Henry Peter

Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How?

Contents

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Abstract

This paper briefly discusses the problem of assigning liability among members of a group of related companies when one or more of them becomes insolvent. The issue is common and important, as business structures composed of several related companies tend to be the rule, especially in multi-national business. The traditional "atomistic" approach is unsatisfactory: it privileges form over substance; ignoring the existence of the group, it considers that each one of its components is a separate and autonomous legal entity. This paper thus explores the consolidated approach, which treats groups of related companies as a single entity, either for general liability purposes or for procedural convenience, and the variety of tests that might be applied in choosing whether and to what degree to do so.

I. The Issue

It is well-known that, with increasing frequency, the activity of any enterprise is no longer conducted through a single legal entity, but through a more or less complex web of related corporations, each formally having its own assets and liabilities (i.e. estate).[1] This is true not only for "national" businesses, but even more so for enterprises whose components are spread out internationally which, in a world of increasing globalisation, tends to be the rule.[2]

The reasons for adopting a group structure are manifold. They range from management efficiency to tax planning, and include compliance with national legislation and/or historical factors.[3] In recent years separate entities – so called special purpose entities or vehicles – have been set up in order to disso-

[1] David A. Skeel, Groups of Companies: substantive consolidation in the U.S., *infra* this volume.

[2] Roland von Büren, Der Konzern – Rechtliche Aspekte eines wirtschaftlichen Phänomens, Basel 2005, p. 551; Stephen Taylor, Practical difficulties in handling group insolvencies, *infra* this volume; Henry Peter, From Atomism to Consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 87 seq.; Henry Peter/Francesca Birchler, Les groupes sont des sociétés simples, SZW/RSDA 1998, p. 114; Hans Hanisch, Grenzüberschreitende Insolvenz, in International Symposium on Civil Justice in the Era of Globalization, Tokyo 1993, p. 341 seq.

[3] Eric A. Webber, Consensual Substantive Consolidation: Comments on the Working Papers of Professor Skeel and Dr. Staehelin, *infra* this volume.

ciate specific assets from general liabilities, the purpose being to raise funding under more favourable conditions.[4]

Although in some cases these reasons could be criticised, they are usually perfectly reasonable and fair, sometimes even imposed by sound business management.[5] Tax authorities may be dissatisfied, but they have developed their own weaponry to fight against inadequate inter-company transfer pricing or hidden dividends so that it is generally considered that their concerns are adequately taken care of.

As long as a group of companies remains solvent, the fact that – and the manner in which – it is formally divided into several corporations is not an issue. Often this is even ignored by third parties, who are under the impression that they are dealing with the group as a whole. However, if one or more of the components becomes insolvent, the question often arises as to whether and to what extent each of the related companies should really be treated as a separate entity.[6]

The principle is that, regardless of the fact that a legal entity is or not part of a group of companies, if insolvency occurs it is traditionally considered a stand-alone body, solely liable for its own debts with only its own assets.[7] Adopting a rather schizophrenic stance, it is thus ignored that during its lifetime the company was part of a larger economic entity and has always been treated as such. This "atomistic" approach leads to the separate liquidation of the estates of each of the group entities, some of which may be bankrupt, while others remain solvent. This often triggers a fierce battle over the formerly unified estates. The arsenal at the parties' disposal ranges from contractual to extra-contractual, tort, fraudulent conveyance (*pauliana*), mismanagement,

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4 Webber, *id*. In respect of so called securitisation see in particular Steven L. Schwarcz, Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures, 70 (2002) U. Cin. L. Rev., p. 1314 and 1315 and Steven L. Schwarcz, Collapsing Corporate Structures: Resolving the Tension Between Form and Substance, The Business Lawyer 60 (2004), p. 115 seq.

5 von Büren, *supra* footnote 2, p. 84 seq.; Taylor, *supra* footnote 2; Louis Dallèves, Problèmes de droit privé relatifs à la coopération et à la concentration des entreprises, ZSR/RDS 1973, Heft. 2, p. 598 seq.; Peter/Birchler, *supra* footnote 2, p. 118.

