Harmonisation of European Insolvency Law and the need to tackle two common problems: common pool & anticommons

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Abstract

Insolvency Law has finally become a field of law for which harmonisation at a European level is considered both important and feasible. In deciding upon the content of such harmonized rules, there will need to be a common understanding about the goals of insolvency law and therefore a European debate on bankruptcy theory. Bankruptcy theory, and most notably the influential Creditors' Bargain Theory, has long viewed insolvency law as a set of rules for overcoming common pool problems. Bankruptcy theory thus far has almost completely overlooked anticommons problems. Anticommons present themselves in a situation in which there are several owners or entitled parties, and each of the parties has it within its power to block the use by others. Should anticommons behaviour in insolvency procedures go unchecked, creditors as a whole will be harmed. Insolvency is a collective process and this process may not be sabotaged by a single party. Four typical insolvency issues, each identified by INSOL Europe as a candidate for harmonisation at a European level, are discussed, analysing them in terms of common pool problems and anticommons: preferences, reorganisation/composition plans, claim validation and insolvency of a group of companies.

1. Introduction: bankruptcy theory and harmonisation of European Insolvency Law

In 2010, following a request from the European Parliament, INSOL Europe prepared a report to determine the need for and the feasibility of harmonisation of European Insolvency Law. The report concludes that several topics are apt for harmonisation.[2] Where the primary aim of the report is simply to identify topics apt for harmonisation, the report does not provide or sometimes provides only limited suggestions for the content of harmonised rules, let alone a detailed account of the policy goals underlying the different rules. In more general terms, policy considerations and bankruptcy theory receive far less attention in European insolvency law debate, than is the case in America.

Taking the Report by INSOL Europe as a starting point, this article focuses on four topics selected for harmonisation[3] and analyses them using the concepts of two property law theories. The first theory is the well known theory of *common pool*

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[2] INSOL Europe, *Harmonisation of Insolvency Law at EU level*, April 2010, available at http://www.insol-europe.org/eu-research/. Since Insolvency Law has long (until the coming into force of the EU Insolvency Regulation (EC Regulation No. 1346/2000) on May 31, 2002) been excluded from even the harmonisation of European international private law, this can be seen as a leap forward towards harmonisation of substantive European Insolvency law. See on this, B. Wessels, 'Harmonisation of Insolvency Law in Europe', *European Company Law*, 2011 8(1), p. 31 where he concludes: 'The H-word out!'.

[3] The Report provides the following conclusion. '*Topics that are apt for such harmonisation and for which harmonisation is also important are the following* (numbers added, rdw)*: i) the rules on the opening of insolvency proceedings including the eligibility of the debtor; ii) the rules on the filing and verification of claims; iii) the rules on the responsibility for the proposal, verification, adoption, modification and contents of reorganization plans; iv) the rules on the voidness, voidability and unenforceability of detrimental acts; v) the rules on the termination of contracts and rules on the mandatory performance under contracts; and vi) the rules on the liabilities of directors, shadow directors, shareholders, lenders and other parties involved with the debtor. vi) Furthermore, rules on the insolvency of groups of companies should be developed. vii) Finally, it is desirable that a central database containing relevant court orders and judgments is made available*.'

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problems. Treating the limited assets of the insolvent debtor as a common pool problem is often used to explain the need for and *raison d'être* of insolvency law. The second theory is the less well known theory of *anticommons*. Anticommons can arise in situations where there is a joint good or resource, to which several parties have a legal interest and the parties have it within their power to effectively block the use by others. Thus far, anticommons problems have been overlooked in trying to understand the insolvency process. The two theories of common pool problems and anticommons together, explain much of what insolvency law needs to do. Taken together, they provide a useful analytical tool in developing rules of European Insolvency Law.

In this article, the basic idea of insolvency law as a set of rules dealing with common pool problems will be revisited (§2), followed by a discussion of how part of the rules on transaction avoidance in insolvencies can be understood as combating common pool problems (§2.1). In § 3 the notion of anticommons as a general property law concept will be explained. Subsequently, the theory of anticommons will be applied to insolvency law (§4), more specifically to the topics of reorganisation/composition plans (§4.1), claim validation rules (§4.2) and multiple office-holders in case of groups of companies (§4.3).

2. Insolvency as combating common pool problems

The most influential bankruptcy theory, the Creditors' Bargain Theory, views insolvency as a common pool problem, and accordingly insolvency law as a set of rules to overcome these common pool problems. The theory has been mainly developed by the American scholars Jackson and Baird.[4]

The Creditors' Bargain Theory is based on the hypothetical argument, asking what creditors would agree upon upfront with each other if there were no insolvency laws providing for a collective insolvency procedure. The answer provided by the Creditors' Bargain Theory, is that creditors would agree upon just that: a collective procedure. Since creditors themselves would agree upon a collective insolvency procedure, this provides a strong justification for the existence of insolvency laws. In order to understand why creditors would agree on a collective procedure upfront, one needs only to realise what would happen in the absence of insolvency law.

In the absence of a collective procedure, it would be a virtual free-for-all. The problem is similar to other common pool problems, such as fishing in a lake or the grazing of lands. If all parties would act in a self-interested manner, they would try to catch as many fish as possible, or have their cattle graze as much as possible, even to the extent that it could mean that this behaviour would exhaust all resources. Lacking individual rights that could *exclude* others from use, common resources are prone to *overuse*.

In the case of distressed debtors, the moment a threat of insolvency presents itself, creditors will rush to have their claim satisfied before others, trying to seize individual assets in order to satisfy their claim. This would result in a destruction of a potentially viable business. Although all creditors would be better off by a joint sale of all assets, this cannot take place. The *going concern value* will be lost. Insolvency law seeks to

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[4] See T.H. Jackson, 'Bankruptcy, non-bankruptcy entitlements, and the creditors' bargain', *Yale Law Review*, 1982, p. 862-863, D.G. Baird and T.H. Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A comment on Adequate Protection of secured Creditors in Bankruptcy', *University of Chicago Law Review*, 1984/51, D.G. Baird and T.H. Jackson, 'Fraudulent conveyance law and its proper domain', *Vanderbilt Law Review* 1985/38, p. 829-855 and T.H. Jackson, *The Logic and Limits of Bankruptcy Law*, Cambridge MA: Harvard University Press 1986. The Creditors' Bargain Theory is subject to, sometimes harsh, criticism. See for an overview of the theory and reactions to it V. Finch, *Corporate Insolvency Law*, Cambridge: Cambridge University Press 2009, p. 29-65, where she also develops her own conceptual framework of 'explicit values'.

