as a solution model on 267 (!) pages, Sections 141–408.

42. Heavily doubting also Karsten Schmidt, ZIP 2012, 1053, 1056.

43. Karsten Schmidt, ZIP 2012, 1053, 1057 justly complains about the limited wealth of standards and experience; Eidenmüller, ZIP 2004, 3455, 3458 sees difficulties from a legal point of view.

44. Summarizing the domino effect, see Becker (supra, footnote 2), p. 76 f, Rn 146 ff.; Deyda (supra, fn. 3), Section 27; Timm, ZIP 1983, 236; Wellensiek, ZIP 1984, 541; Rottstegge, ZIP 2008, 955; the same in Konzerninsolvenz, 2007, pp. 26 f., 63 f.; as to the domino effect through security rights, Pleister/Theusinger in: Kübler (supra, fn. 3), Section 50, Rn. 66 ff, Section 51, Rn 3 - internationale Konzerninsolvenz.

45. Karsten Schmidt, ZIP 2012, 1053, 1057 rightly points out that the legislator could not know *ex ante* where the ‘right place of jurisdiction for groups’ is. This is why the legislator should not try to determine it.

The further development of the group insolvency based on laws that are not designed for it finally leads to an optimization and thereby stabilization of a variety of proceedings, but not to a prevention of such a variety of proceedings.

The basic idea of group-specialized proceedings on the other hand is to prevent the insolvency of subsidiaries as a consequence of the insolvency of the parent company by derivation of situations of facts and claims by means of a trustee, away from the subsidiary and focused on the shares of the company. This means that the insolvency proceedings should be focused on the proceeds arising out of the sale of the shares, and not with regard to the assets and liabilities of the company. In the proceedings, claims having suffered a 'loss' due to the derivation should be included. A solution of the group-specific situations of facts and claims with the parent company should replace the sale of the shares if this was possible in terms of a consideration of the interest in preserving the subsidiary.

The intent and purpose of group-specialized proceedings is not to sell the assets of the subsidiary, but only to guide the companies' shares to a sale. The group-specific constellations should be derived to prevent the insolvency, with the aim of preserving the value and the jobs, so that the best possible satisfaction of the creditors can be achieved.

II. Analysis of the Domino Effect

The following remarks contain an analysis of the domino effect and establish—by means of typical procedures from practice—the basic idea of group-specialized proceedings. By way of illustration, one of the biggest international insolvency procedures within the last years will serve as a basis for the examples.⁴⁶

The mentioned insolvency proceedings concerning groups of companies deal with the debtor in possession proceedings concerning the A-TEC Industries AG (stock corporation), Vienna.⁴⁷

The A-TEC Industries AG is an international industrial holding having its registered office in Vienna.⁴⁸ In 2007, the group employed almost 14 000 people and generated a turnover of more than €2bn.⁴⁹ The group consists of more than 150 subsidiaries.⁵⁰ Because of problems with an Australian subsidiary in connection with a refinancing of a bond, the A-TEC Industries AG filed for insolvency proceedings within the framework of a reorganization proceedings with the debtor in possession (*Sanierungsverfahren in Eigenverwaltung*).⁵¹ By the end of December 2010, the creditors accepted a reorganization plan, according to which an investor would have to be found by the 30 June 2011. This attempt failed.⁵² By that time, a quota of 39% could be distributed to the creditors.⁵³

46. Herein, the authors rely on the publicly accessible sources.

47. The law firm Siemon has advised the self-administrating managing board of the A-TEC Industries AG with regard to its German subsidiaries, particularly with regard to the Dörries Scharmann group and the ATB group.

48. A-TEC Industries, Wikipedia.

49. A-TEC Industries, Wikipedia.

50. A-TEC Industries, Wikipedia.

51. A-TEC Industries, Wikipedia.

52. A-TEC Industries - Wikipedia.

53. Ad hoc announcement A-TEC Industries AG on 6 November 2012.

A. Example of a contractual entanglement of liability

1. Problem statement

On 17 January 2011, the *A-TEC Industries AG* managed to sell the highly profitable group *Dörries Scharmann*, Mönchengladbach, at a price of €70bn.⁵⁴ Thereby, about 650 jobs in the high-technology sector of North Rhine-Westphalia could be saved.⁵⁵

In the case at issue, a domino effect could be prevented. For the considerations herein, one should assume that a domino effect resulting from a joint and several liabilities of the subsidiary for its parent existed and that because of this joint and several liabilities, the subsidiary became overindebted and—because of the calling in of the loan—also illiquid.⁵⁶

Contractual entanglements of liability can be found in groups of companies in numerous ways. In particular, guarantees, warranties, and joint and several liabilities are mentioned.⁵⁷ These constellations might appear when the parent company is the borrower and the loan is secured by a subsidiary out of its assets, for example, by guarantee (upstream financing).⁵⁸ It is also possible that the subsidiary is the borrower and the parent issues a guarantee (downstream financing).⁵⁹ It should be noted that personal securities such as guarantees, warranties, and joint liabilities are in the foreground when it comes to downstream financing.⁶⁰ However, a generalization is not permitted. It is the diversity of life situations occurring that renders the regulation of the group insolvency so difficult. For this reason, in the case of group insolvency, an extremely flexible regulation is needed.

2. Solution

In the group-specialized proceedings presented, the flexibility should be achieved by the trustee identifying the group-specific circumstances of facts and claims and reporting them to court. A court order should impose an immediate suspension of the respective situations. In light of the example given, the meaningfulness of such an approach is evident. The basic idea of group-specialized proceedings is to detach the joint liability from the subsidiary and divert it to the proceeds. This should happen by means of a trustee capable of applying for the suspension of the entanglement of liability at the competent insolvency court (concerning the application of the subsidiary). This suggestion corresponds with the already existing Section 21 II No. 5 of InsO, which also permits separating and securing parts of the debtor's assets. This principle should be transferred to opened group-specialized proceedings.

52. *A-TEC Industries* - Wikipedia.

53. Ad hoc announcement *A-TEC Industries AG* on 6 November 2012.

54. *A-TEC Industries*, Wikipedia.

55. *A-TEC Industries*, Wikipedia.