6 von Büren, *supra* footnote 2, p. 585 seq.; Taylor, *supra* footnote 2; Dallèves, *supra* footnote 5, p. 601 seq.; Peter/Birchler, *supra* footnote 2, p. 116.

7 This is subject to very few exceptions, such as, in Italy, the well-known rule according to which the sole shareholder of a limited by share company cannot in substance claim that such company has a limited liability, cf. § 2362 of the Italian Civil Code "*(Unico azionista). In caso d'insolvenza della società, per le obbligazioni sociali sorte nel periodo in cui le azioni risultano essere appartenute ad una sola persona, questa risponde illimitatamente*".

and hidden or fake dividend claims; in certain cases it includes extraordinary means such as "piercing the corporate veil" (in German, "*Durchgriff*") by which the creditors of one company try to gain access to the assets of another.[8]

The inherent limits and deficiencies of this atomistic approach are well-known; considerable time, effort and therefor costs are in particular spent on inter-company claims.[9] Consequently, a substantial part of the overall assets are spent on intra-group battles, instead of benefiting the group's good faith external creditors. Oftentimes claims that could be brought against third parties, in particular the group's former insiders and controlling shareholders, are not pursued, mainly because none of the estates acting individually has the necessary knowledge and/or resources to do so successfully, while acting together their chances of success would have greatly increased. The process frequently lasts years, if not decades – obviously to the satisfaction of the liquidators but detrimental to the well understood interest of the creditors. In extreme cases, the entire substance of the group is consumed without being able to re-construct the estate of each member in the group as it would have been had they been managed at arm's length.

All lawyers are aware of similar cases. Recent examples in Switzerland include Swissair, Erb, Sasea,[10] Omni Holding,[11] Gatoil.[12] The still ongoing BCCI bankruptcy[13] and, some years ago, the Banco Ambrosiano case are other examples, both of which had world-wide implications. Outside Switzerland and more recently, the Enron and Arthur Andersen debacles, Worldcom, and the Italian Parmalat cases also provide striking illustrations.

Historically the "piercing the corporate veil" (*"Durchgriff"*) doctrine[14] has developed in order to overcome the inefficiencies and unfairness of the tradi-

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8 See footnote 14 hereunder.

9 Daniel Staehelin argues that substantive consolidation may also be a source of new conflicts and litigation, since the disadvantaged creditors will certainly not accept such an approach without any resistance. Daniel Staehelin, No substantive consolidation in the insolvency of groups of companies, *infra* this volume, at 10.

10 Henry Peter / Francesca Birchler, Liquidation des groupes de sociétés et consolidation – Enseignements de la pratique récente, SZW / RSDA 1995, p. 123 seq.

11 ATF 123 II 220 = JT 1997 I 242 = SJ 1998 277.

12 Peter / Birchler, *supra* footnote 10, p. 128 seq.

13 Bank of Credit and Commerce International SA.

14 In Switzerland, Peter Forstmoser, Haftung im Konzern, in Vom Gesellschafts- zum Konzernrecht, Bern 2000, p. 131 seq.; Andreas von Planta, La théorie de la transparence, in Responsabilité de l'actionnaire majoritaire, Zürich 2000, p. 19 seq.; Alexander Vogel, Die Haftung der Muttergesellschaft als materielles, faktisches oder kundgegebenes Organ der Tochtergesellschaft mit einer rechtsvergleichenden Übersicht über andere Konzernhaftungs-

tional atomistic approach. The perspective of this remedy is, however, by definition limited to two separate entities, the creditors of one of them endeavouring to gain access to the assets of another, but not *vice versa*. The difference between such a bilateral approach and consolidation is clear: in the former there is no real pooling of assets or, if any, only a limited and asymmetrical one, as if one entity would have guaranteed the debts of the other, but not the contrary. In addition, the *Durchgriff* can be granted only to single creditors on a case-by-case basis, depending on the circumstances surrounding each such creditor's relationship with the debtor. Fundamentally, this relief thus belongs to the same category as fraudulent conveyance cases (*actio pauliana*) and suffers from the same limitations.[15] To put it simply, it is a remedy which by essence applies to specific transactions between specific parties in favour of specific creditors. It becomes inappropriate, however, or at least unrealistic, in the presence of numerous intra-group transactions. Stephen Taylor makes this point in his paper citing the Enron case where the 3000 companies which composed the group produced over 180,000 transactions amongst themselves![16]