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maximize the value of assets by a coordinated procedure.[5] UNCITRAL recognised this as an underlying goal of insolvency law, where it stated:

> 'It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies (..)'[6]

There are two additional reasons, besides maximisation of the value of assets, why creditors would opt for a collective procedure, according to the Creditors' Bargain Theory. First, lacking such a procedure, the insolvency of a debtor could easily ignite a costly all-against-all litigation in which each creditor tries to get its hands on as many of the assets or as much of the value of the assets as possible. Secondly, in order not to be left out, because a creditor might be too late in joining the battle over the limited assets, creditors would have to deploy significant resources to monitor their debtor. An orderly and effective insolvency procedure would remove this incentive and its related monitoring costs.

2.1 Preference law seen as combating common pool problems

One of the topics for which INSOL Europe advises harmonisation is the law on transaction avoidance, which encompasses preferences.[7] Preferences is understood here in the Anglo-American sense of preferring an existing creditor over the others by improving its position relative to what it would have been in an insolvency procedure otherwise.[8] Understanding insolvency law as a collective procedure seeking to overcome destructive asset grabbing, also explains the need for rules combating preferences. For example, as Jackson states on the need for and nature of preference law:

> 'Preference law is best viewed as a solution to this replication of the common pool problem that results from strategic planning in the pre-bankruptcy period. Preference law, therefore, is essentially a transitional rule designed to prevent individual creditors from opting out of the collective proceedings once that event becomes likely.'[9]

The Creditors' Bargain Theory, and viewing insolvency law as overcoming common pool problems, illuminates the problems preference law seeks to combat. Even if one does not embrace the Creditors' Bargain Theory to its full extent, it provides

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[5] See Jackson, *The Logic and Limits of Bankruptcy Law*, p. 14: *'To the extent that a non-piecemeal collective process (whether in the form a liquidation or reorganization) is likely to increase the aggregate value of the pool of assets, its substitution for individual remedies would be advantageous to the creditors as a group. This is derived from the commonplace notion: that a collection of assets is sometimes more valuable than the same assets would be if spread to the winds. It is often referred to as the surplus of a going-concern value over a liquidation value.*'

[6] UNCITRAL, *Legislative Guide on Insolvency Law*, p. 136. The quote continues with a distinctive second principle, namely that of a *pari passu* distribution, as follows; *'(..) and that it requires all like creditors to receive the same treatment.*'

[7] The analysis here is limited to preferences, and does not encompass transactions at an undervalue or other transactions infringing on the integrity of the debtor's estate. In his book, *The Logic and Limits of Bankruptcy Law*, Jackson embarks on a course framing all insolvency questions as being related to solving a common pool problem. If this is not the case, Jackson urges us to wonder whether the rules are even part of insolvency law. This leads Jackson to argue that other rules within transaction avoidance are not even part of insolvency law proper. Rules on fraudulent transfer (such as a sale far below the market value) do not deal with a common pool problem, but, according to Jackson, with protecting creditors against misbehaviour by their debtor. See Jackson, *The Logic and Limits of Bankruptcy Law*, p. 146. See for a full comparative analysis of transaction avoidance including transactions at an undervalue, R.J. de Weijs, 'Towards an objective European rule on transaction avoidance in insolvencies,' (2011) 20 *International Insolvency Review*, 219-244.

[8] There are numerous ways in which this can be done, e.g. the payment of a sum of money, the granting of a security right for an already existing debt, payment in kind and the transfer of a good followed by set-off.

[9] Jackson, *The Logic and Limits of Bankruptcy Law*, p. 122.

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additional arguments for preference law over and beyond fairness. Preference law seeks to ensure that the assets are kept together and eventually sold in a structured procedure.

The provisions of the respective countries within the European Union are quite different in their basic structure and approach to preferences. Most notable are the differences as to the use of subjective and objective criteria.[10] Some legal regimes provide very strict subjective criteria. For example, English law provides that preferences can only be reversed if they are created at a relevant time[11] and the *debtor* was influenced by a desire to prefer the creditor.[12] These English rules are subject to severe criticism, also because they cannot be reconciled with the account of preference law seeking to protect the collective scheme. Mokal critiques along these lines, noting:

> 'What is worse, a transaction entered into because the company was subject, and succumbed, to commercial pressure applied by one of its creditors is held to negate any suggestion that the company was motivated by a desire to prefer. Needless to say, this is the very antithesis of the entire point of having a collective insolvency regime in the first place. As explained elsewhere, one of the main reasons for the existence of insolvency law is to counter the incentives possessed by the creditors to act individualistically in pursuing their claims.'[13]

The English rules on preferences are furthermore quite remarkable in that the subjective elements on the preferred *creditor's* side play no role.

German preference law contained in §§130 InsO and 131 InsO[14] stands in sharp contrast to English preference law and makes no references whatsoever to subjective elements on the debtor's side and takes a much more objective approach. As far as these sections require subjective requirements to have been met,[15] they focus on the subjective elements of the *creditor*, and not of the debtor. Bearing in mind the aim of preference law as protecting the collective scheme, it makes more sense to provide an objective rule or, if one needs to resort to using subjective criteria, to focus on

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[10] Subjective criteria are concerned with the state of mind of the parties involved, such as intent and knowledge of something.

[11] It is required that the preference was created within 6 months (two years in case of connected parties) prior to the 'onset of insolvency' and that the debtor was already insolvent at that time or became insolvent as a result of it.

[12] See R. Parry, J. Ayliffe and S. Shivji, *Transaction Avoidance in Insolvencies,* Oxford: Oxford University Press 2011, p. 154-212 and A. Walters, 'Preferences', in: J. Armour and H. Bennet (eds), *Vulnerable Transactions in Corporate Insolvency*, Oregon: Hart Publishing 2003, p. 123-181.

[13] R.J. Mokal, *Corporate Insolvency Law*, Oxford: Oxford University Press 2005, p. 336, 337.