56. As to the liability situations in the affiliated group regarding contractual entanglements of liability, see Merkel in: Lutter/Scheffler/Schneider, Hb. der Konzernfinanzierung, 1998, Sections 512 f., 557 f., and 561.

57. Merkel in Lutter/Scheffler/Schneider (supra, fn. 56), Section 561.

58. Merkel in Lutter/Scheffler/Schneider (supra, fn. 56), Section 543; Pleister/Theusinger, in Kübler (o. fn. 3), Section 50, Rn 31.

59. Merkel in Lutter/Scheffler/Schneider (supra, fn. 56), Section 544; Pleister/Theusinger, in Kübler (o. fn. 3), Section 50, Rn 40.

60. Merkel in Lutter/Scheffler/Schneider (supra, fn. 56), p. 557.

After the examination, the insolvency court should be able to impose the suspension of the entanglement of liability by means of a court order. Thereby, the legal provision should apply, stipulating that thanks to the mentioned liability cases, an insolvency of the subsidiary could not become subject to insolvency proceedings. Group-specialized proceedings should allow the subsidiary to continue its business outside insolvency proceedings. The trustee should be obliged to sell the shares in the subsidiary or to reach an agreement concerning the replacement. The creditors' claims resulting from the joint liability should be satisfied out of the sale or out of the agreement concerning the replacement.

If one had assumed a guarantee of the subsidiary for the loan of its parent,⁶¹ in the given example, a domino effect would have occurred when declaring the guarantee due and payable, and the highly profitable subsidiary would have been illiquid and also overindebted. The present legal provisions would have led to filing for insolvency of the subsidiary, by which means a loss in value would have occurred and the guarantee itself would have been devalued because of a satisfaction only in the amount of the insolvency quota. The given example shows clearly the sense of detaching the contingent liabilities arising from guarantees from the subsidiary and diverting it to the proceeds of the sale of the shares. The insolvency of the subsidiary can be prevented, meaning that a negative impact on the debtor and creditors due to insolvency can be avoided.

Also, the position of the group lender will be enhanced by such a procedure. The lender of the parent company is faced with the situation of structural subordination.⁶² The term 'structural subordination' describes the situation of the creditor of the controlling company, who will only have access to the assets of the controlled company after the satisfaction of the creditors of the controlled company.⁶³ Although the creditors of the subsidiary are secured by group-specialized proceedings, because the subsidiary does not become insolvent, the creditors of the controlling company are secured because of the substitution of the situation concerning the structural subordination.

Group-specialized proceedings are also able to solve downstream financing in an adequate manner. If the subsidiary was a borrower because it purchased for example the machines and if the parent company provided a guarantee for the loan, the lender would have a contingent claim in the insolvency of the parent company. This claim could increase in an intrinsic value if an insolvency of the subsidiary was prevented. The group-specialized proceedings should be able to suspend potential termination clauses. The lender of the group of affiliated companies takes part in the group-specialized proceedings with claims concerning damages caused by a suspension.

61. Which was granted for whatever reason.

63. Merkel in Lutter/Scheffler/Schneider (supra, fn. 56),

62. Merkel in Lutter/Scheffler/Schneider (supra, fn. 56), p. 537.

p. 537.

B. Example: entanglement of liability secured *in re*

1. Problem statement

An entanglement of liability secured *in re* is rather uncommon in cases where the parent company is the lender of a loan and the loan is secured by a subsidiary out of its assets (upstream financing).⁶⁴

- (a) *Pledge of shares.* In the case of an entanglement of liability secured *in re*, the different ways of securitization have to be distinguished. Group-specialized proceedings should, however, reserve different reactions for each kind of securitization. Concerning the case at issue, a pledge of the shares in the subsidiary by its parent company to the credit institution would be conceivable, whereby the credit institution would hold a lien on the shares in the subsidiary for the purpose of securing a credit to its parent company. This case typically does not lead to a domino effect, thus not to an insolvency of the subsidiary. However, it may lead to the attempt of the credit institution to sell its lien. In this case, a suspension should be possible within the group-specialized proceedings. Furthermore, it should be possible to refer the credit institution to a participation in the group-specialized proceedings with its ‘damage’ due to the suspension. The reference of the credit institution to its participation in the group-specialized proceedings is objectively justified, as their lien would be worthless or at least of lesser value in case of an insolvency of the subsidiary. This solution principally corresponds to Section 251 III of InsO, which was introduced by the ‘ESUG’.⁶⁵ According to this provision, a satisfaction is only obtained out of the funds in case of an unfavourable situation and has to be claimed in separate proceedings.
- (b) *Collateral securities in the assets of the subsidiary.* The entanglement of liability secured *in re* can take place in such a form that for the parent company’s loan, the subsidiary will provide collateral securities in its assets, for example, create a mortgage, declare the assignment as security, or grant a global assignment of receivables.

2. Possible solutions

Generally, there are three possible solutions in group-specialized proceedings to solve these constellations.⁶⁶

The first possible solution emerges when the granting of the loan finally finances the operational business. In such a case, the loan relationship should be pursued, and the securitization should be maintained. Furthermore, it is conceivable that the financing affects solely the relationships of the parent company. In this constellation, the trustee will examine whether there are any rights to contest or whether there is any violation of the repayment prohibition stipulated in Section 30 of *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbHG).⁶⁷

64. Merkel in Lutter/Scheffler/Schneider pp. 543 and 557; Pleister/Theusinger in: Kübler (supra, fn. 3), Section 50, Rn. 66.

65. Law for the further facilitation of restructuring of enterprises.

66. Pleister/Heusinger, in: Kübler (supra, fn. 3), Section 50, Rdnr. 66, refer to the significant difficulties with the

solution of this problem by means of an insolvency plan, due to Section 254 II 1 of InsO.

67. As to the constellations of claims, see Pleister/Heusinger, in: Kübler (supra, fn. 3), Section 50, Rdnr. 30 f. (GmbHG = *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*. See next footnote.)

If this was the case, the trustee should be in a position to assert the claims against the credit institute. According to the circumstances of the case, a waiver on the security granted could also be considered.