For this reason, and with increasing frequency, stakeholders involved in a group insolvency try to apply to its liquidation the standards which were applied while the group was solvent, namely a *consolidated approach.*[17] This approach has not only been suggested by creditors, but also sometimes by the bankrupt companies themselves (through their trustees) and, in a few cases, has even been imposed by courts.[18]

ansätze, Bern 1997, p. 163 seq.; Roland von Büren, *supra* footnote 2, p. 181 seq.; Lukas Handschin, Der Konzern im geltenden schweizerischen Privatrecht, Zürich 1994, p. 311 seq.; Thomas Carsten Ebenroth, Zum Durchgriff im Gesellschaftsrecht, in SAG/SAS 1985, p. 124 seq.; Markus Dennler, Durchgriff im Konzern, Zürich 1984; Eric Homburger, Zum Durchgriff im schweizerischen Gesellschaftsrecht, in SJZ 67 (1971), p. 249 seq. In the US see *inter alia* Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, 76 (1991) Cornell L. Rev., p. 1036 seq.; Steven L. Schwarcz, Collapsing Corporate Structures: Resolving the Tension Between Form and Substance, The Business Lawyer 60 (2004), p. 111 seq., 199, 136 and 137.

15 von Büren, *supra* footnote 2, p. 585 seq.; Henry Peter, L'action révocatoire dans les groupes de sociétés, Basel 1990, p. 203 seq.

16 Taylor, *supra* footnote 2.

17 Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 89; Peter / Birchler, *supra* footnote 10, p. 129 seq.

18 In *Re Augie/Restivo Baking Co.,* 860 F.2d 506 (2d Cir. 1988), Judge Winter outlines a "test" consisting of two critical factors: *"(i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit (…) or (ii) whether*

Consolidation is the combination of the assets and liabilities of two or more related companies so that they are treated as a single entity. It is the translation in a liquidation or reorganisation scenario of the well known concept bearing the same name in the accounting field. As the academic literature has pointed out, the result of substantive consolidation is similar to that of a merger.[19] Dogmatically, it can be seen as a generalisation or multi-party version of veil piercing.[20] Creditors of the separate incorporated entities become creditors of the consolidated group's estate, sharing in the combined assets with all other group creditors. Claims against two or more pre-consolidated entities become one single claim against the consolidated estate. By operation of the civil-law notion of "confusion", inter-company claims disappear altogether, along with the costs and delays inherent to the atomistic approach. In terms used by Professor Skeel, *"substantive consolidation fully collapses the boundaries among the corporations in a corporate group"*.[21]

Although consolidation has been referred to as a "neglected corner of the law",[22] the topic is not new. It raises questions of both national corporate and bankruptcy law, as well as problems of international law whenever the group is trans-national, which tends to be the rule.[23]

To be clear, we admit that substantive consolidation should not be applied as a general rule; rather, it should be reserved for exceptional cases.[24] It indeed undermines what is probably the most fundamental principle of corporate law: that of limited liability.[25] It would however be unreasonable to take the view that under no circumstances whatsoever should consolidation be

the affairs of the debtors are so entangled that consolidation will benefit all creditors." [cited by Skeel, *supra* footnote 1].

19 Steven L. Schwarcz, Collapsing Corporate Structures: Resolving the Tension Between Form and Substance, The Business Lawyer 60 (2004), p. 114; Elisabeth Kors, Altered Egos: Deciphering Substantive Consolidation, 59 (1998) U. Pitt. L. Rev., p. 381; Christopher W. Frost, Organisational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups, 44 (1993) Hastings Law Journal, p. 449.

20 Skeel, *supra* footnote 1; Webber, *supra* footnote 3; Charles Robert Clark, The duties of the corporate debtor to its creditors, 90 (1977) Harvard L. Rev. p. 505 seq.; Patrick C. Sargent, Bankruptcy Remote Finance Subsidiaries: the Substantive Consolidation Issue, 44 (1989) Bus. Law, p. 1224, 1225, 1227 and 1228.