[14] The specific German rules on voidable transactions are, especially from an English perspective, extremely detailed and nuanced. In short, congruent performances (section 130 InsO) can be challenged if performed within three months prior to the filing for insolvency proceedings if the debtor was already insolvent or illiquid at that time and the creditor was aware of that. In contrast, incongruent performances (section 131 InsO) are much easier to reverse. Especially compared to English law, transactions carried out in a way or at a time other than stipulated by contract or law, are subject to ample avoidance possibilities. All incongruent performances within one month prior to the filing for insolvency procedures can be avoided. No further requirements apply here; most notably, no intent on either side needs to be proven by the office-holder. The mere fact that a transaction was made within one month prior to the filing for insolvency, suffices for the transaction to be subject to reversal – regardless of whether it can be proven that the company was illiquid at the time. If the incongruent performance took place two or three months prior the filing for insolvency, all incongruent performances can be challenged in case the debtor was already illiquid at that time. Again, no intent on either side needs to be proven by the office-holder. Incongruent performances can be challenged if they are performed within two or three months prior to the filing if the creditor knew that the performance would be to the disadvantage of the remaining creditors or had knowledge of circumstances which would lead to that conclusion.

[15] Section 133 InsO can also be applied to preferences created prior to the three month period. In that case, intent of the debtor to prejudice its creditors is required, with knowledge of the counterparty thereof.

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subjective elements of the preferred creditor instead of the distressed debtor. In brief, preference law is creditor-creditor law, and seeks to overcome problems of a creditor opting out early to prevent getting stuck in a collective scheme. An aggressive and early withdrawal by individual creditors may result in the total group of creditors being worse off.

3. From common pool to anticommons

More recent property law scholarly writing shows that the mirror-image of a common pool problem can also present itself.[16] As to a common pool, *none of the parties* has it within its powers *to prevent* other parties from using or even overusing a specific good or resource. In an anticommons situation the opposite is the case. In the case of an anticommons, there is a also a joint good or resource, as to which several parties have a legal interest, but here the legal structure is such that *each party* has it within its power to *block* the use of others.[17] Where the typical effect of a common pool is overuse, the existence of an anticommons is likely to produce an underuse, because all parties can veto the use by the other entitled parties.[18]

The notion of anticommons as a property law problem was introduced by Michelman[19] and first applied and researched in great length by Heller.[20] Heller describes numerous anticommons situations, all dealing with pure property law situations. The Komunalkas in the former Soviet Union present an evident example. Here, under socialist regimes several families shared a single large apartment, where they more or less had exclusive use of a room and shared kitchen and bathroom facilities. When converting old socialist society norms into user rights, these tenants were granted property rights such as rights to their rooms and indirectly the right to block others from using the whole apartment. Hold out problems prevented the different interests being brought into the hands of a single individual. For example in the case of four joint owners, these fragmented property rights had limited value to each individual, say €25,000. However, often due to the prime real estate locations in the city centre, if all interests were brought into the hands of a single indvidiual, the value would increase significantly to something in the region of €500,000. Here a real estate developer might be able to buy for €50,000 from 3 of the owners, and try to make a profit. Where each party is trying to gain the surplus value, this creates hold out problems.[21] The last one might not sell for € 50.000 but demand € 350.000,

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[16] See for an overview of literature on both common pool problems and anticommons as well as an illuminating analysis of the relation between them, L.A. Fennell, 'Commons, Anticommons, Semicommons' in K. Ayotte and H.E. Smith (eds), *Research Handbook on the Economics of Property Law*, Cheltenham: Edward Elgar Publishing 2011.

[17] Heller provides the following definition (M.A. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets', *Harvard Law Review*, 1998/111, p. 622): '*In an anti-commons, multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use*.' L.A. Fennell (*Commons, Anticommons, Semicommons*. p. 41) provides the following explanation: '*The term 'anticommons' has since become shorthand for a broad class of problems requiring the assembly of permissions or entitlements, from land development to patent rights. In each case, the worry is the same: that a value-enhancing assembly – one that could leave every party better of than the status quo, will fail to occur as a result of strategic holdout behaviour and other transaction costs*.'

[18] See for examples where a common pool problem might lead to underuse and anticommons to overuse, Heller, *The Tragedy of the Anticommons,* p. 675, 676. See for a warning against making too much out of this distinction between overuse and underuse, L.A. Fennell, *Commons, Anticommons, Semicommons*, p. 41.

[19] See F.I. Michelman, 'Ethics, Economics and the Law of Property', in: J. Roland Pennock and John W. Chapman (eds.), *Nomos XXIV: Ethics, Economics and the Law*, New York: New York University Press 1982, 3–40.

[20] M.A. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets', *Harvard Law Review*, 1998/111.

[21] See for a short explanation of the dynamics underlying hold out behaviour, Fennell, *Commons, Anticommons, Semicommons*, p. 42 (references omitted): '*Particularly conducive to holdout dynamics are lumpy or 'step' goods that do not deliver surplus in smoothly increasing increments as additional inputs are added, but rather provide a large shot of surplus all at once, when the assembly is complete.*

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thereby trying to seize all surplus value, and destroying every incentive for the real estate developer to acquire the stake of the individual owners. Market forces here were shown to be brutal from time to time, with reports of hold out tenants being murdered.[22]

A clear way out of anticommons is, of course, bringing all dispersed interests into the hands of a single individual. Insolvency law at its core does exactly the opposite. In case of a formal insolvency procedure, the previous owner, the debtor, is in economic terms expropriated by its joint creditors. Of course, many of the anticommons problems are dealt with by the appointment of an office-holder. Yet, at those times when the 'new owners' (the creditors) have additional rights, other than just getting *pro rata* payment whatever the outcome of the procedure may be, anticommons problems are lurking in the shadows.

4. Three anticommons problems in insolvency

The focus within insolvency law analysis has been almost exclusively on common pool problems. Only in one article, titled 'Anti-bankruptcy' do Baird and Rasmussen discuss the phenomenon of anticommons in bankruptcy at any great length in relation to claims trading and reorganisation plans in a chapter 11 procedure.[23]

The problems related to a common pool situation do not, however, provide a sufficient explanation of parties' behaviour once they are forced into a collective procedure. Once parties are locked in, so to speak, their behaviour mutates. Instead of trying to opt-out of the procedure (which preference law seeks to redress, see §2.1), they might try to advance their own interest by frustrating or simply threatening to frustrate the collective process.

In this paragraph three characteristic insolvency problems in which the law will have to deal with typical anticommons behaviour will be discussed, namely: creditors frustrating reorganisation/composition plans (§4.1), creditors creating nuisance value by filing exorbitant claims (§4.2) and the problem of office-holders' hold out in the case of the insolvency of a group of companies (§4.3).

4.1. Creditors' anticommons behaviour: frustrating reorganisation/composition plans[24]

If all of the components are necessary in order for any of the surplus to be enjoyed, the last holdout can command a high price – and, perceiving this, each fragment-holder will strive to be in that enviable position. In such a case it is possible (although by no means certain) that an assembly failure is attributable not to efficient fragmentation but to strategic behaviour.'

