Intra-group financing and enterprise group insolvency: problems, principles and solutions

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Propositions relating to the dissertation

Intra-group financing and enterprise group insolvency

Problems, principles and solutions

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1. Insolvency law should respond to the legal reality of entity separateness and the economic reality of group integration (*passim*).
2. Group interests must not always trump the interests of creditors of individual group companies, nor should they always infringe upon creditors' constitutional (property) rights (section 3.4).
3. The potential risks of transaction avoidance and the statutory subordination of intra-group financing can lead to underinvestment. Hence, alternative *ex-ante* strategies, such as the authorisation of a transaction (i.e. safe harbour), and pre-emptive structural and contractual support arrangements, should be explored (sections 7.5.4, 8.3, 12.4.2).
4. Typical intra-group financial arrangements, including cross-guarantees, co-debtorship, cash pooling and intercompany ipso facto and cross-default clauses may significantly complicate group restructuring (sections 6.6, 9.5).
5. Legal tools that extend the effects and protections of insolvency law to (non-debtor) group entities engaged in intra-group financing – such as third-party releases, extended enforcement stays, and certain limitations on contract clauses – are valuable additions to the modern restructuring toolbox. Yet they should be used proportionately (sections 10.3.2, 11.4.2, 13.4.2, 13.4.3).
6. The justification for extending insolvency law protections is stronger in cases involving: (i) integrated and interconnected groups, (ii) insolvent or financially distressed group companies, (iii) financial restructuring aimed at sophisticated and strongly adjusting creditors, and (iv) procedures driven by public interest considerations (section 14.4).
7. A principle-based approach is optimal for investigating complex legal problems and bridging gaps across different legal systems (sections 4.5, 5.5).

8. When designing insolvency laws for enterprise groups, we should draw lessons from the regulation of banking groups, which tends to be more advanced and group-oriented, for good reasons.

9. Effective solutions to group insolvencies often require pragmatic and innovative responses from insolvency practitioners and practicing lawyers, as well as cross-border communication and cooperation between judges.

10. Sometimes, “we” is just “I”, even if you are not a King of the Netherlands.