21 Skeel, *supra* footnote 1.

22 Berry, Consolidation in Bankruptcy, 50 AM Bankr. L.J. 343, 371 (1976).

23 See *supra* footnote N. 2.

24 Skeel, *supra* footnote 1.

25 Staehelin, *supra* footnote 9, at. 2.

applied.[26] Assuming that these two assumptions are right, the debate should therefore focus on which specific circumstances should allow consolidation and to what extent.

II. Consolidation: How and When

A. Substantive Consolidation

The most radical solution is thus to impose or permit the substantive consolidation of the assets and liabilities of several – or all – entities belonging to the same group.[27] In some extreme cases, this can even extend to:

(i) solvent companies belonging to the group and/or

(ii) individuals, in particular the estate of the controlling shareholder and/or of persons close to him.

The circumstances under which substantive consolidation should be granted include cases in which:[28]

(i) there has been hindrance or fraud on creditors;

(ii) there has been good faith creditors' reliance on the group as a whole (i.e. on the group as a consolidated enterprise);

(iii) there has been intermingling of various corporate estates and of their accounts, if any;

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[26] This is the approach of US Courts which have traditionally been reluctant to substantially consolidate but do so in extreme circumstances. Skeel, *supra* footnote; Webber, *supra* footnote 3; Steven L. Schwarcz, Collapsing Corporate Structures: Resolving the Tension Between Form and Substance, The Business Lawyer 60 (2004), p. 114 and 115.

[27] Lukas Bopp, Konzerninsolvenz?, in «nur, aber immerhin», Festgabe für Anton K. Schnyder zum 50. Geburtstag, Zürich 2002, p. 19 seq., especially p. 35–39; Alexander Vogel, Die Haftung der Muttergesellschaft als materielles, faktisches oder kundgegebenes Organ der Tochtergesellschaft, Bern 1997, p. 241–242; Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 91 and 92; Peter / Birchler, *supra* footnote 10, p. 122 seq., especially p. 129 and 130; Henry Peter, La faillite consolidée, in Insolvence, désendettement et redressement, Etudes réunies en l'honneur de Louis Dallèves, Basel 2000, p. 221 seq.

[28] In respect of the test applied in the USA, see Skeel, *supra* footnote 1; Webber, *supra* footnote 3; Henry Peter, From Atomism to Consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 93 seq.

(iv) whole or part of the groups' companies have been grossly undercapitalised;

(v) a consolidated approach would facilitate a reorganisation plan;

(vi) generally speaking, this would be in the interest of the creditors.

Clearly, any decision to consolidate *prima facie* affects the very core of creditors' and debtors' rights, at least as traditionally viewed in limited liability entities. As already suggested, consolidation should therefore be reserved to cases in which the circumstances are truly extraordinary and granted only after careful analysis of the rights and interests of all parties involved.[29] Before reaching any conclusion, particular attention should be paid to the concerns of good faith creditors. As U.S. case law has shown, consolidation is in fact not necessarily in all creditors' interest.[30] The opinion expressed by Judge Friendly in Chemical Bank New York Trust Co. v. Kheel,[31] should indeed not be forgotten:

> *I cannot agree that a practice of handling the business of a group of corporations so as to impede or even prevent completely accurate ascertainment of their respective assets and liabilities in their subsequent bankruptcy justifies failure to make every reasonable endeavor to reach the best possible approximation in order to do justice to a creditor who had relied on the credit of one – especially to a creditor who was ignorant of the loose manner in which corporate affairs were being conducted. Equality among creditors who have lawfully bargained for different treatment is not equity but its opposite, and the argument for equality has a specially hollow ring when made by the United States [the creditor in this particular case] whose priority over other creditors will necessarily be enhanced by having the assets of all these corporations thrown into a hotchpot.*[32]

Consolidation should therefore be applied only if the creditors agree, or, if not, under careful court control. In the presence of extraordinary circumstances, judges should however, as a matter of principle, be allowed, ready, and willing to approve a consolidated scheme whenever this appears appropriate.

