Recent Developments in European and Greek Insolvency Law

George V. Bazinas
OUTLINE

I. SCOPE ................................................................................................................................................................. 1

II. EMERGING TRENDS IN EUROPEAN INSOLVENCY CONCEPTS ................................................................. 1
   A. CENTRE OF MAIN INTERESTS IN THE CASE OF GROUP FAILURES ..................................................... 1
   B. THE MG ROVER CASE ............................................................................................................................. 5

III. ANTI-SUIT INJUNCTIONS .................................................................................................................................. 6

IV. LIFTING THE VEIL AND CREDITOR PROTECTION UNDER GREEK LAW ........................................... 8
   A. THE POSITION AFTER ÜBERSEERING ........................................................................................................... 8
   B. THE CORE PIERCING THE VEIL DOCTRINE ............................................................................................... 9

V. CONCLUSIONS .................................................................................................................................................... 10
I. **Scope**

(1) It has indeed been a turbulent year for international insolvency lawyers and international insolvency law, as major cross-border cases tested (and continue to test) just how efficient the solutions available in cases of cross border and group failure under the current laws of a number of different states involved.

(2) It is perhaps a source of relief that none of the major cases involved Greece, and there is, therefore, little of truly international interest to report by way of cases imminent or pending. However, developments elsewhere in Europe continue to shape European and Greek insolvency law, and therefore this presentation will seek to touch upon four such issues: harmonisation of certain concepts in European insolvency law, emergent trends with respect to group insolvency, the tenability of anti-suit injunctions and the emergent reshaping of creditor protection under Greek law under the lifting the veil doctrine in corporate insolvencies.

II. **Emerging Trends in European Insolvency Concepts**

A. **Centre of main interests in the case of group failures**

(1) It is commonplace that, in respect of legal entities, the concept of “centre of main interests” adopted as the exclusive jurisdictional basis for the opening of main insolvency proceedings under the EU insolvency regulation (Art. 3§1) corresponds to the “actual” or “real” seat of legal entities.  

(2) This concept has been traditionally used in civil law jurisdictions as the connecting element in corporate conflict rules for determining the law applicable to corporate entities, and a lot of ink has been shed for the conceptualisation of the problems of locating the “centre” of a corporate organisation, and for arriving at tractable criteria for determining where that

---

1 See *Fletcher in Moss, Fletcher, Isaacs*, The EC Regulation on Insolvency Proceedings, Oxford University Press, Dec. 2002, §3.10; *id.*, “European Union Regulation on Insolvency Proceedings”, Collier International Business Insolvency Guide (rel. 8/03), Ch. 43, §43.02.2.

is under all conceivable scenarios.

(3) The historical point of departure for the development of the actual seat doctrine was the Savignian “most significant legal relationship” doctrine (postulating that a legal entity should be governed by the legal order predominantly affected by its activity)\(^3\). Thus, although criteria such as the location of a central establishment, productive facilities, or the location indicated as its “centre” by the legal entity concerned itself, have been contemplated\(^4\), they are ultimately displaced by the principal criterion, being the centre of administration of the entity’s affairs\(^5\), or “the place where the management office and the organs representing the company are engaged in business [...] the place where fundamental decisions of the management and control office are taken and effectively carried out”\(^6\).

(4) The Preamble to the Regulation that the COMI should “correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”\(^7\). In line with the above, several judgements applying the Regulation have given precedence to such an ascertainable place, out of which a legal entity is effectively managed, and where its main legal relationships develop\(^8\).

(5) However, the position is much more perplexed, both conceptually and practically, in the case of groups of companies. As the law presently stands, there are no European law rules on group insolvency, nor equivalent national law rules in most (if not all) EU Member States. Specifically as regards the Regulation, it is observed that the problem of group insolvency is not addressed, but rather deferred to future legislation\(^9\), possibly contingent on

---

\(^3\) Rammelloo, loc. cit, p. 177 et seq.

\(^4\) And, on occasion, applied over other “formal” criteria, such as the place of incorporation.

\(^5\) Under Greek law there is a long series of Supreme Court judgements confirming this rule: SC 171/1907; SC in plen. 461/1978; SC in plen. 2/1999; also the sequence of judgements on the MTI bankruptcy, Athens CA 2735/2000, aff’d SC 335/2001, aff’d SC in plen. 2/2003.

\(^6\) Rammelloo, loc. cit, p. 179, citing several German Supreme Court judgements.

\(^7\) Recital 13 of the Regulation, reflecting the wording of §75 of the Virgos-Schmit Report.