[22] See Heller, *The Tragedy of the Anticommons*, p. 658 with references.

[23] D.G. Baird and R.K. Rasmussen, 'Anti-bankruptcy', *Yale Law Journal*, 2010/648. As an abstract of their article they write: '*In large Chapter 11 cases, the prototypical creditor is no longer a small player holding a claim much like everyone else's, but rather a distressed debt professional advancing her own agenda. Secured creditors are more pervasive and enjoy much more control than they had even a decade ago. Moreover, financial innovation has dramatically increased the complexity of each investor's position. As a result of these and other changes, the legal system now faces a challenge that is much like assembling a city block that has been broken up into many parcels. There exists an anticommons problem, a world in which ownership interests are fragmented and conflicting. This is quite at odds with the standard account of Chapter 11 – that it solves tragedy of the commons, the collective action problem that exists when general creditors share numerous dispersed, but otherwise similar, interests*.'

[24] The words reorganisation often lead to confusion since it is not immediately clear whether the aim is to save the legal entity or the enterprise. Here, like in the Principles of European Insolvency Law (see W.W. McBryde and A. Flessner, 'Principles of European Insolvency Law and General Commentary', in: W.W. McBryde, A. Flessner and S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Kluwer: Deventer 2003, p. 15-89.), reorganisation is understood in a narrow legal sense, as a measure aimed at saving the legal entity. The Principles (p. 66) state the following. '*Reorganisation, as understood in these Principles, is insolvency law reworking the liabilities of the debtor*.'

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Insolvency laws show a tendency towards a more rescue-oriented and reorganisation friendly approach.[25] A prominent element herein is the desire of legislatures to provide debtors with the possibilities to reorganise their debts by means of a formal insolvency procedure using the protection of a moratorium. The most straightforward form of such a possibility is a composition plan. In its most basic form a composition plan offers creditors a certain percentage to be paid on their claim against which the creditor relinquishes the debtor for the remainder of the debt. Often a composition plan is made possible by the infusion of additional funds. Creditors thereby receive a higher percentage of their claim compared to a straight-forward liquidation of the assets followed by a distribution. Such a composition plan can therefore be attractive to creditors.[26]

Throughout Europe, the rules on presenting and accepting a composition plan vary considerably. Almost invariably,[27] legal systems require some kind of creditors' approval. As to the required majorities, a distinction can be made as to a majority in number of creditors[28] and a majority in value of outstanding debt.[29] Under Dutch law, it is required that 50% of the number of unsecured creditors present at the meeting, representing at least 50% of the total outstanding debt vote in favour.[30] German law provides the debtor the possibilities to restructure its debts by means of a so-called *Insolvenzplan*.[31] The creditors can be divided into classes, where the creditors within a class are to be treated equally.[32] For an *Insolvenzplan* to be accepted, it is required that within each class, at least half the number of creditors[33] vote in favour and that the creditors voting in favour represent at least half of the total amount held by all creditors voting.[34] English law sets relatively high thresholds with respect to the creditor's[35] consent, which might be rather surprising in the light of its reputation of a debtor- and reorganisation-friendly regime. A Company Voluntary Arrangement (CVA)[36] requires the approval of a majority[37] of 75% or more in value of the creditors[38] present in person or by proxy and voting on the resolution.[39]

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[25] See for example McBryde and Flessner, *Principles of European Insolvency Law and General Commentary*. See for a change in focus in English law, Finch, *Corporate Insolvency Law*, p. 253-276.

[26] See as a general remark as to the working of a such a plan, in England usually by means of a CVA, A. Keay and P. Walton, *Insolvency Law*, Bristal: Jordans 2008, p. 142. '*The whole idea of pushing through a CVA is usually to prevent the creditors putting the company into winding up. The way this goal is achieved is by offering the creditors a better deal than they would realise in a liquidation*.'

[27] See for exceptions to this, McBryde and Flessner, *Principles of European Insolvency Law and General Commentary*, p. 73.

[28] If the creditors agree, the plan usually needs court confirmation, thereby providing a system of two decision makers; first the creditors and then the court. See for Dutch law, section 145 Fw for creditors' consent and section 150-153 Fw for court confirmation, and for German law sections 248 and 254 InsO. See for exceptions to a court approval, McBryde and Flessner, *Principles of European Insolvency Law and General Commentary*, p. 73.

[29] See for a high level comparison of different jurisdictions Finch, *Corporate Insolvency Law,* p. 291-292.

[30] See section 145 Fw and section 268 Fw. These rather low percentages have been the outcome of a very significant relaxation of the required majorities. Prior to January 15, 2005 (law of 24 November 2004, Stb. 615), it was required that 66,6% in number, representing at least 75% of the total outstanding debt, voted in favour. Creditors not voting, were treated as having voted against. See on Dutch law, Soedira, *Het Akkoord*, Kluwer: Deventer 2011, p. 141 and 142.

[31] See section 217-269 InsO. According to section 217 InsO the content of an *Insolvenzplan* is not limited in any way and can therefore contain any measure. See for an account of the working of these German provisions in the English language, A. Flessner, 'National Report for Germany', in: W.W. McBryde, A. Flessner and S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Kluwer: Deventer 2003, p. 358. There have amendments made since 2003, however, and more amendments are being proposed.

[32] Sections 222-226 InsO.

[33] Following section 247 InsO, the debtor also needs to consent. A refusal can, however, be overruled on the basis of section 247 sub 2 InsO.

[34] Section 244 InsO.

[35] The relative flexibility in English law can, therefore, not be found in creditor's consent, but in shareholder or members' consent if required, such as under a debt for equity swap.

[36] A CVA can be concluded either in conjunction with a formal insolvency procedure, such as Administration and Liquidation, and also outside any formal insolvency procedure. See Keay and Walton, *Insolvency Law,* p. 141-142. The CVA can also take another form than a straight forward

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Where there are rather clear rules as to the thresholds of consent in different jurisdictions, there is little explicit statutory guidance as to the content of these plans. One of the core principles of insolvency law is the *pari passu* treatment of creditors. The problem of treating creditors equally in case of composition plans, is that there is often little incentive for small creditors to consent to a composition plan, or even to bother researching the plan offered. If a certain percentage of creditors is required to vote in favour, it thereby becomes a very difficult endeavour to convince a sufficient number of creditors.[40] A solution is to create classes of creditors, in which small creditors get a higher percentage. So whereas the large creditors with a claim above €1 million receive 15%, the small creditors with a claim up to €100,000 receive, for example, 40%. Composition plans will almost never just be filed and presented as a take it or leave it. Before a final plan is drawn up, there will already be a significant going back and forth and testing the waters with at least some major creditors to see what kind of plan has a good chance of being accepted.