If there is no right to contest or repayment prohibition according to Section 30 of GmbHG⁶⁸ and if the security is effective, Section 165 ff. of InsO shall be applied by means of an analogy. As a result, the trustee of the subsidiary shall have an exploitation right. This right should be used in such a way that the security right is detached from the subsidiary and the secured creditor receives an appropriate compensation. In this constellation, the secured creditor would have a compensational right to separate satisfaction in group-specialized proceedings. He or she would be satisfied in advance out of the proceeds.

In case of downstream financing, that is to say, when the bank has granted a loan to the subsidiary and the parent company therefore has provided a mortgage or another right *in rem*, group-specialized proceedings also provide adequate solutions. Such a case will regularly not lead to a domino effect (as to termination clauses, refer to later discussion). Nevertheless, in the case of a possible sale of the shares in the subsidiary by the trustee, necessities for a solution would be conceivable. If the subsidiary continues its operational business, the loan can be resumed. The secured right of the parent company will be available to the credit institution, although it is up to the insolvency administrator of the parent company to find an appropriate arrangement. If the credit institution should suffer from ‘damage’ due to the deduction of claims, it would be entitled to participate in the group-specialized proceedings.

C. Termination clauses as an example

1. Problem statement

For the following remarks, it should be assumed that—on the basis of the first example given—group-related rights of termination have been agreed upon in the credit agreements of the subsidiary with its lenders.⁶⁹ In practice, these group-specific rights of termination are regularly designed for the case in which the parent company files for insolvency. The reason for the agreement of these group-specific rights of termination in the credit agreements is that the creation, alteration, and termination of group relations can have an influence on others with regard the creditworthiness of the controlling as well as controlled company.⁷⁰ For the following remarks, it should be assumed that a credit institute makes use of its right to terminate the credit agreements because of the insolvency of the parent company.⁷¹

Because of such a termination of the credit agreements, even an extremely profitable subsidiary would—in a situation where the parent company files for

68. German Law on Limited Liability Companies, in the following referred to as ‘GmbHG’.

69. As to the group-specific termination rights, see Maier/Reimer in Lutter/Scheffler/Schneider (supra, fn. 55), pp. 527 and 535.

70. Merkel in: Lutter/Scheffler/Schneider, (supra, fn. 56), p. 535.

71. A termination of credit agreements at this stage of proceedings could have the most diverse reasons; see Haarmeyer, ZInsO 2011, 1722.

insolvency—become illiquid. This would entail a domino effect and thus an insolvency of a subsidiary operating profitably.⁷²

2. Solution

Group-specialized proceedings would improve the situation significantly. The trustee could examine the facts, determine them, and apply for a suspension of the termination clauses or the termination already announced if necessary. The insolvency court should be in a position to suspend the termination clauses or the termination already announced. The result of the suspension of the legal relationships should be that the suspended relationships could not lead to an insolvency and that—with regard the termination of the loans—an effective termination of the credit relationship cannot take place. Possible damages resulting from the suspension of the legal relationships would have to be registered in the group-specialized proceedings and would be satisfied out of the proceeds of the sale of shares pro rata, according to the quota.

An example of termination clauses reveals the particular advantages of group-specialized proceedings. A trustee would be able to investigate flexibly the relevant facts and present them to the insolvency court. The insolvency court would be in the position to make its orders flexibly. A degree of flexibility would be reached, which is necessary in the insolvency law as part of the commercial law and is essential to the group insolvency, because of its complexity. Even the most sophisticated legal provision would not reach such a degree of flexibility.

D. Cash management systems

1. Problem statement

The regulation of the group insolvency causes difficulties notably because there are different forms of group integration. According to the authors, an integrated group should be spoken of when the economic integration has progressed so far that the subsidiary would not be viable on its own.⁷³ Such a situation can be found in particular when it comes to cash management systems.⁷⁴ The managements of subsidiaries are not exempted from the responsibility for the liquidity of their own company.⁷⁵ In case of a centralized group financing, the controlling company also has to ensure the liquidity of the subsidiary.⁷⁶

Despite an existing cash management system, the insolvency of the parent company will cause an immediate domino effect, and the subsidiary will become

72. There were similar constellations in the insolvency of A-TEC Industries AG.

73. As to the term of the integrated group, see Deyda (fn. 2), p. 133, who speaks, however, of an integrated group if the COMI of the parent company and the subsidiary is at the same place.

74. In detail, Lutter/Scheffler/Schneider (supra, fn. 56), Section 27; Pleister/Theusinger in Kübler (supra, fn. 3), Section 50, Rn 42.

75. Wehlen, in Lutter/Scheffler/Schneider (supra, fn. 56), p. 773.

76. Wehlen, in Lutter/Scheffler/Schneider (supra, fn. 56), p. 773.

illiquid. On the basis of the current legal framework, these cases regularly cannot be solved within the 3-week period for filing an insolvency application.

2. Solution

Group-specialized proceedings would improve the situation significantly. A quick supply of cash resources and the legal protection of this supply would be necessary. Group-specialized proceedings should imply a rule stating that the parent company or a third party (or even the State within the framework of State aid rules) could provide liquidity assistance on the basis of an agreement with the trustee. This liquidity assistance should reach the rank of debts of the insolvency assets and should be satisfied prior to the claims according to Section 38 of InsO in the group-specialized proceedings or in potential insolvency proceedings following later. Objectively, such a regulation could only be justified if the share in the subsidiary was worthless without the liquidity assistance. Because of this, it seems justified to pay back the liquidity assistance after a potential sale of the shares by the trustee according to Section 209 I of InsO, namely out of the proceeds.

It is very likely that the breakdown of the cash management system in the group of companies would also influence the asset side of the subsidiary, for example, a loan of the subsidiary to its parent company would become worthless in the insolvency of the parent company. This might lead to overindebtedness. The parties would have to consider this situation when determining the price, and the purchaser would have to invest equity capital. It should be regulated by law that the company must not be overindebted or illiquid after the termination of the group-specialized proceedings, meaning that the general rules should apply after the termination of the proceedings.

In subsequent insolvency proceedings, which could possibly not be prevented, the liquidity assistance should also be privileged as debt of the insolvency assets according to Section 209 I No. 2 of InsO, as the supply of liquidity under surveillance of the trustee in group-specialized proceedings will—generally considered—have advantages for future insolvency assets. A general consideration is appropriate and sufficient, and it corresponds with the complexity of the insolvency law concerning groups of companies.

