



The Endless Problem of Enterprise Groups' Insolvency

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Milan, ECFR Annual Meeting, 27 September 2013



Introduction

q Theses:

Company law scholarship has lost sight of the limited meaning of (the concept of) legal personality

Legal personality is a method, so is group law

Company law and insolvency law are branches of the same tree

Insolvency law nudges creditors to take each other's interest into account

“Communauté d'intérêts” (can) complement “Eine Person, ein Vermögen, einze Insolvenz”

q How do we move forward?

Life can only be understood backwards; but it must be lived forwards
[Kierkegaard]



Introduction





Introduction

q Path dependency

[g]roup activity in the sense of the conduct of various businesses by a holding company through a number of subsidiaries is a Twentieth Century phenomenon. The principles of our company law and our insolvency law were developed in the Nineteenth Century. It is not surprising, therefore, that some of the basic principles of company and insolvency law fit uneasily with the modern commercial realities of group enterprise [Cork-report, 1982]

q Baseline: “Eine Person, ein Vermögen, eine Insolvenz”

It has been a widely accepted principle of European law that, as such, there is no such thing as the insolvency of a corporate group. On the contrary, it was often emphasized that the insolvency of a company group follows the principle of company law, and here too, corporate groups lack legal personality [Hirte]



Legal personality revisited

- q Legal personality is a (legal) concept
- q Legal personality contains no self-limiting or guiding principle
 - Am Ende hängen wir doch ab von Kreaturen, die wir machten [Goethe]
- q Permanent (re-)construction of legal personality
 - The fiction must drop out of the final reckoning [Fuller]
- q Functional analysis of legal personality
 - It [a corporation] is not a thing. It is a method. (...). When defined as a method the definition varies. The definition for one purpose may be totally different from the definition for another [Douglas]



Legal personality revisited

q Entity v. enterprise: (limited) contribution of company lawyers (?)

It is suggested that no single explanation for these cases will be found and that in any event company lawyers are not well equipped to provide the explanation or explanations [Davies]

It may perhaps be no advantage at all to leave the question of identification to company law specialists [Werlauff]

q Group law is a method. Its results depend on the: characteristics of the particular enterprise group purpose of the rule which requires application (competition law, insolvency law, accounting law, employment law, IP-law, ...)

Insolvency law: voodoo corporate law?

- q (International) insolvency law must not create a “voodoo corporate law”
- q Artificial schism between insolvency and corporate law
- q Increasing recognition of the (functional) similarities between corporate and insolvency law
 - Company law and insolvency law do not operate as two islands with no bridges between them [Bachner]
- q Company law manages agency conflicts in good times; insolvency law manages agency conflicts in bad times
 - Bankruptcy law introduces a new structure for the firm that retains the five basic features of the corporate form (...), with the difference that the creditors, rather than the shareholders, are now the owners [Kraakman, et al.]



Am I my brother's keeper?

- q From *Ius est vigilantibus (Prioritätsprinzip)*... (debtor-creditor)

Le principe fondamental qui régit le statut des créanciers d'un même débiteur, loin d'être celui de la communauté d'intérêt, est, au contraire, celui de la liberté d'action et de l'indifférence [Grégoire]