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29 Skeel, *supra* footnote 1; Taylor, *supra* footnote 2; rather against consolidation Staehelin, *supra* footnote 9 and Webber, *supra* footnote 3; Eastgroup Props., 935 F.2d at 248–249.

30 In *Re Augie/Restivo Baking Co.,* 860 F.2d 506 (2d Cir. 1988), the Second Circuit held that the above-mentioned test (see note n°18) was not met and therefore substantive consolidation was not allowed.; see Skeel, *supra* footnote 1; Webber, *supra* footnote 3.

31 369 F. 2nd 845, 846, 847 (1966).

32 Ibidem, p. 848.

B. Less Radical Solutions

Should full substantive consolidation appear inappropriate, less radical solutions exist, all of them deriving from the same equitable concern but allowing the legitimate interests of other parties involved to be duly taken into account. Such solutions include:

(i) *administrative (as opposed to substantive) consolidation*, where the same court (forum) is declared to have jurisdiction so as to order and monitor the liquidation of the bankruptcy of all (or several) group companies,[33] or the same trustee (curator or the like) is appointed for more than one of the affiliated companies.[34] In short, procedural consolidation means that bankruptcies are administratively dealt with together, but without substantively pooling their assets and liabilities.[35]

(ii) *partial substantive consolidation* (as opposed to full substantive consolidation). Here, consolidation will not extend to those assets or creditors in respect of which this does not appear equitable. The following factors, among others, might be considered:

– consolidation may be extended only to unsecured creditors, as opposed to secured ones who by definition have relied on an atomistic perspective of the group;[36]

– consolidation may be "fine tuned" in order to attenuate excessive effects. In the WorldCom consolidation scheme, for example, WorldCom's MCI subsidiary was much healthier than the group as a whole. The MCI creditors objected to substantial consolidation, arguing that their recovery should reflect this fact. Finally, a settlement was reached pur-

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33 Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 114; Henry Peter, L'action révocatoire dans les groupes de sociétés, Basel 1990, p. 187 seq. and 273–274.

34 Taylor, *supra* footnote 2, Bopp, *supra* footnote 27, p. 19 seq., especially p. 32–33; Henry Peter, L'action révocatoire dans les groupes de sociétés, Basel 1990, p. 189 seq. This has been very efficiently done in the current Parmalat group bankruptcy in Italy.

35 Skeel, *supra* footnote 1; Under US law, Bankruptcy Rule 1015 explicitly provides for procedural consolidation; Taylor, *supra* footnote 2.

36 See, recently, the WorldCom "consolidation scheme"; Skeel, *supra* footnote 1; Webber, *supra* footnote 3; Staehelin, *supra* footnote 9, at 13; Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 114.

suant to which the MCI creditors were allocated a substantially greater payout than the other WorldCom creditors;[37]

– if consolidation is extended to solvent companies of the group, it might pertain only to the net (if any) equity of such non-bankrupt entities; in other words consolidation will not affect or endanger the rights of the creditors of the solvent affiliated companies;[38]

– in a reverse perspective the mother company may be declared liable for the negative net equity of the affiliated companies; thus consolidation would not extend to the affiliated (controlled) companies' assets;

– where part of the assets undoubtedly belong to specific companies, while others are totally scrambled, consolidation may be limited to the intermingled part of the group's assets;[39]

– consolidation may benefit only small creditors;[40]

(iii) there are also cases in which any form of consolidation might appear inappropriate, but where, because of their behaviour, insiders (typically the controlling shareholder or persons close to him) do not deserve priority compared to good faith outside creditors. In such cases, *substantive subordination* of the claims of the "insiders" vis-à-vis those of "outsiders" can be ordered.[41] This can in particular prove to be an appropriate form of relief in cases of under-capitalisation of subsidiaries or where insiders have been more or less systematically siphoning off the subsidiaries' equity. It is important to realise that this remedy be-

37 See Skeel, *supra* footnote 1; Webber, *supra* footnote 3; Staehelin, *supra* footnote 9.

38 Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 115.

39 Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 115.