\(^8\) [Parmalat – Eurofoods]

\(^9\) The Virgos-Schmit Report, §76 states: “The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity [sic]. Naturally, the drawing up of a European norm on associated companies may affect this answer”.

2
the development of a European norm of connected companies. Thus, the rule is that jurisdiction must be confirmed *independently* for each group member, regardless of the procedural possibility of practically consolidating separate proceedings (e.g. by joining respective trials) opened against several group members.

(6) The position is more or less the same under German conflict rules\(^{10}\): regardless of the control exercised or instructions given by a parent company, each group member is governed by its own proper law, determined independently, *i.e.* by a separate application of the actual seat doctrine.

(7) The conclusion is, therefore, that at least for the purposes of insolvency law a “group” of companies is presently not a valid legal concept under any system of rules in Europe. There can, accordingly, be no “group COMI” or “group seat”, so that these must be sought and identified separately for each group member. More important, in determining a group member’s COMI the *control exercised or instructions given* by an immediate or ultimate parent are far from decisive: it is the group member, *not* the “group as a whole”, which must have its centre of main interests with the forum concerned. Finally, it is the group member’s “interests”, not the interests of the group as a whole, which must be considered for determining that member’s COMI.

(8) Interestingly, the point regarding control exercised and instructions given by an ultimate parent is stressed in the Eurofoods judgement of the Irish Supreme Court\(^{11}\), which was asked to contemplate this, among other things, as grounds for finding that Eurofoods’ centre of main interests coincided with that of its parent, Parmalat SpA, and therefore the presumption of Art. 3§1 of the Regulation should be rebutted.

(9) The Court was specifically asked to consider five facts as grounds for the rebuttal of the presumption of Art. 3§1: that Eurofoods was a wholly-owned subsidiary of Parmalat; that its sole object was the provision of finance for companies in the Parmalat Group; that it had no employees in Ireland; that its obligations to noteholders was guaranteed by Parmalat; and, most importantly, that *its policy was decided at Parmalat headquarters in Italy, by Parmalat executives and the Company exercised no independent decision-

---

\(^{10}\) *Rammelloo, loc. cit.* p. 181; also p. 156 (Switzerland).

\(^{11}\) *Eurofoods IFSC Limited, Re* [2004] IESC 47. Eurofoods is one of the Parmalat insolvency cases.
making function.

(10) In rejecting control by the parent as a criterion for locating Eurofoods’ centre of main interests, the court used strong language aptly identifying the far reaching effects of such a decision:

“...These submissions are of a very far-reaching character so far as the fundamentals of company law are concerned. It is perfectly normal and to be expected that subsidiary companies in a group will pursue and give effect to group policy. Parent companies form subsidiaries either in their own states of incorporation or in other states for a wide variety of business, commercial and tax reasons. Those subsidiaries are required to respect the now very complex legal, financial and regulatory regimes of their states of incorporation. It seems to this Court to be deeply inimical to the need for respect for corporate identity and respect for the rules of law (including Community law rules) relating to companies that the separate existence of such companies should be ignored.”

Of particular importance, in the present case, is the compelling evidence placed before the High Court and this Court, which demonstrates the very serious extent to which the principal, indeed the only, creditors relied on legal and financial advice that the Company was a company incorporated in Ireland at the IFSC and subject to all the controls and regulation that that entailed. It would have very serious implications for the future of international corporate structures if it were to be accepted that the test for centre of main interests were to be ultimate financial control by a parent company rather than legal and corporate existence.” (emphasis added)

(11) In my opinion, the Court correctly identified the incompatibility between accepting control by a parent undertaking as a test for locating the centre of main interests, and the respect for the autonomous legal existence of each subsidiary. The conclusion must, therefore, be that parent control is not a legitimate element for locating the centre of interests of a subsidiary undertaking.
B. *The MG Rover case*

(1) Against the backdrop delineated above, it is interested to consider some of the implications of the MG Rover insolvency.

(2) On April 8, 2005, MG Rover Group Limited was placed under administration in the United Kingdom, *together with eight of its European subsidiaries*¹² (and other companies of the Phoenix Group). There is an inexhaustible amount of general information presently available from the various financial news sources, and I have yet not had the opportunity to review the respective court orders.

(3) However, it is evident that the case is breaking new ground, although not necessarily in a correct direction, by apparently premising UK jurisdiction to open main insolvency proceedings in respect of foreign subsidiaries on concepts of “group” COMI and interests.