Concerns can be raised as to whether an approach in which creditors receive more than their *pari passu* share is compatible with basic insolvency law principles. However, the prevalent mode of thinking appears to be that flexibility is desirable,[41] especially if it enables distressed debtors to reorganize and save a viable business and jobs.[42] The downside of such an approach is that it fosters hold out problems, indicative of anticommons situations. The relevant question is no longer simply whether the composition plan provides a better total result, but also whether the individual outcome is the best possible one that can be achieved. Why would a small creditor, with a claim of €100,000 be satisfied with 20% payment on its claim, if it believes that large creditors would be satisfied with 15%, and small creditors could negotiate so as to try and receive 40%. The question of the *division* of funds thereby becomes to a large extent separated from the total offer.

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composition plan, in which it is also possible that the creditors get a stake in the company (debt for equity swap).

[37] There is also the proceeding of Scheme of Arrangements. Here a 75% majority in value majority is required. See Finch, *Corporate Insolvency Law*, p. 291.

[38] Shareholders also get to vote at a separate meeting, but can basically be overruled by the creditors. Shareholders can however apply to the court arguing that there is an unfair prejudice or there has been a material irregularity.

[39] See Insolvency Rules 1986 1.19(2). See Keay and Walton, *Insolvency Law*, p. 148. Since this rule alone would make it possible to have creditors connected to the debtor overrule unconnected creditors, Insolvency Rules 1986 1.19(4), provides that at least 50% of unconnected creditors have to support the CVA.

[40] A first response to this, can come from the legislator, providing that majorities are calculated by creditors actually voting. Prior to the 2005 legislative changes (supra note 30), Dutch law required a 75% in outstanding claims. Not only were these percentages lowered to 50%, but equally important, they are now calculated as to creditors actually voting. So absentees are no longer treated as voting against.

[41] The UNCITRAL Legislative Guide, p. 222, is open to dividing creditors into classes but warns to be cautious in doing so: '*Since the creation of different classes has the potential to complicate the voting procedure, it may be desirable only where there are compelling reasons for special treatment of some ordinary unsecured creditors, such as where there is a large number of creditors that lack a common economic interest and the treatment they are to be to be offered under the plan differs*.'

[42] In the underlying report for a new Dutch Insolvency Act (which entire project has, however, been withdrawn by the Minister in 2011), the following is said about the growing practice of paying small creditors in full (Draft Explanatory Notes to a Draft for a New Insolvency Act, published in S.C.J.J. Kortmann and N.E.D. Faber (eds), *Geschiedenis van de Faillissementswet. Voorontwerp Insolventiewet,* Deventer: Kluwer 2007, p. 144 translated): '*It is also possible that the debtor wishes to pay some creditors in full, and that there are good grounds to do so. This might be the case if a large number of private person customers were to be involved, where the amount of their claims would be modest and a limitation of their rights would significantly hamper a continuation of the enterprise*.' Under English law an unequal or differential treatment of creditors in the same class is also not held to constitute unfairness per se, see Finch, *Corporate Insolvency Law*. p. 510 with reference to *IRC v. Wimbledon Football Club Limited* [2004] BCC 638.

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In order to redress harmful anticommons behaviour, the law needs to ensure that a mechanism is in place that overrules creditors that hold out for the wrong reasons.[43] Under German law, courts have this possibility. If the required majority has not been met, creditors' dissent can be replaced by a court decision. The relevant provision has the telling name of *Obstruktionsverbot*[44] (prohibition to obstruct). The explicit goal of the provision is to diminish the nuisance potential of certain creditors trying to frustrate the plan to their own benefit.[45] Under Dutch law, the courts can also overrule a dissenting creditor and substitute the creditors' dissent with a court decision. This is the case if 75%[46] of the creditors (in terms of numbers) voted in favour and the creditors' non acceptance of the composition plan can be ascribed to one or more creditors voting against the proposal, which creditors could, given all circumstances and especially their expected pay out in case of liquidation, reasonably not have voted as they did. These rules can be seen as counterbalancing the relative flexibility of the rules. Notable is the lack of such provisions in case of a CVA in England. Although English courts can refuse to approve a CVA, they do not have statutory powers to overrule dissenting creditors or substitute their dissenting vote by a court order in case the required majorities have not been met.

To frame the problem of creditors holding out in anticommon terms, this leads to the following. The anticommons situation is created by requiring multiple creditors to consent to accept a single composition plan. Assuming the plan provides for a better outcome for the joint creditors as a whole, and even to each individual creditor, there are still significant risks that the offer will be not be accepted, leading to non-use or under-use. Although the joint creditors might benefit from the composition plan, there is a risk that the plan is not realised, because certain creditors are holding out or threatening to hold out, trying to get a larger share, than their *pro rata* share.

Creditors might also hold out or frustrate the collective process for other reasons than trying to seize a larger share compared to what they would be entitled to under a *pari passu* distribution.[47] In their article Anti-bankruptcy, Baird and Rasmussen describe the increasing difficulties[48] to reach to a common understanding among creditors in a Chapter 11 Procedure using the theory of anticommons. One of the problems they discuss is that of creditors wearing a double hat. There is the risk that a creditor, in addition to its capacity as a creditor, has a different and competing interest. From this competing interest, the creditor could actually *gain* from a *failure* of the collective process. The authors provide the example in which a hedge-fund creditor has a substantial investment in a competitor of the debtor and that the competitor would