E. Example of tax liabilities

1. Problem statement

In the insolvency of a parent, fiscal unities might end,⁷⁷ and tax liabilities according to Section 73 of the Regulation of Taxation (AO)⁷⁸ might arise in the insolvency of the parent company. Thus, the tax law is an important trigger of the domino effect.

77. Gäde, *Gesellschafts- und steuerrechtliche Konsequenzen der Insolvenz für die steuerrechtliche Organschaft*, 2006, pp. 41 ff.; BFH, NZI 1999, 207, as well as OFD Frankfurt, S 7105A-21-St110 v. 20.7.2009—individual case; termination, if the insolvency administrator

loses his influence on the subsidiary; Schneider/Höpfner, BB 2012, 87 (90).

78. Regulation of Taxation (*Abgabenordnung*), in the following referred to as 'AO'.

It is characteristic of the fiscal domino effect that it cannot be removed by legal transactions. Although it is possible to agree with a creditor for a guarantee that the corresponding liabilities could be satisfied out of the proceeds resulting from a sale of shares, this is impossible in tax laws. The controlled subsidiary is responsible for the tax liabilities of the parent company according to Section 73 of AO.⁷⁹ This constellation has a destructive effect on reorganization.

2. Solution

Group-specialized proceedings would be in a position to take account of group-specific situations in a flexible manner. The trustee could identify the liabilities and could report them to court. The court should be able to impose a suspension of the group-specific liabilities, particularly those according to Section 73 of AO. The fiscal authority as the creditor of the liability would participate with its claims in the group-specialized proceedings and would be satisfied out of the proceeds originating from the sale of shares.

F. Detachment of the subsidiary from the group of companies

1. Problem statement

The insolvency of the parent company has a negative effect on the business model of its subsidiary,⁸⁰ even if the subsidiary itself might be operationally profitable.⁸¹ The loss of trust in the solvency of the parent company has an impact not only on the business model of the group, but particularly on the business model of each subsidiary. This situation leads to a disloyalty of the management towards the owners, thus the parent company. The management—possibly supported by the staff—feels compelled to look for a new owner.

A particular risk arises in the event of debtor in possession proceedings with a reorganization plan.⁸² Thus, an insolvency risk arises with regard the subsidiary, as the management could be tempted to detach from the group of companies because of insolvency and save itself in this way.⁸³ Timm has already pointed out in 1983, that in the case of the insolvency of the controlling company, there is a danger of single (usually healthy) subsidiaries placing themselves under the ‘protective shield of the insolvency proceedings’ to break away from the group.⁸⁴ He rightly referred to the fact that the management board of the subsidiary could—by initiation of insolvency proceedings—succeed in selling ‘the company’ favourably to an interested party to save the existence of the subsidiary.⁸⁵ If the

79. BGH, DSStRE 2005, 51.

80. Becker (supra, fn. 2) is calling it the ‘danger of cutting the cord’.

81. Fundamentally, to the effect of the insolvency situation on the business model Simon, ZinsO 2012, 1045.

82. In the debtor in possession proceedings of A-TEC Industries AG, such tendencies became also visible with the subsidiaries of the ATB group.

83. Potential transferees and advisers in reorganization are very quick to navigate such a situation skilfully.

84. Timm, ZIP 1986, 225 (237), fn. 110.

85. Timm, ZIP 1986, 225 (237), fn. 110.

subsidiary was economically healthy, meaning it had only been initiating the proceedings because of the virtually imposed ‘illiquidity’ (today also in case of pending illiquidity), the controlling company would be deprived of significant values.⁸⁶

2. Solution

The experience with situations of this kind shows that very complex questions can arise, which cannot easily be solved under the pressure of insolvency situations. Group-specialized proceedings would bring significant benefits. In this constellation, the trustee would have the task to ensure the proper conduct of the business processing. She or he would be in a position to consider the negative impact of the parent company’s insolvency situation on the business model of the subsidiary. Hence, he or she could take the right measures, for example, the suspension of the assertion of group internal claims. If there are no measures necessary, she or he could stabilize and calm the procedural situation. By analogy of Article 31 of the EC Regulation, the trustee and the insolvency administrator of the parent would be obliged to cooperate for the benefit of the mutual assets in the insolvency.

Also, group-specialized proceedings would be in a position to take care of an appropriate reconciliation of interests between the parent company and the subsidiary. The parent company is interested in keeping the value of a successful subsidiary within the group. The subsidiary is interested in having a healthy partner, so that it cannot get into trouble itself. An act of balance is necessary, which reconciles the interests adequately and which cannot be induced by legal provisions. Group-specialized proceedings would enable the trustee to find an adequate reconciliation of interests. A value-destroying escape into insolvency could be inhibited. In case of A-TEC Industries AG, the parent company managed to sell the ATB group for €62m.⁸⁷

G. Special case: a reorganizational stalemate in main and secondary proceedings

1. Problem statement

In case of an international group insolvency, there is—with regard to integrated groups (e.g. group cash management)—a reorganizational necessity to include the foreign subsidiary in the reorganization proceedings. Even in case of a nonintegrated group, there could be situations where the foreign subsidiary is included without any reorganizational necessity. The practice in international group insolvencies in the past years reveals that the attempt has been made to take the procedural situation into account by filing for the main proceedings at the COMI of the parent company and at the same time by assuming that—contrary to Article 3, paragraph 1, second sentence of the EC Regulation—the COMI of the foreign

⁸⁶ Timm, ZIP 1986, 225 (237), fn. 110.

⁸⁷ A-TEC Industries, Wikipedia.

(for the nonintegrated) subsidiary is also at the head office of the parent and by filing the main proceedings concerning the subsidiary at the parent's head office.