(4) Under accepted COMI and real seat doctrine, this may be tantamount to a misapplication of the rules. It is beyond doubt that each of these subsidiaries was a perfectly valid company in their respective territory, with a substantive physical presence, ascertainable establishments, a nexus of legal relationships, assets and liabilities, and organs legally appointed to represent each company and effectively conduct its administration, regardless if in doing so they complied with a parent-devised general plan and strategy, or the degree of control effectively exercised by such parent. It is therefore more likely than not that the COMI of each subsidiary could easily be located within its respective European country.

(5) It is to my mind clear that parties dealing with MG Rover Deutschland GmbH would address the company at its German head office (in fact the current English administrator *instruct* German parties to address the company at its German headquarters!), before the courts of which ordinary creditors would also sue. Any lawyer contemplating to get at the UK parent undertaking would depart from the position that valid grounds for *lifting the veil* of the German subsidiary are without question an indispensable prerequisite.

(6) Therefore, from the viewpoint of civil law jurisdictions, it is likely that the opening of main insolvency proceedings against these “genuinely” (not

pseudo-) foreign subsidiaries amounts to a finding that (a) their real seat is in fact in the UK in the sense that the affairs of each subsidiary, not of the group, are managed in the UK, and/or (b) that their veil should effectively be pierced inasmuch as they have no separate management or interests, being nothing more than the alter ego of the UK parent undertaking in their respective territories. A necessary corollary would be to enable the lifting of their veil *in* their respective territories, and the ascription of direct liability to the UK parent for the obligations of each subsidiary.

(7) Thus, the very idea of group insolvency at the territory of the parent company under the Regulation appears to question the very viability of the principle of autonomy of each group entity, and therefore the rationale of operating through subsidiaries, rather than branches, as a means of limiting risk and exposure for the parent undertaking. This is exactly the point made by the Irish Supreme Court in *Eurofoods*, but which appears to have fallen through with the English court, which opened administration proceedings for the MG Rover non-UK subsidiaries in England.

(8) I suspect the Rover case will fuel extensive discussion of these issues across the EU, since it is likely to have a significant spill-over effect in many areas of non-insolvency law. As practical matter, however, the developments indicate a trend to concentrate group insolvency proceedings in the parent’s forum, a trend of obvious significance for all international groups with a European ultimate parent: the Rover case is clearly not a “strictly European” affair.

### III. ANTI-SUIT INJUNCTIONS

(1) In the legal orders which provide this remedy, there is a long and heated discussion about the legitimacy of anti-suit injunctions in a non-insolvency context, and the conditions of its reconcilability with concepts of international comity.

(2) In a very recent judgement¹³ (*Turner v. Grovit*) the European Court of Justice ruled anti-suit injunctions in general *incompatible* with the 1968 Brussels (Judgements) Convention, and therefore with its successor, Brussels

---

¹³ ECJ C-159/2002 *Turner v. Grovit*. As of this writing, the judgement has not been published in the ECR series. Its text, however, may be found on the ECJ’s website (www.curia.eu.int).
I Regulation\(^{14}\), by an unqualified ruling that “the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings”.

(3) The point of departure for the Court’s finding was the principle of mutual trust between the Member States and their judicial institutions, long established in the Court’s jurisprudence, and the concomitant respect for each other’s jurisdiction under the set of rules set forth exclusively under the Convention:

“24. [...] the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments (Case C-116/02 Gasser [2003] ECR I-0000, paragraph 72).”

“25. It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them (see, to that effect, Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 23, and Gasser, paragraph 48).”

“27. However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.”

(4) It would appear, then, that all of the above points are equally valid in the event of insolvency proceedings opened under the Regulation. It is accepted wisdom that the Regulation prescribes a complete and exclusive system of

direct jurisdictional rules (rather conflict rules), which displace respective rules of domestic law. Further, insolvency proceedings opened in a Member State are recognised automatically throughout the EU, and therefore legal consequences such as the stay of action apply immediately, as of the opening of insolvency proceedings.

(5) It would therefore appear that anti-suit injunctions are equally incompatible with the regime established by the Regulation, for at least two categories of reasons: firstly, because of the precedent set in Turner and on the grounds given therein; secondly, insofar as this might interfere with the universal effect of main proceedings and their automatic recognition throughout the EU.

IV. LIFTING THE VEIL AND CREDITOR PROTECTION UNDER GREEK LAW

A. The position after Überseering

(1) It is by now common knowledge in Europe that the actual seat doctrine can no longer be employed to deny the legal personality of EU-incorporated entities actually seated in a different Member State than that of their incorporation. This was held in the well known ECJ judgement Überseering. For countries, such as Greece, which have traditionally relied on the actual seat doctrine to extend liability (in both insolvency and non-insolvency cases) to shareholders and directors, this has called for a reorientation of creditor protection mechanisms.