[43] This is not to say that creditors can simply be said to vote against for the wrong reasons if it can be demonstrated that they will receive less in case of a straight forward liquidation. Especially if the company has been severely overleveraged, there may be good grounds to provide trade creditors with a better treatment then creditors deliberately financing the leveraged structure and thereby taking a more equity like stake in the firm.
[44] Following from section 245 InsO there are three cumulative requirements for the court to overrule a class that voted against. Namely i) the creditors are not worse of under the plan, compared to a liquidation, ii) the debtor itself or entities related to the debtor do not retain value and iii) no creditor which would rank equally with the dissenting class creditors without the plan, would receive more under the plan.
[45] See the explanatory notes to section 245 InsO published in M. Balz and H.G. Landfermann, *Die neuen Insolvenzgesetze*, Düsseldorf: IDW-Verlag 1995, p. 499.
[46] See for a critique on the requirement that 75% in number must have voted in favour, J.M. Hummelen, 'Het faillissementsakkoord. De efficiëntie van de wettelijke regeling onderzocht vanuit het perspectief van creditors' bargain theory', *TvI* 2010/26.
[47] See for economic research into creditor hold-out in German restructuring cases, P. Jostarndt and Z. Sautner, 'Out-of-Court Restructuring versus Formal Bankruptcy in a Non-Interventionist Bankruptcy Setting', *Review of Finance* 2010/14, p. 623-668.
[48] Baird and Rasmussen describe several developments which make it increasingly difficult to come to the acceptance of plans in Chapter 11 procedures, the most important of which are i) claims trading, ii) increased pervasiveness of secured creditors and iii) increased complexity of each investor's position. See for a critique A.J. Levitin, 'Bankruptcy markets: Making sense of claims trading', *Brooklyn Journal of Corporate, Financial & Commercial Law,* 2009/67. He argues that claims trading might facilitate more efficient bankruptcy negotiations and help reorganisations.

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benefit from the debtor's demise. In such a scenario the hedge fund could use its rights as a creditor to slow down and ultimately undermine the reorganisation of the debtor altogether. The loss the hedge fund would suffer in its position as a creditor would be amply compensated by its gain as an equity holder in the competitor. On closer examination, this problem of creditors wearing a double hat, although arguably similar to anticommons problems, should be distinguished from it. In a basic anticommons situation, the fragmented owners find themselves in a situation where their position taken as a group could be better as a result of joint action, but hold out behaviour creates underuse. In a pure anticommons situation the underlying interests are in principle aligned and similar, but the best result is not achieved.[49] The double hat problem is a different one. The double hat turns the interest of some creditors around and against those of the group as a whole. The underlying interests are, therefore, not aligned, but instead opposed. The problem is not so much an 'anticommons' problem, but the problem is one of some owners having a larger interest 'against the commons'.

In working towards the harmonisation of European Insolvency Law, in which process reorganisation plans are high on the agenda,[50] there is not only the need to provide a uniform framework for thresholds as to creditors' consent, but also to have clear provisions in place enabling courts to overrule creditors that are holding out only because they seek to receive a larger piece of the pie offered.[51] In more general terms, creditors' behaviour related to voting on reorganisation plans cannot fully be understood or even generally understood by using the analytical tool of the tragedy of the commons related to a common pool. Creditors' behaviour in voting against a fair market value offer can often better be understood by framing the problem along the lines of anticommons.

4.2. Creditors' anticommons behaviour: nuisance value by filing exorbitant claims

One of the other topics for which the INSOL Europe Report suggests harmonisation is the process of filing and verification of claims.[52] Also at this stage in insolvency procedures, anticommons problems can and quite regularly do present themselves. Here, unlike the case with composition and reorganisation plans, the creditors' consent is not expressly required. Creditors can, however, still hold out in a more active way and thereby block the collective process.

In the process of claim validation, creditors file their claim and if these claims are undisputed, they are by some sort of formal process acknowledged as a valid claim on which distributions will be made. In this process of claim filing, there is the

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[49] See Fennel, *Commons, Anticommons, Semicommons,* p. 41: '*Like the tragedy of the commons, the tragedy of the anticommons makes inefficiency transparent by creating a self-contained system in which participant make themselves worse off.*'

[50] INSOL Europe, *Harmonisation of Insolvency Law at EU level*, p. 16 and 17.

[51] Jackson (*The Logic and Limits of Bankruptcy Law*, p. 214) warns exactly against these distributions, that are in any way different from a distribution following the legal scheme with priority and *pari passu* within a class of creditors. If there are no deviations possible from the normal *pari passu* distribution rules, there is no incentive for hold out and anticommons problems are unlikely to arise. Especially in Chapter 11 procedures, however, the content of a plan can take almost any form. The following quote from Jackson (*The Logic and Limits of Bankruptcy Law,* p. 216) hints already at the anticommons problem that are likely to arise here from: '*The groups, moreover, are negotiating distributional issues in a bilateral monopoly context, and any time this is done there is some danger that the distributional conflicts will interfere with the optimal deployment result.*' More in general, Jackson is extremely critical of the reason why the law should provide for a reorganization procedure, since it is not clear how this reorganization through a Chapter 11 procedure benefits the creditors as a whole.

[52] INSOL Europe, *Harmonisation of Insolvency Law at EU level*, p. 16: '*In order to reduce uncertainty and create equal treatment among the creditors in the different EU Member States, there is an urgent need to harmonize the rules with regard to the filing and verification of claims, i.e. the procedures, time limits, penalties and consequences for failure to comply, information to be provided to creditors etc.*'

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possibility to create nuisance value as a creditor by filing exorbitant claims without any real legal basis.

Imagine debtor X having 4 undisputed creditors A, B, C and D, each for the amount of €100,000. A fifth creditor, creditor E, also has a solid claim of €100,000. Following the liquidation of the assets, there is €400,000 to be distributed. This would give all creditors a handsome pay out on their claim of 80%. At the filing of their claims, creditor E, however, conjures up an exorbitant claim of €10 million for loss of income and other damages. Lacking a settlement, lengthy procedures will follow. Pending these procedures, a trustee is likely to only make distributions making a full reservation for the exorbitant claim of creditor E. Taking into account the claim for €10 million, there would only be a distribution to creditors possible of 3.8%.[53] If the trustee is successful in disputing the claim, leaving costs aside, in maybe 8 years time, the creditors will receive the remaining 76.2% of their claim. In such a case, a settlement accepting a total claim from creditor E of €125,000 might be reached just to get creditor E to withdraw its exorbitant claim.

In filing exorbitant claims without any real merit, creditors can block significant parts of the estate available for distribution. In doing so, the creditor frustrates the collective process. The aim to do so will be to get the trustee to yield into allowing claims at least in part, even though the creditor knows that the claim has no or only very little chance to be upheld court.[54] It is a subtle form of blackmail in the collective process. The great difference with frivolous claims outside an insolvency setting, is that a company has – at least in principle – an infinite lifespan, whereas an insolvency procedure is by its nature finite, and as a basic rule, the shorter the procedure the better. It is exactly the timely finalisation of the insolvency process that is targeted by the filing of exorbitant claims.

