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## Restructuring of Corporate Groups in Europe

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DATE FOR  
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Joint One-Day Seminar,  
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Following the successful 2018 seminar in Helsinki, INSOL International is delighted to announce their first seminar to take place in the beautiful city of Stockholm, organised in association with INSOL Europe and with the support of restructuring professionals from across the Nordic region.

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The seminar will culminate with cocktails and dinner at Villa Källhagen, with stunning views of the Djurgårdsbrunn canal and the Nordic Museum.

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# Restructuring of Corporate Groups in Europe

Restructuring of corporate groups was discussed at two consecutive conferences of the European Law Institute (ELI), report Gert-Jan Boon, Ilya Kokorin and Jessie Pool.

On 5 December 2018, a joint conference of the ELI and the Business & Liability Research Network of Leiden University took place in Leiden (the Netherlands). During this conference, developments at both the national and European levels were discussed. The second conference, on 11 December 2018, was organised on the occasion of the UNCITRAL Working Group V meeting in Vienna (see *opposite page*). This conference focussed on matters of substantive consolidation.

In Leiden, prof. em. Bob Wessels (Leiden University) introduced the ELI Business Rescue Project. This project – led by himself and prof. Stephan Madaus (Halle-Wittenberg University, Germany) – resulted in 115 recommendations on a legal framework enabling further development of coherent and functional rules for business rescue in Europe\*. Stephan Madaus introduced the recommendations, contained in Chapter 9 of the ELI Business Rescue Instrument on the issue of corporate groups. He highlighted that different approaches can be distinguished, from no or limited coordination up to substantive consolidation. Insolvent members of corporate groups in Europe are traditionally treated on an entity-by-entity basis. Domestic rules on corporate groups remain rare in the EU. This was also illustrated by prof. Joeri Vananroye (KU Leuven, Belgium), who elaborated on the possibilities for corporate group restructurings under Belgian law. Prof. Reinout Vriesendorp (Leiden University) highlighted that further research needs to consider the role of directors of insolvent corporate group members in the European context.

A joint presentation was given by Jessie Pool, Ilya Kokorin and Gert-Jan Boon (researchers at Leiden University), who discussed the existing legal mechanisms to facilitate efficient resolution of group distress. First, they considered the European Insolvency Regulation (EIR 2015) and concluded that, due to the voluntary nature of group coordination proceedings and an easy opt-out from them, such innovation may have limited effect. Different alternatives were considered, including the appointment of the same insolvency practitioner, establishing an

enterprise COMI and using synthetic or “reversed” synthetic proceedings. But currently these options are either unavailable or face significant (practical) difficulties. Insolvency protocols were suggested as the most flexible tool. However, to make their adoption more prevalent, training for judges and insolvency practitioners is needed.

The conference in Vienna continued the debate and focused on the issue of substantive consolidation within corporate groups, adding perspectives from Europe, UNCITRAL and the USA. As Stephan Madaus stated, from the ELI Business Rescue Instrument it followed that only some EU Member States allow insolvency consolidation in case of intermingled assets or fraud. Florian Bruder (DLA Piper, Germany) showed the limitations under the EIR 2015, including a blanket prohibition of substantive consolidation in a cross-border context. He discussed alternative (out-of-court) approaches instead. In addition, prof. Irit Mevorach (Nottingham University, UK) argued that UNCITRAL in its Legislative Guide, Part Three (treatment of enterprise groups) struck a good balance between the principles of company and insolvency law by allowing for substantial consolidation, but only in the case of intermingled assets or fraud. According to prof. Edward Janger (Brooklyn Law School, USA), the US experience shows that substantive consolidation in practice is pursued mostly in the context of consensual (restructuring) plans.

The conferences revealed that approaches to restructuring of corporate groups are still very much in development. To date, there are no experiences yet with the group coordination proceedings under the EIR 2015. The application of other tools, such as insolvency protocols, has also remained limited. From the discussion it follows that in a cross-border setting, but also domestically, improving coordination by means of cooperation and communication may be the most feasible direction to pursue at the moment. To this end, judges and practitioners may rely on recommendations and best practices, for instance the ELI Business Rescue Instrument, but also those from other standard-setting organisations, which should support the restructuring of corporate groups.

\* Bob Wessels & Stephan Madaus, *Rescue of Business in Insolvency Law – an Instrument of the European Law Institute* (September 6, 2017).