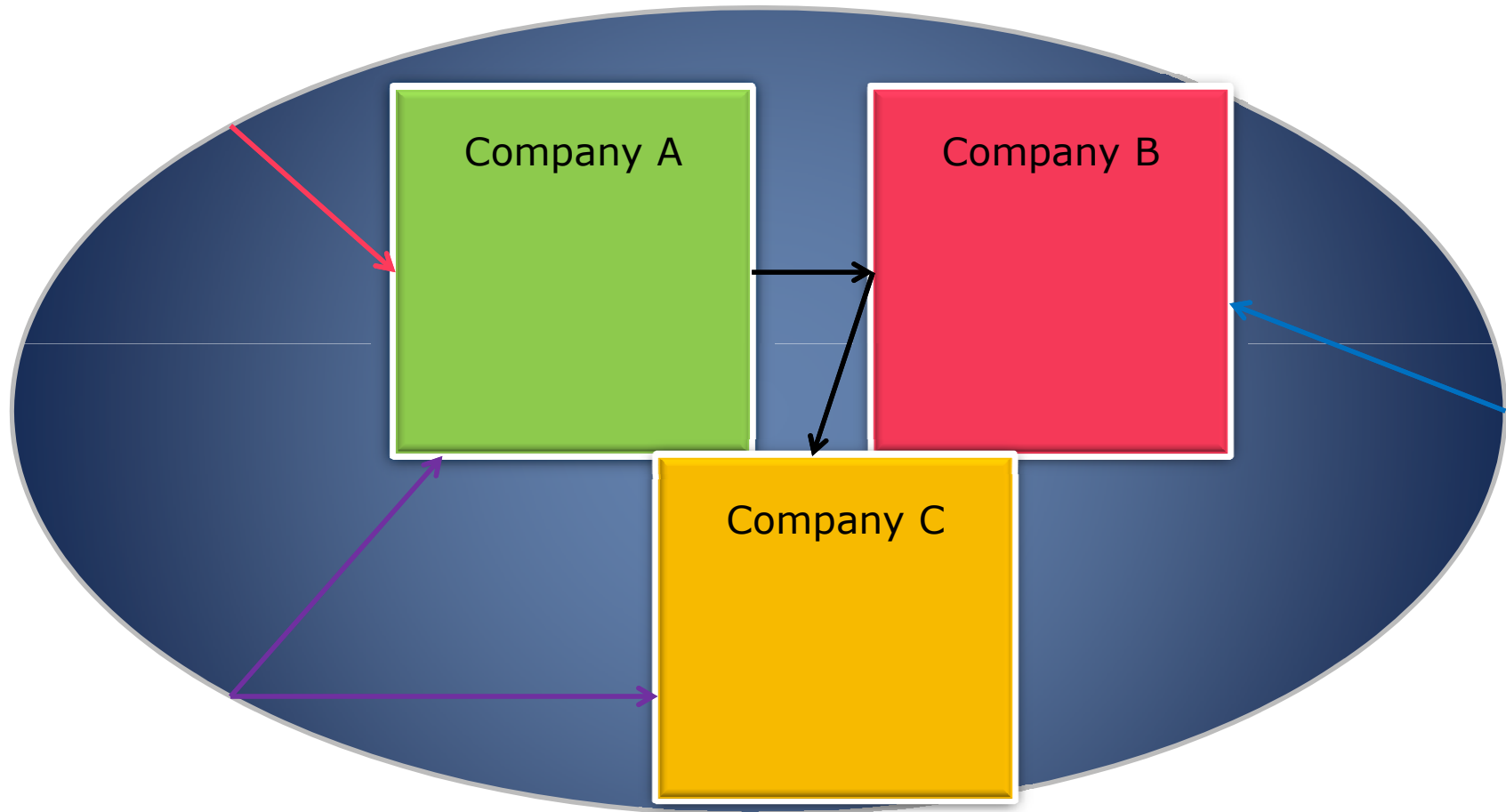
- q ... to a "communauté d'intérêts" (creditor-creditor)

insolvency law nudges creditors to take each other's interest into account

La communauté d'intérêts peut être prise en compte sans disposer de la personnalité morale [Pelletier]

group insolvency law=insolvency law²: it *should nudge* creditors to take the interests of creditors of (other) group companies into account

Group insolvency law = insolvency law²





Recent initiatives: “centre d'intérêts”

- q Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Erleichterung der Bewältigung von Konzerninsolvenzen (2013)
 - explicit choice against substantive consolidation
 - Verfahrenkoordination/Verfahrenskonzentration (Zuständigkeitskonzentration, Kooperationspflichten, Koordinationsverwalter, Koordinationsplan)
- q Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (2012)
 - entity-by-entity approach: maintained
 - duty to cooperate and communicate (liquidators, courts)
 - duplication of rules re. main and secondary proceedings
 - stay of proceedings, rescue plan



The endless problem of enterprise groups' insolvency: solved?

- q Ultimate goal: to realize the objective(s) of insolvency law in the context of enterprise groups
- q Movement away from "Eine Person, ein Vermögen, eine Insolvenz"...
- q ...Towards recognition of "communauté d'intérêts"