By 'extension' of the provisions stipulated in the EC Regulation, many courts have followed this attempt.⁸⁸ In a reorganizational sense, this is based on the idea that the power of the group management and thus the structure of the group should be maintained. This approach is—in a reorganizational sense—thwarted by the fact that in a lot of cases, secondary proceedings are filed for or opened at the administrative headquarters of the subsidiary.⁸⁹ In this case, a reorganization is only possible if it is based on a consistent plan in the main and secondary proceedings.⁹⁰ This requires a coordination on the highest level and has to be feasible according to the participating statutory instruments. According to Article 34(1) of the EC Regulation, a reorganizational termination of the secondary proceedings is dependent on the approval of the administrator of the main proceedings.⁹¹ This emphasizes—with regard to the intention of the reorganization by insolvency plan and the unpractical approval requirements stipulated in Article 34(2) of the EC Regulation—the necessity of coordinated, cross-border insolvency plans. This is, however, not realistically manageable.⁹²

In German practice, there is also the 'disturbing' provision of Article 102, Section 9 of the Introductory Law to the Insolvency Act (EGInsO).⁹³ This provision provides for an approval of all the affected creditors in case of an intervention having an effect upon assets outside of those directly included in the secondary proceedings. As a 'cross-border, uniform insolvency plan',⁹⁴ it has to have an effect on all the creditors or no effect at all.⁹⁵ With the insolvency plan, there are two risks arising from the secondary proceedings: the possible inclusion of the debtor's assets abroad and the outvoting of the foreign creditors by the possibilities offered under the German insolvency law provisions (Sections 244, 245, and 254 of InsO) in the reorganization proceedings. The formulation 'effect in respect of the

88. High Court Leeds, *Daisytek*, NZI 2004, 219; English High Court, *Criss Cross*, *Beschl. v. 20.05.2003*, nach *Martinez Ferber* 40; Tribunale di Parma, *Eurofood*, ZIP 2004, 1220; Tribunale di Parma, *Parmalat Deutschland*, ZIP 2004, 2295; AG München, *Hettlage*, *ZInsO* 2004, 691; Munizipalgericht Fejer/Székesfehévár, ZIP 2004, 861; English High Court, *Aim Underwriting Agencies*, (2004) EWHC 2114 (Ch); AG Siegen, *Zenith*, NZI 2004, 677; AG Offenburg, *HUKLA-Werke*, NZI 2004, 673; AG Düsseldorf, *MG Rover*, *Beschl. v. 07.11.2005*, 502 IN 110/05; LG Leoben, *Collins & Aikman*, ZIP 2005, 1930, see also (critical) *Mankowski*, NZI 2006, 418; ders. *BB* 2006, 1755; as to the whole, see *Deyda* (supra, fn. 2), Section 184; also *Pleister/Theusinger in Kübler* (supra, fn. 3), Section 51, Rn 9 with further quotes and references.

89. AG Köln (*Automold*), NZI 2004, 151 (152); AG Düsseldorf (*Daisytek*), NZI 2004, 269 (271); LG Innsbruck (*Hettlage*), ZIP 2004, 1722; LG Klagenfurt (*Zenith*), NZI 2004, 677; Court order of the AG Düsseldorf for *MG Rover Deutschland*, *Beschl. v. 07.11.2005-502 IN 110/05*; LG Leoben (*Collins & Aikman*) ZIP 2005,

1930; AG Köln (*Collins & Aikman*), *Beschl. v. 23.08.2005-71 IN 478/05*; the possibility of the opening of secondary proceedings at the registered office of the subsidiary is also acknowledged by the High Court Birmingham (*MG Rover*), NZI 2005, 515 ff., the *Cour d'appel de Versailles (MG Rover)*, *Recueil Dalloz* 2006, 379, the English High Court (*Collins & Aikman*) (2006) EWHC 1343 (Ch) and the Tribunal de commerce de Nanterre (*MPOTEC GmbH*), *Urt. v. 15.02.2006-PCL 2006J00174*; as to the whole, see *Deyda* (supra, fn. 2), Section 184.

90. *Pleister/Theusinger in Kübler* (supra, fn. 3), Section 51, Rn 64.

91. See also *OLG Graz*, NZI 2006, 660, 662

92. *Seidl/Paulick*, *ZInsO* 2010, 125.

93. Herchen in: *Pannen*, *EuInsVO* 1.Aufl., Section 34, Rz. 46; Frind in: *Pannen*, Article 102, Section 9 EGInsO Rz. 1; for criticism, *Wenner/Schuster in FK-InsO*, 6. Aufl. *InsO*, Article 102, Section 9 of EGInsO, Rn 4.

94. *Reinhart in MünchKomm-InsO* (supra, fn. 11), Article 34, Rz. 3.

95. *Undritz in Hmb-InsO* (supra, fn. 11), Section 355, Rz. 5.

debtor's assets not covered by those proceedings' in Article 34(2) of the EC Regulation has to be understood in a wide sense, as a German insolvency plan actually does not provide for any provisions concerning the debtor's assets abroad. However, it can interfere in the claims of foreign creditors. This should not be allowed without the general consent of all the creditors having an interest.

Werner/Schuster pointed out that such a barrier of consent is not necessary if the insolvency plan is based on a coordinated 'master plan' regulating the distribution of the entire assets of the debtor divided into several 'sub-insolvency assets'.⁹⁶ Whether an outvoting of rejecting creditors should be possible in case of coordinated insolvency plans must not remain an open question.⁹⁷ Such a possibility of outvoting does rather contradict the provision of Section 17 II 2 of InsO, so that the present regulation is justified by the implementation of this provision. This is why the present provision does not predicate the barrier of consent from the question of whether the assets abroad are affected by the plan but does order a general barrier of consent in the insolvency plan with decrees, deferments, and so on.⁹⁸ Therefore, a reorganization of a subsidiary by means of an insolvency plan in secondary proceedings could hardly be successful.

Thus, an additional coordination of the main proceedings of the parent company is necessary. As a result, the main and the secondary proceedings of the subsidiary have to be coordinated, and in addition, these are to be coordinated with the main proceedings of the parent company. With regard to reorganization, this procedural situation could have a destructive effect.

2. Solution

The destructive effect could be avoided by group-specialized proceedings. Group-specialized proceedings would offer the opportunity to maintain the power of the group management for the time being in such sense that the subsidiary does not become insolvent. The main proceedings at the parent company's registered office would no longer be necessary. Consequently, there would be no secondary proceedings.