The main cause[55] of creditors being able to create nuisance value at this stage is that, although insolvency law is a collective process with swift procedures aimed at facilitating the collective procedure, claim validation procedures are delegated to regular slow civil procedures. Once a regular civil procedure has to be followed, the collective process can come to an almost full stop. This problem presents itself in most jurisdictions. The Dutch Insolvency Act provides that if a claim is disputed by the office holder or a creditor and no consensus can be reached at the claim validation meeting itself, a normal civil procedure is started by the supervisory judge referring

[53] If the claim of € 10 million were to be admitted, the total amount of outstanding debt would amount to € 10.500.000, resulting in a pay out on unsecured claims of 3.8%.

[54] To understand the behaviour of parties in anticommons situations, Fennell, *Commons, Anticommons, Semicommons*. p. 43-44, frames the problem in terms of playing the Game of Chicken. A game in which two cars speed towards each other, and the first, if any, to swerve, loses. Although it is clear that neither party will benefit from a head on collusion, this does not mean that the game will not be played. Here, although creditor E, will not win anything (nor will any other party) if the trustee does not concede, E might still engage in this kind of behaviour.

[55] Another cause is the late timing at which claim validation often takes place. Claim validation, in various jurisdictions usually does not take place until it becomes realistic that there will be sufficient funds to even make a distribution. In the Netherlands this practice of postponing claim validation has developed even against express statutory rules providing otherwise. Although the Dutch legal framework provides for the setting of a claim validation meeting within two weeks after the opening of the insolvency procedure (Section 108 Fw) this often does not take place until many months or even years after the start of the proceedings. See on the issue with references to case law, B. Wessels, *Verificatie van Schuldvorderingen*, Deventer: Kluwer 2010, nr. 3052 and 3053. English practice also does not start the process of claim validation until there is a realistic perspective of being able to make a distribution to creditors. German insolvency practice provides a similar picture. Although the German Insolvency Act provides that already in the decision to open the procedure, a date for a claim validation meeting needs to be set (section 29 InsO), and this also happens, in practice there are often subsequent claim validation meetings. Under both Dutch (section 184-186 FW) and German law (section 177 InsO) creditors can also, as late as at the distribution stage, file a notice of opposition against a distribution list for the reason of being left out. All in all, both the existing legal rules and a subsequent developed legal practice have shifted the moment of claim validation disputes towards the end of insolvency procedures, and it is at this already late stage that lengthy procedures start.

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the case.[56] Since all possibilities of appeals are open to the creditor, a creditor will be able to drag the procedure on for years. Under German law, the creditor must submit a claim to the office holder. There will be a claim validation meeting (*Prüfungstermin*). Both the office holder and other creditors can dispute a claim. Following the dispute, the case has to be litigated in the normal civil courts.[57] The insolvency court is not competent to decide on the merits of the claim.[58] Under English law, in both bankruptcy and winding up procedures,[59] the office holder can dispute a claim after which the creditor can apply to the court[60] to have the decision reversed.[61] Under English law, the dispute might thereby also result in lengthy court procedures.[62]

In cases of exorbitant filing, the tragedy of the anticommons can lead to underuse, at best. The underuse is the late distribution of funds.[63] Although it is in the joint creditors' collective best interest, to come to a swift distribution, the process is delayed unnecessarily. At worst, the opposing creditors or office holder give in to the delinquent creditor in which case it will receive more than its fair share. In framing the problems surrounding claim validation into anticommons notions, the behaviour of parties becomes clearer. It also provides a justification to begin to consider claim validation in terms other than providing the claimant with the greatest possibility to argue its claim in court. Insolvency law should provide for a procedure in which a judge can suspend or terminate claim validation procedures if there is no realistic prospect that the claim will be admitted. A draft for a new Dutch Insolvency Act contained such a provision. In this provision the Supervisory Judge was given the power to decide that a judgment by a district court in a claim validation procedure would not be open to appeal.[64]

4.3. Office-holders' anticommons in case of groups insolvency

Anticommons problems in insolvency do not only arise in situations where it is difficult to align *creditors*. They are also likely to present themselves in cases of group insolvencies, where *office-holders* have to reach consensus as to a joint sale of assets belonging to the different legal entities, also referred to as a package sale.

As to groups of companies, a classical insolvency problem presents itself; namely that of preservation of value where the assets taken together are worth more than sold separately.[65] Take for an example a multinational enterprise, in which the assets are

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[56] See section 122 Fw.
[57] Section 179, 180 InsO.
[58] Flessner, *National Report Germany*, p. 343, 344. See F. Kieβner, in Braun, *Insolvenzordnung*, C,H. Beck: München 2010, comments to § 181 under 3: '*Die Feststellung einer bestrittenen, nichttitulierten Forderung kann nach § 180 Abs. 1 S. 1 nur außerhalb des Insolvenzverfahrens erfolgen*.'
[59] See IR 40.33 and IR 36A.27. In case of an Administration procedure no rules have been prescribed as to how the submission and admission of claims is to be conducted. See Stevens, *National Report for England*, p. 219-220. This is apparently due to the fact that under the old regime, the administrator had no power to make distributions to creditors. Now this is made possible, see Keay and Walton, *Insolvency Law*, p. 133-136.
[60] There is a rule of procedure in IR 4.83. '(3) *Where application is made to the court under this Rule, the court shall fix a venue for the application to be heard, notice of which shall be sent by the applicant to the creditor who lodged the proof in question (if it is not himself) and to the liquidator*.'
[61] Keay and Walton, *Insolvency Law,* p. 530 and Stevens, *National Report for England*. p. 219.
[62] R. Stevens, *National Report for England*, p. 219.
[63] The problem is not only one of delay, but the delay will be translated into a monetary loss as well, since trustees will place the money's of the estate on the safest and therefore lowest interest bearing accounts.
[64] See section 5.3.15 Draft for a New Insolvency Act, published in S.C.J.J. Kortmann and N.E.D. Faber (eds), *Geschiedenis van de Faillissementswet. Voorontwerp Insolventiewet,* Deventer: Kluwer 2007. The entire project has been withdrawn by the Minister in 2011, for reasons nothing to do with this provision.
[65] I. Merovach, 'Towards a consensus on the treatment of multinational enterprise groups in insolvency', *Cardozo Journal of International and Comparative Law*, 2010, p. 371, discusses these package sales and the problem of a group wide reorganization plan: '*This is especially relevant where*

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held by different legal entities. Intellectual property rights might be held by a Germany subsidiary, whereas the production facilities are owned by Dutch and French subsidiaries. In order to have a realistic prospect of preserving the going concern value and coming to a package sale, someone should be able to take the lead and speak on behalf of all office-holders involved while at the same time forcing office-holders into line. The current European Insolvency Regulation does not provide for possibilities to do so.[66] A joint single sale will, therefore, need the co-operation and consent of all local office-holders. Tollenaar writes the following about this process:

> 'Aligning efforts and negotiating a single transaction with multiple liquidators of different nationalities located in different countries, within the limited time available, is a very difficult if not an impossible task. Given the time constraints, a potential investor needs to have only one party, rather than many, to negotiate with and needs to be certain that his counterparty has the power to negotiate the sale of all relevant parts of the business in all of the jurisdictions concerned. In the initial "rescue and realisation phase" of the insolvency, "soft" protocols between multiple independent officeholders are not an effective solution, nor is there sufficient time available to negotiate them. Efforts to rescue the business as a whole need to be centralised under the administration of the same liquidator.'[67]

Although the different insolvency estates together would benefit from a swift sale of the entire enterprise, procedural hurdles and lack of consensus as to what constitutes a fair distribution of the proceeds are all too likely to stand in the way of reaching a deal. A deal which might be struck relatively easy if all the assets where held by a single officeholder. The office holder of the subsidiary holding the IP rights, might argue that without IP rights, there cannot be any manufacturing and value to start with, whereas the officeholders of the subsidiary owning the production facilities, might argue that these are the only assets with any real value. Each office holder will be naturally inclined to argue that 'its' part of assets to be sold should be awarded a bigger portion of the proceeds.[68] The incentives of the non co-operative office holders or office-holder holding out will not, or not in the first place, be simple greed.[69] There will also be a real fear of personal liability for each individual office-holder that he did not achieve the best result possible.

The underlying problem is again an anticommons problem.[70] Prior to formal insolvency, the owner of the dispersed assets is a functioning single economic unity.

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the enterprise group conducted a single business – so that the whole is worth more than the aggregate of its parts.'

[66] The European Insolvency Regulation is so drafted as to apply to single legal entity debtors and contains no provisions on groups of companies. See in general on the tension between group insolvency and enterprise law, Mevorach, *Towards a consensus on the treatment of multinational enterprise groups in insolvency*, p. 374-3755. See on the problematic application of the European Insolvency Regulation to groups of companies, B. Wessels, 'The ongoing struggle of multinational groups of companies under the EC Insolvency Regulation', *European Company Law* 2009/4, p. 279-286. Many suggestions, both for current practice and for future rulemaking, are made to overcome this problem. See N.W.A. Tollenaar, 'Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation', *TvI* 2010/14 with references.

[67] N.W.A. Tollenaar, 'Proposal for Reform: Improving the ability to rescue multinational Enterprises under the European Insolvency Regulation', *IILR* 2011/3.

[68] Of course, the most practical solutions would be to separate the discussion about the sale from the subsequent division of the proceeds, and place the proceeds on a secured account until consensus has been reached. However, there are also no clear mechanisms in place which could force office-holders to join in such an approach.

[69] Systems in which trustees receive a percentage of the liquidated assets, provide however for a personal interest of the trustee. Such a system is only likely to exacerbate anticommons problems, since it aligns the interests of the office holder too much with the individual estate and will make it more difficult to have all officeholders join forces to come to greatest common good.

[70] One might easily mistake the problem to be similar to the problem preference law seeks to deal with, namely a common pool problem, where the aim is also value maximization. With preference law, the

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Although prior to insolvency, the group consists of separate legal entities (the group companies), the ultimate parent had it within its powers to have all subsidiaries act in concert. Upon insolvency, the economic single estate of the group-debtor is broken down into as many different owners as there are legal entities. Here the problem is likely to translate itself in underuse. The underuse consists of foregoing an all-encompassing deal maximising value. In its Report on Harmonisation of European Insolvency law, INSOL Europe presses for legislative intervention to provide the (ultimate) parent's liquidator with strong powers in relation to (foreign) insolvency procedures of subsidiaries.[71] Attempts to overcome the anticommons problems inherent in breaking down the economic unity of a group of companies are to be welcomed.

5. **Conclusion**

Insolvency law has finally become a field of law for which harmonisation at a European level is considered both important and feasible. Topics that are deemed apt for harmonisation include preference law, rules on reorganisation/composition plans, claim validation rules and insolvency of groups of companies. In deciding upon the content of such harmonized rules, there will need to be a common understanding about the goals of these rules and therefore a European debate on bankruptcy theory.

Insolvency proceedings are by their nature collective processes. Thus far, bankruptcy theory has focussed almost exclusively on common pool problems and viewed insolvency as a set of rules overcoming these common pool problems. In doing so, it has almost completely overlooked anticommons problems. Insolvency procedures, however, have to be viewed as sometimes dealing with common pool problems and sometimes having to overcome anticommons problems. Anticommons problems introduce themselves because creditors are locked into this collective procedure.

The effect of bankruptcy theory being blind to anticommons problems is, first of all, that it fails to provide a full understanding of parties' behaviour. Much worse, however, is that where anticommons behaviour goes unchecked, this will be to the detriment of the joint creditors as a whole. Insolvency is a collective procedure and this process may not be sabotaged by a single party. Insolvency law should, therefore, be careful not to provide individual parties with either a legal or a *de facto* blocking right. If an anticommons situation presents itself, there should be a swift procedure to remove such a blockage. As to acceptance of reorganisation and composition plans, courts should have strong powers to overrule dissenting creditors holding out for the wrong reasons. In dealing with claim validation, there should be the possibility of a judge intervening by stopping or preventing lengthy claim validation procedures. In overcoming anticommons problems in the case of insolvency of groups of companies, rules should be provided enabling one office-holder to take the lead and force others into line.

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risk is the early dismemberment of a debtor. The problem of reaching a package sale, is not the dismemberment, but the unwillingness of putting something back together: the group company, which was broken down by the opening of insolvency procedures.

[71] INSOL Europe, *Harmonisation of Insolvency Law at EU level*, p. 24 provides the following suggestions in addition to the opportunity to submit proposals on the liquidation or the use of assets of the subsidiary by the liquidator in the main proceedings of the ultimate parent company. The liquidator in the ultimate parent's main proceedings should also have a right to request the court that opened the subsidiary's proceedings to stay the process of liquidation in whole or in part, or stay the process of reorganization in whole or in part, in the interests of the group as a whole. Furthermore, the liquidator of the ultimate parent's main proceedings should have a right to propose a plan with respect to a subsidiary and request the court in the subsidiary's main proceedings to suspend any right to propose a plan with respect to that subsidiary on the same basis.

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