

## BOOK REVIEW

### **Financing Company Group Restructurings**

*Gregor Baer and Karen O'Flynn (Editors)*

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In this important and highly informative new insolvency law volume edited by Gregor Baer and Karen O'Flynn (Co-Chair and Co-Senior Vice-Chair, respectively, of the IBA Insolvency Section), the reader is provided with an in-depth, comprehensive and sophisticated discussion and analysis of an increasingly significant issue in insolvency law as that issue plays out in many different jurisdictions around the globe.

Specifically, this volume addresses the issue of how a group of related corporate entities (namely, a corporate group) can be provided with financing when one or more members of the corporate group are experiencing financial distress and undergoing a restructuring, such as through an out-of-court workout process or a judicially-supervised reorganisation proceeding.

This excellent volume covers 25 different jurisdictions from many regions of the world, with a separate chapter devoted to each of the individual jurisdictions. The volume consists of thoughtful and insightful contributions from a very distinguished and impressive group of leading practitioners from each of the respective jurisdictions.

In tackling the subject of the financing of corporate groups, the volume recognises several crucial realities in contemporary insolvency law and practice. First, businesses these days often operate through corporate groups and not just through individual, stand-alone companies. Thus, as reflected most dramatically in high-profile insolvency cases like *Lehman Brothers* and *Nortel* but also as manifested in many more typical and less complex situations, insolvencies often involve corporate groups and not just single-entity corporate debtors.

Second, the availability of so-called rescue financing for distressed enterprises, whether provided prior to or subsequent to the commencement of an insolvency proceeding, can be determinative as to whether a single company, on the one hand, or a corporate group, on the other, can remain afloat during the period in which the company or corporate group is undergoing a restructuring. Without the availability of such rescue financing, the financially distressed company or corporate group could end up being liquidated. Nonetheless, from a legal standpoint, financing for a corporate group is a much less straightforward subject than financing for a single company debtor.

Third, corporate groups, especially corporate groups of a certain size, often operate internationally, and, thus, for purposes of insolvency law and practice,

one needs to have a firm grasp of the rapidly evolving area of cross-border insolvency law. In this context, the subject of financing for multinational corporate groups – ie, where the corporate group has group members in two or more different jurisdictions – can raise very challenging, and possibly even novel, issues of cross-border insolvency law and not merely issues of domestic insolvency law.

As the volume's chapters on individual jurisdictions make abundantly clear, the legal issues related to the financing of corporate groups may consist of both insolvency law and non-insolvency law components. The relevant insolvency law issues may run the gamut from matters such as the priority, if any, afforded to post-commencement financing to questions of substantive consolidation and procedural consolidation (or joint administration) to myriad other issues such as the availability of avoidance actions for preferences and fraudulent transfers, the treatment of intra-group guarantees (namely, upstream, downstream, and cross-stream guarantees), and the doctrine of equitable subordination.

The volume also underlines the importance of non-insolvency law matters as a crucial part of any legal analysis conducted with respect to the issue of the financing of corporate groups. As the volume illuminates, the financing of corporate groups can implicate major areas of non-insolvency law, including corporate law, secured transactions law and lender liability law.

In the area of corporate law, a key issue associated with the financing of corporate groups relates to the duties and obligations of directors of individual companies comprising a corporate group. For example, an issue may arise as to whether the directors of a solvent company in the corporate group are properly discharging their fiduciary duties if and when they take actions on behalf of the solvent group member that benefit an insolvent member of the group (eg, pledging security or giving a guaranty in favour of a third-party lender, etc). Separately, directors of insolvent companies may also need to be cognisant of their duties and obligations when they take (or do not take) actions as the company in question enters a 'zone of insolvency'.

Depending on the particular jurisdiction in question, a breach of a director's duties and obligations in the insolvency law context could, under certain circumstances, result in civil liability – and, in some jurisdictions, even criminal liability – for the offending directors. Obviously, then, in light of these potential liability issues, the issues related to the obligations and duties of directors will be of more than passing interest to directors and their advisers.

One of the unique strengths of this volume is that the contributors place their respective discussions of financing corporate groups within the broader context of the individual insolvency laws of the various jurisdictions that are examined in this volume. Therefore, even though the contributors discuss the specific provisions in the respective insolvency laws that govern the financing of distressed enterprises, they do not limit themselves to simply discussing those provisions.

In that way, the reader can gain a more thorough and detailed understanding of the relevant insolvency mechanisms and key insolvency principles and

concepts in the various jurisdictions. The issue of financing corporate groups is best analysed against this more complete backdrop of the broader insolvency framework of the individual jurisdictions.

The reader will come away with very practical and detailed knowledge about the idiosyncrasies that may exist in the insolvency laws of certain jurisdictions. For instance, the reader will learn which particular jurisdictions favour the ring-fencing of domestic assets for the benefit of domestic creditors or which favour certain creditor constituencies (eg, employees) in the ranking of creditor priorities as a means to achieve certain social policy ends in the insolvency process.

Such jurisdiction-specific features are very important for insolvency stakeholders and insolvency practitioners to bear in mind and, indeed, to thoroughly understand. Such jurisdiction-specific features can affect, for example, the willingness of foreign lenders to provide rescue financing to members of a corporate group where the corporate group members that would be receiving the financing are located in jurisdictions with features in their insolvency law that the lenders may consider potentially unfavourable if the corporate group members who are the respective borrowers ultimately enter insolvency.

As a concluding chapter, the volume contains an unexpected bonus: a stimulating and incisive overview essay by volume co-editor Gregor Baer on the topic of international insolvency law reform efforts – past, present and even potential future efforts – that bear on the subject matter of financing corporate groups, including in the cross-border context. From an international standpoint, the original parameters in the areas of post-commencement financing, corporate groups and cross-border insolvency were set forth in international instruments and texts such as those promulgated by the United Nation Commission on International Trade Law (UNCITRAL) and the World Bank.

Nonetheless, as the volume's concluding chapter elucidates, the international community continues to grapple with these matters with the aim of developing a more comprehensive and unified international legal framework for addressing these issues – ie, the law reform efforts in these complex but interrelated areas are very much a 'work in progress'.

Finally, it should be noted that the volume contains a useful table of cases as well as a helpful table of relevant insolvency legislation, in each case organised jurisdiction-by-jurisdiction and with cross-references to the corresponding pages in the volume. In addition, the volume contains a very thorough index organised by substantive insolvency law topics as well as by the specific jurisdictions covered by the volume.

In sum, this volume will be an immensely valuable and timely addition to the bookshelf of insolvency law practitioners who confront the complex issues associated with the financing of corporate groups experiencing financial distress and undergoing restructuring. It will be of special value to insolvency

practitioners engaged in cross-border insolvency matters, as they seek to understand how a particular foreign jurisdiction might address a domestic corporate group insolvency arising within that specific foreign jurisdiction or how multiple foreign jurisdictions might address a multinational corporate group insolvency arising across several different jurisdictions.

Thus, insolvency practitioners will want to keep this volume close at hand since the topic of financing both domestic and multinational corporate groups is likely to become an ever-more salient feature of the insolvency landscape in the coming years.

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