The insolvency administrator of the parent company or the operative creditor of the subsidiary should obtain the right to file for group-specialized proceedings in Germany. The insolvency administrator of the parent company would have achieved his aim to maintain initially the structures of the group. Furthermore, in these reorganization situations, the necessary time is gained to find solutions. At the same time, the trustee should be able to contribute to the stabilization of the situation to the extent that the parent company refrains from any unlawful interference in this procedural situation.

96. Wenner/Schuster in: FK-InsO (supra, fn. 96), Article 102 of EGInsO, Section 9, Rdnr. 4.

97. Wenner/Schuster in: FK-InsO (supra, fn. 96), Article 102 of EGInsO, Section 9, Rdnr. 5.

98. Kemper in: Kübler/Prütting/Bork, InsO, 2012, Article 102 of EGInsO, Section 9, Rn 4; Undritz, in: Hmb-InsO (supra, fn. 11), Article 102, Section 9, Rdnr. 1.

H. Other examples

The most essential situations leading to a domino effect have been mentioned earlier. There are, however, many other situations that can trigger a domino effect. For instance, there are mutual supply and service agreements within a group, which could be worthless because of the insolvency of the parent company and which could lead to indebtedness and illiquidity.⁹⁹ The omission of the letter of intent could lead to a situation of indebtedness.¹⁰⁰

In group-specialized proceedings, the trustee can respond flexibly to it and report the facts of the case to the insolvency court. The insolvency court should be able to make the necessary orders on the legal basis of a general clause. The group-specialized proceedings could master situations of indebtedness adequately, as in the case of a subsidiary becoming indebted because of the default of a receivable while working successfully on the operative side, the situation of indebtedness can be handled by the purchaser within the frame of the sale of shares by means of a reduction of the price and supply of fresh equity capital.

In literature, it is rightly pointed out that challenging the debtor's transactions, which are disadvantageous for the insolvency assets, is particularly relevant in group constellations.¹⁰¹ These cases particularly reveal the difficulty of coordinating large group insolvencies. According to the view of the authors, this is particularly relevant in debtor-in-possession cases and in case of a solution of the problem by means of an insolvency plan with only one overall administrator.¹⁰²

Group-specialized proceedings offer appropriate solutions. On the one hand, the trustee should have the possibility to challenge the debtor's transactions, which are disadvantageous to the insolvency assets for the benefit of the subsidiary, by analogy with Sections 129 and 280 I of InsO. The constellation in which securities have been granted to the parent company by its subsidiary contrary to the provisions concerning the challenging of debtor's transactions is particularly relevant. If the right of the parent company to contest is directed towards its own subsidiary, the group-specialized proceedings should offer the possibility to override this right to contest and to suspend it with the effect that it operates within the context of the group-specialized proceedings.

III. Proposal for a Legal Reorganization of Group-specialized Proceedings

According to the authors' point of view, group-specialized proceedings should be established to overcome the domino effect in group insolvency. Systematically, the respective provisions should be established close to Sections 21, 22, and 270b of InsO, as group-specialized proceedings are—in a legal sense—a preliminary stage to the insolvency proceedings. It does not require any ground for insolvency, because it is actually supposed to prevent the insolvency. In a conceptual sense, group-specialized proceedings should be regulated as follows:

99. See Deyda (supra, fn. 2), p. 27.

100. Deyda (supra, fn. 2), p. 27.

101. Kübler in: ders. (supra, fn. 3), Section 18, Rn 48–52.

102. Kübler in: ders. (supra, fn. 3), Section 18, Rn. 52.

(1) Application

Group-specialized proceedings require a corresponding application. The application should be lodged by the manager of the subsidiary, affected creditors of the subsidiary, the insolvency administrator—including a foreign one—or the parent company. But also the insolvency court having the jurisdiction for the parent company should be entitled (also without any separate application, but according to its discretion) to appoint a trustee and to initiate the proceedings. The competent insolvency court for the group-specialized proceedings is the court of the parent company. If the parent company's registered office is located abroad, then the domestic insolvency court at the subsidiary's registered office is competent for the proceedings.

(2) Competence of the trustee

The trustee, who should obtain the power of administration and disposal by law, is competent for the following:

- the exercise of the shareholders' rights
- the monitoring of the proper conduct of the subsidiaries' business operations
- identification of the group-specific situations of claims and facts
- the application for the suspension of group-specific legal relationships and liability situations
- the initiation and conduct of a sales process regarding the shares in the subsidiary along with the collection of proceeds and the distribution to the creditors by analogy with the provisions of the InsO
- or the bringing about of an arrangement concerning the removal/replacement of the group-specific claim and liability situation with the parent
- an agreement with the parent or a third party concerning the liquidity assistance of the subsidiary as a debt of the insolvency assets
- the request for a termination of the group-specialized proceedings for the purpose of the conduct of subsequent insolvency proceedings, particularly in a case where the subsidiary made substantial losses.

(3) Regulation by analogy with Section 21 II No. 5 of InsO

The insolvency court has to be authorized by legal order to suspend the group-specific situations of claims and facts determined and applied for by the trustee. The result is that the suspended legal relationships cannot result in an insolvency of the subsidiary.

(4) Claim for compensation arising from the suspension

The result of an order issued by the insolvency court is that claims for compensation arising from the suspension of the legal relationships can only be asserted in the group-specialized proceedings. They participate in the distribution of the proceeds arising from the sale and the detachment of the shares. For the proceedings, the provisions of the Insolvency Code shall be applied analogously, particularly the Sections 38 and 171 ff. of InsO. Claims have to be lodged with the trustee.

(5) Obligation to apply and liability of the managing director

The managing directors of the subsidiary have satisfied the obligation to apply according to Section 15a of InsO by applying for group-specialized proceedings. Section 64 of GmbHG does not apply to the management during the ongoing group-specialized proceedings.