40 Peter / Birchler, *supra* footnote 10, p. 122 seq., especially p. 125–127.

41 Henry Peter, L'action révocatoire dans les groupes de sociétés, Basel 1990, p. 205 and 276; Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 115; Bopp, *supra* footnote 27, p. 19 seq., especially p. 33–35; Alexander Vogel, Die Haftung der Muttergesellschaft als materielles, faktisches oder kundgegebenes Organ der Tochtergesellschaft, Bern 1997, p. 238–240; von Büren, *supra* footnote 2, p. 591 seq. Examples are provided in the United States by Taylor v. Standard & Elc. Co., 306 U.S. 307 (1939) and, in Switzerland, by Banque Commerciale SA contre Faillite Ersa, SJ 1971 p. 209.

longs to the same conceptual area of equitable concern as that leading to consolidation;[42]

(iv) *group pauliana*: it should be possible to cancel or ignore intra-group transactions (or transactions between the group and its controlling shareholder(s) or person(s) close to him) which were not conducted at arm's length. This can sometimes be carried out efficiently by having recourse to the fraudulent conveyance ("*pauliana*") doctrine. In view of the circumstances it is important, however, to waive any "subjective" evidence requirement regarding the intention of the group's insiders to prejudice the outside creditors;[43]

(v) *private international law*: in international insolvency cases, some or all of the foregoing solutions should be allowed to extend to all foreign subsidiaries in case such schemes have been reasonably applied by the court having jurisdiction over the mother company.[44]

(vi) *consolidation on a consensual basis*: practice has shown that parties sometimes desire to have recourse to consolidation of related bankruptcies on a consensual basis, both procedurally and/or substantively.[45] It is important to allow this.

(vii) *decision-making process*: in all (or most) of the foregoing cases, it is fundamental to establish who can propose and/or impose the envisaged measures:

- the judge?
- administrative authorities (bankruptcy authorities), if any?
- the trustee(s) of the estate(s)?
- the creditors? If so, in cases where unanimity is lacking, it should be known (i) which majority should apply and (ii) if the creditors must decide on a consolidated basis or if the creditors of each respective company will have to agree.[46]

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42 Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 104.

43 von Büren, *supra* footnote 2, p. 593 seq.; Henry Peter, L'action révocatoire dans les groupes de sociétés, Basel 1990, p. 272.

44 Peter/Birchler, *supra* footnote 10, p. 127-128.

45 See the WorldCom example, Skeel, *supra* footnote 1; Webber, *supra* footnote 3.

46 Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 108; Peter/Birchler, *supra* foot-

III. Conclusion

The possibility to collapse corporate structures should be allowed, at least in extreme cases. Most of the remedies mentioned in this paper have already been applied in the US and in Switzerland, in this latter case somewhat timidly and on rather unclear grounds.[47] This is encouraging, but still unsatisfactory, as it is crucial to ensure foreseeability and legal security. Indeed, in particular in this field, all stakeholders have to know in advance who will or might be held liable, under what circumstances, on which conditions, and in relation to which particular assets or estate.[48] As Professor Schwarcz put it recently, the failure to dispose of clear rules of general application "*leaves the law with unsettling ad hocery, which in turn creates uncertainty, inconsistency, and inefficiency on multiple levels*".[49] Thus a dogmatically satisfactory statutory basis needs to be formulated. Not doing so undoubtedly affects the possibilities for financing – and refinancing – potentially sound and therefore economically and socially useful businesses.

note 10, p. 124-127; Staehelin, *supra* footnote 9, at 13 and 14, and Webber, *supra* footnote 3, who urges caution.

47 Henry Peter, From atomism to consolidation in Group's Insolvency, in Peter Nobel (Ed.), Internationales Gesellschaftsrecht, Heft 1, Bern 1998, p. 187 seq.; Peter / Birchler, *supra* footnote 10, p. 122 seq.

48 Staehelin, *supra* footnote 9, at 11; Webber, *supra* footnote 3; Steven L. Schwarcz, Collapsing Corporate Structures: Resolving the Tension Between Form and Substance, The Business Lawyer 60 (2004), p. 110.

49 Steven L. Schwarcz, Collapsing Corporate Structures: Resolving the Tension Between Form and Substance, The Business Lawyer 60 (2004), p. 142.

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