(2) Under the relevant conflict rule of Greek law, the capacity of a legal entity is governed by the law of its actual seat. Therefore, since such entities will normally not have complied with domestic incorporation requirements and procedures, they are not recognised as foreign corporate entities, but by legal fiction treated as constructive de facto unlimited liability (general)

---

15 See Recital 8 to the Regulation. See also Moss, Fletcher, Isaacs, loc. cit. §3.08: “[T]he jurisdictional rules in Article 3 […] operate in an exclusive manner, and do not merely generate an additional basis of jurisdiction to operate in parallel with national rules”.

16 Case C-208/00, ECR 2002, p. 0000, on referral by the German Federal Supreme Court, Beschluß vom 30. März 2000, VII ZR 370/98.

17 Art. 10 Civil Code.
partnerships between their purported shareholders and board members. Provided such entities engage by profession in commercial activity, they are deemed to be merchants and the constructive partners incur unlimited personal liability and automatically join the partnership in bankruptcy.\textsuperscript{18}

(3) This mechanism for “topping up the estate” and averting losses to creditors due solely to financial engineering and complex group structuring, being a variant of the lifting-the-veil doctrine, is no longer available in respect of EU-incorporated entities, since these may not, by reason of their incorporation elsewhere, be denied legal personality and treated as unlimited partnerships.

B. \textit{The core piercing the veil doctrine}

(1) Arriving at the same result, therefore, now requires recourse to the core lifting-the-veil doctrine. Under Greek law this is based on a combination of legal concepts and statutory provisions, essentially prohibiting the \textit{abuse of legal personality}.

(2) The concept of abuse is predominantly defined by reference to Art. 281 of the Greek Civil Code, which prohibits the exercise of any private right if it exceeds the limits posed by good faith and the \textit{boni mores} or the social or economic purpose, for which the right is established. In the context of the lifting-the-veil doctrine, abuse would amount to the use and invocation of the separate legal existence of a legal entity for purposes disapproved by the legal order.

(3) According to the dominant position in the jurisprudence, the capacity of sole (\textit{a fortiori}, of main) shareholder is not sufficient grounds to support a finding of abuse\textsuperscript{19}. A number of judgements, applying somewhat elliptic reasoning, have concluded that piercing of the veil is possible if a shareholder is “a sole or main shareholder, so that the continuation of the company’s business depends on that person’s participation”\textsuperscript{20}. By improvement on this reasoning, a sole shareholder must actually \textit{command} the activity of the company\textsuperscript{21}.

(4) As a rule, however, it is accepted that the holding of shares alone (by a

\textsuperscript{18} See the judgements cited in footnote 5 supra.
\textsuperscript{19} SC in plenary 5/1996.
\textsuperscript{21} Piraeus CA 70/1996.
natural person or parent company) is not sufficient for attributing the consequences of legal acts of a company to the shareholder; *additional facts*, such as the use of the subsidiary as a straw-man, while negotiations and agreement are conducted with the parent, may warrant the lifting of the company’s corporate veil\(^22\). Such additional facts must positively indicate intent to circumscribe rules of law, which would normally be applicable, to avoid the performance of obligations, or unlawfully prejudice the rights and interests of third parties\(^23\).

(5) Thus, the use of a corporate entity as a “straw-person”, the parallel conduct of similar activity in a person’s own name or conduct creating a reasonable expectation that the actor intends to be personally liable, as well as undercapitalisation and the mixing of parent-subsidiary (or personal-company) assets, have on occasion been accepted as facts, which may support a finding of abuse.

(6) It is, therefore, now necessary, when attempting to pierce the veil of a corporate entity, to invoke such specific facts, evidencing conduct which constitutes abuse.

V. **CONCLUSIONS**

Of the present developments in European insolvency law, the discernible battle between conflicting views on the meaning and function of the concept of COMI in the case of group failures is by far the one with the most significant and far reaching consequence. It at the same time, rapid developments in other areas of the law affect the tactical options available in cross-border insolvencies, and necessitate a rethinking of strategies traditionally employed.

---

\(^22\) Athens CFI 9291/1993 (Calcestruzzi case); Piraeus CFI 1673/2003.

\(^23\) Piraeus CFI 1673/2003. In Thessalonica CA 724/2002, it was held that each member of a group of companies is jointly and severally liable for the payment of wages and severance indemnities to employees employed alternatively by each group member without any change of the actual object of employment.