IV. Relation of Group-specialized Proceedings to Existing Provisions in Insolvency Law

A. Compliance with the insolvency purpose

It is necessary to classify group-specialized proceedings with regard the insolvency purposes of Section 1 I of InsO. Group-specialized proceedings are able to reach the aim of Section 1 I of InsO in the form of the best possible satisfaction of creditors by ensuring the preservation of the company. However, concerning the equal treatment of creditors, group-specialized proceedings create appropriate distinctions. The creditors of the integrated subsidiary keep their legal position against the subsidiary, insofar as they derive from the operative business of the subsidiary. The creditors of the suspended group-specific claims and legal relationships are treated differently. They are referred to participation in the equal treatment of the creditors, insofar as they have suffered any damage from the suspension of the legal relationships.

Thereby, a generalized view is proper and appropriate because of the complexity of the group insolvency. The differentiation between creditors of the operative business and creditors from group-specific situations of claims and facts is appropriate. From a general view, it is true that by suspension of the legal relationships, the domino effect of the group insolvencies could be overcome and—from a general view—has a value-conserving effect on all the groups of creditors. Against this background, these provisions are particularly compatible with Article 14 of the German constitution.¹⁰³

B. Group-specialized proceedings instead of harmonization of jurisdiction

In terms of the solutions discussed concerning the group-specific provisions regarding the jurisdiction of the insolvency courts,¹⁰⁴ Karsten Schmidt pointed out that the legislator could not know in advance where the competent court for groups of companies is located, wherefore the legislator should not try to determine the competent court.¹⁰⁵ Becker justly pointed out that all the discussed solution models aim in their core at ensuring coordination and cooperation, thus at facilitating the use of those parts of the economic entity still existing by systematic cooperation.¹⁰⁶ Thus, the notion of a uniform competent court in the group is supported, and in practice, there is a search for suitable solutions, to bring exactly this about.¹⁰⁷

The solution models aiming at the appointment of a uniform insolvency administrator also have this basic ideal. They also want to ensure proper coordination and cooperation as well as the maintenance of group structures. The authors

¹⁰³ German constitution (*Grundgesetz*), referred to as 'GG'.

¹⁰⁴ *Supra*, fnn 32 and 33.

¹⁰⁵ Karsten Schmidt, ZIP 2012, 1053, 1057; different view Hirte, ZIP 2008, 444, 445.

¹⁰⁶ Becker (*supra*, fn. 2), p. 139.

¹⁰⁷ As an example, see Vallender, DB 2012, 1609, 1611.

basically also supported the appointment of a uniform insolvency administrator in group insolvencies.¹⁰⁸ However, the appointment of a uniform insolvency administrator in group insolvencies has a crucial weakness because it is not able to ensure the balance of interest between the parent company and its subsidiary. The solution assumes regularly that the interest of the parent company will prevail. Karsten Schmidt rightly referred, on the contrary, to the fact that the forced adjustment of all the insolvency proceedings of affiliated companies is an aberration for the same reason as a consolidated liquidation of a group.¹⁰⁹ There might be reasons for either reorganizing or liquidating single parts of a group, up to cases in which legal disputes between insolvent subsidiaries and their parent company become necessary.¹¹⁰ It is problematic that an entire coordination and cooperation by an insolvency administrator *de facto* overrides the existing group law in terms of a protective right.

It is also overlooked that the appointment of a uniform insolvency administrator can overtax this person to a significant extent. If the group is only dealing with virtually one product, it could be useful to give a hundred companies into the hands of one insolvency administrator. But if one considered an example like the A-TEC Industries, the appointment of one insolvency administrator for 150 companies could not have been justifiable because the affiliated companies of the A-TEC group had been working in different sectors with extremely different products.¹¹¹ There is of course also the fact that the companies were spread all over the world. In such circumstances, group-specialized proceedings produce far better results.

Also, the instituting of debtor in possession proceedings (Sections 270 and 270a of InsO) to overcome the problems of coordination in group insolvencies can be useful in certain cases. According to the authors, this construct cannot be elevated to a generalized practice. Because of the limited capacity on the part of the management in the context of a debtor in possession proceedings for a corporate group and because of its insufficient knowledge of the insolvency-specific possibilities, the instrument of a debtor in possession within a group particularly leads to a sham debtor in possession by complete replacement of the management.¹¹² This gives rise to the potential danger, particularly in combination with the—by then debtor-controlled—possibility of the preliminary creditors' committee to nominate a preliminary trustee according to Sections 22a, 56a II, 270a, and 274 I of InsO, of deadlock for the trustee due to informal consultations or side agreements, which cannot be controlled by the body of creditors later on.¹¹³ In a group-integrated,

108. See Frind, in: Hmb-InsO (supra, fn. 11), Section 56, Rn 41b with further references concerning supporting opinions.

109. Karsten Schmidt, ZIP 2012, 1053, 1045.

110. Karsten Schmidt, ZIP 2012, 1053, 1045.

111. A-TEC Industries, Wikipedia.

112. AG Köln, NZI 2005, 633; Piepenburg, Die Wirtschaftsprüfung, Sonderheft 2011, 18, 20; Beissenhirtz/Specovius, INDAT-Report 7/09, 36; Adam/Poertzgen, ZInsO 2008, 345, 346 as a solution

to the problem of group insolvency; Vallender, NZI 7/2007, V, Editorial; Wehdeking, DZWIR 2006, 453; Spies, ZInsO 2005, 1254; for the appointment of the adviser drafting the reorganization plan as administrator Kadletz, ZIP 2000, 117; Paulus, ZIP 2005, 2301, 2302; ders. ZGR 2005, 309, 323; ders. NZI 2008, 705. 113. Frind, ZInsO 2002, 745; Bork, ZIP 2006, 58; Hofmann, ZIP 2007, 260; AG Nürnberg, ZIP 2007, 81; critical Uhlenbruck, BB 2004, 5; Schudde, ZInsO 2006, 347, 352.

but insolvency-specific, independent proceedings specially designed for the purpose, this danger can be avoided through the appointment of a trustee who is demonstrably independent.¹¹⁴

This also counters the danger that with an overall debtor in possession, all the protection provisions that a Stock Corporation Act or a German Companies Act contains regarding the relation of controlling and controlled company will be negated. Literature describes the so-called group danger,¹¹⁵ meaning the danger that arises for a controlled company due to the state of integration in the group. This condition is promoted by a debtor in possession in group insolvency, leading to an insolvency-specific group danger affecting the creditors' interest. If for example the parent company is in self-administration, the administrator has—according to the Insolvency Code—to orient his actions towards the creditors' interest. If there are subsidiaries in the group that on the one hand are insolvent and on the other hand are not insolvent, then the leading management has to safeguard the creditors' interest and its own economic interest regarding the companies that are not insolvent at the same time.¹¹⁶ Against this background, it is evident that group-specialized proceedings are particularly useful in cases where the parent company is under self-administration. The trustee can particularly observe the proper conduct of the liquidation of the company between subsidiary and parent.

Becker justly pointed out that the decisive point of criticism concerning the solution models supporting the coordination and cooperation is that the duties of coordination and cooperation do not guarantee that the parties will adhere to them *in concreto*. In group-specialized proceedings, the head of the group has to cooperate with the trustee, as the trustee can sell the shares otherwise.

C. Relation to the EC Regulation

According to the authors, group-specialized proceedings should be introduced European-wide. The *Lehne* report gives reason to do so.¹¹⁷ On 15 November 2011, the European Parliament has passed a resolution report of *Klaus-Heiner Lehne* for insolvency proceedings within the frame of the European company law. It has therefore declared itself in favour of a revision of the Regulation 1346/2000/EC. For justification, the Parliament referred to the existing disparities between the national insolvency laws, creating competitive disadvantages as well as difficulties for companies with cross-border activities and favouring forum shopping. Especially the changes that have

114. In the same way, Hertling INDAT-Report, 3/2003, S. 3; the same in INDAT-Report 4/5-2003, S. 3; Görg FS Uhlenbruck, Section 117, 123; Bärenz, NZI 2003, 655; Hill, ZInsO 2005, 1294; LG Bonn, ZInsO 2003, 806.

115. Kuhlmann/Ahnis, Konzern- und Umwandlungsrecht, 2010, Section Rn. 359; ebenso Lutter/Hommelhoff, 2009, Anh. zu, Section 13, Rn 15.

116. As an example AG Essen, 162 IN 181/12, sowie AG Essen, 162 IN 180/12.

117. Lehne, ZInsO 2011, 1342; critical Paulus, NZI 2012, 297 ff. From the DAV'S point of view, there is

primarily a reduced need for modification (Reinhart, NZI 2012, 304 ff.). The recommendations of the UNICITRAL concerning the future structuring of the national and international group insolvency laws are also of great relevance (see Holzer, INDAT-Report 6/2011, 38 und ZIP 2011, 1894 ff.: joint application, coordinated implementation, in exceptional cases inclusion of solvent group members, no consolidation by joint recoverable assets; further theses at Hirte, ZInsO 2011, 1788).

occurred in the meantime (e.g. the entry of 15 new Member States and the enormous increase of phenomena such as groups of companies) have to be considered according to the Parliament. Also, a misuse of the insolvency provisions has to be confronted and thereby the best possible protection achieved for the creditors and employees.

The proposed group-specialized proceedings are exactly in this line. But even if group-specialized proceedings were only introduced in Germany, it would bring substantial benefits for international group insolvencies. The practice of the past years has shown that stalemates in a reorganizational sense can occur when the COMI of a subsidiary abroad is—contrary to its administrative headquarters—assumed at the registered office of its parent company. There will be a need for the coordination of three proceedings then, namely the main and secondary proceedings concerning the subsidiary as well as the main proceedings concerning its parent company. Group-specialized proceedings would be able to overcome this stalemate. In a legal sense, it is a procedure *sui generis*, which should be—as a group-specific procedure—integrated in the EC Regulation with its own governing article. Alternatively, an introduction in all countries would be conceivable, but hardly realistic. If both possibilities were not feasible, it should be the main proceedings to prevent the application of the main proceedings by obstructing creditors at the COMI of the parent company right from the start.

V. Conclusion

Group-specialized proceedings designed for the occurrence of insolvency cases in groups are essential for overcoming unnecessary, internal domino insolvencies. The current focus of the reform discussion on mere improvement of the EU Regulation concerning place of jurisdiction and coordination is hardly beneficial and hardly leads to the desired result.

List of Abbreviations

AG	Amtsgericht (<i>Local Court</i>)
BB	Der Betriebsberater (http://www.betriebs-berater.de/)
BFH	Bundesfinanzhof (Federal Finance Court)
BGH	Bundesgerichtshof (Federal Court of Justice)
DB	Der Betrieb (http://www.der-betrieb.de/content/)
DStRE	Deutsches Steuerrecht—Entscheidungen (http://rsw.beck.de/cms/main?site=dstr)
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (http://www.degruyter.com/view/j/dwir-2013-23-issue-3/issue-files/dwir-2013-23-issue-3.xml)
EWIR	Entscheidungen zum Wirtschaftsrecht (http://www.rws-verlag.de/hauptnavigation/zeitschriften/ewir-entscheidungen-zum-wirtschaftsrecht.html)

FK-InsO	Frankfurter Kommentar zur Insolvenzordnung
FS Krefl	Festschrift für Gerhart Krefl zum 65. Geburtstag
FS	Festschrift für Wilhelm Uhlenbruck zum 70. Geburtstag
Uhlenbruck	
Hmb-InsO	Hamburger Kommentar zum Insolvenzrecht
IPRax	Praxis des internationalen Privat- und Verfahrensrechts (http://www.iprax.de/)
LG	Landgericht (<i>regional court</i>)
MünchKomm-InsO	Münchener Kommentar zur Insolvenzordnung: InsO
NJW	Neue Juristische Wochenschrift (http://rsw.beck.de/cms/main?site=njw)
NZI	Neue Zeitschrift für das Recht der Insolvenz und Sanierung (http://rsw.beck.de/cms/main?site=nzi)
OFD	Oberfinanzdirektion (superior finance directorate)
OLG	Oberlandesgericht (higher regional court)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (http://www.degruyter.com/view/j/zgre-2013-42-issue-1/issue-files/zgre-2013-42-issue-1.xml)
ZInsO	Zeitschrift für das gesamte Insolvenzrecht (http://www.insolvenzrecht.jurion.de/meine-inhalte/zeitschriften/zinso/)
ZIP	Zeitschrift für Wirtschaftsrecht (http://zip-online.de/)