The Group of Companies Facing the Moroccan Insolvency Law: Overview and Perspectives

Le groupe de sociétés face au droit des entreprises en difficulté : Etat des lieux et perspectives

Par

Miya SLAMTI
Assistant Professor
Law School - International University of Rabat-Morocco
Abstract:

The corporate group is a fundamental concept in business law. This notion has been widely deployed in the Moroccan national circle and beyond. The corporate group is of concern to all lawyers, especially those specializing in the law of companies in difficulty. The concept of the group of companies seems to be neglected by this law, which takes refuge behind the idea that without legal personality, there can be no collective proceedings. The application of Law 73-17 repealing and replacing Book V of the Moroccan Commercial Code, despite the reform, could reveal the legal vulnerability of the group. This poses real problems and challenges for the managers of debtor companies, but also for the legislative and judicial powers. It is therefore appropriate to take stock of the situation and propose reforms and recommendations with reference to comparative legislation.

Key words: Group of Companies - Moroccan Law - Companies in Difficulty- Comparative Law - Collective Procedure -

Résumé :

Le groupe de sociétés est un concept fondamental en droit des affaires. Cette notion a connu un déploiement considérable dans le cercle national marocain et au-delà. Le groupe de sociétés interpelle tout juriste et plus particulièrement le spécialiste du droit des entreprises en difficulté. Le concept de groupe de sociétés paraît être délaissé par ce droit, qui se réfugie derrière l'idée que sans personnalité juridique, il ne peut y avoir de procédure collective. L’application de la loi 73-17 abrogeant et remplacant le livre V du code de commerce marocain, malgré la réforme, pourrait révéler la vulnérabilité juridique du groupe. Celui-ci pose en effet de réels problèmes et défis aux dirigeants des entreprises débitrices, mais aussi aux pouvoirs législatif et judiciaire. Il convient alors de faire un état des lieux en la matière et proposer des réformes et des recommandations tout en se référant à la législation comparée.

Mots clés : Groupe de sociétés - Droit marocain - Entreprises en difficulté - Droit comparé - Procédure collective.
Introduction

Groups of companies are a major and current phenomenon. As soon as they reach a certain size, they set up subsidiaries in order to segment their different businesses and limit the risk attached to each of their activities\(^1\). In law, the notion of group is traditionally defined through the notion of power. This is expressed in law by control. In accounting, control provides a framework for the obligation to prepare consolidated accounts\(^2\).

The concept of a group of companies is of concern to all lawyers, and particularly to specialists in the law of companies in difficulty. The Moroccan legislator does not recognize the legal personality of a group of companies. Article 585 of the Commercial Code refers to the extension of collective proceedings in the event of confusion of assets or fictitiousness of the legal person. Law 17-95 on the public limited company, as amended and completed, lays down certain rules relating to holdings and controlled companies\(^3\).

It is not easy to precisely define the concept of a group. This difficulty is due to the fact that no text expressly specifies, in a general manner, what is to be understood by a group of companies. The Moroccan legislator only refers to the case of subsidiaries. It specifies that a subsidiary is a company in which another company, known as the parent company, owns more than half the capital\(^4\). It also states that there is participation when a company holds a fraction of the capital of another company of between 10 and 50%\(^5\).

When we try to go beyond such an observation, we notice that, basically, the notion of a corporate group refers to a legally imperfect situation characterized by the control of some companies over others for the promotion of a common interest\(^6\). On the occasion of certain events, this situation will generate legal effects in the name of a higher legitimacy that will admit the transgression of the principle of autonomy of societies.

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\(^3\) Articles 143 and 144 of Law 17-95 on the public limited company.
\(^4\) Article 143 paragraph 1 of Law 17-95 on the Public Limited Company
\(^5\) Article 143 paragraph 2 of Law 17-95 on the Public Limited Company
\(^6\) Frédéric Durand & Quentin Urban (2012), *Groupe de sociétés*, Lextenso.
The group of companies can be defined as a set of several companies, each with its own legal existence. They are linked to each other by various ties (shareholdings, ownership of a majority of the capital, identity of managers, close control of one of the companies over the others, joint ventures, etc.) by virtue of which the parent company keeps the others dependent on it, exercises direct or indirect control over the whole and ensures that a unity of decision-making prevails. The group does not constitute an independent legal entity with legal personality and assets. Hence, the corporate group cannot be the holder of rights and obligations. Therefore, corporate groups are entities composed of several legally independent but economically united companies or firms.

In the same vein, two conceptions of the group of companies are conceivable. A narrow conception which makes its existence conditional on the financial control of certain companies, in particular the parent company, over others. The group then has a corporate structure.

Another broader concept refers, on the one hand, to the combination of parent companies and subsidiaries within the meaning of the law on commercial companies. These are linked by agreements such as subcontracts or supply contracts. On the other hand, companies with a simple community of managers or personal links of any kind. Control is then characterized by very different relationships. The group has a contractual structure: therefore, it is common to distinguish between two types of groups, those with a corporate structure and those with a contractual structure.

In Moroccan law, the group of companies is not subject to any overall legal regulation. The legislator prefers a more ad hoc method in this area, on an ad hoc basis. This intervention is, moreover, usefully complemented by the work of judges, who have been able to demonstrate an undeniable imagination in adapting classic legal concepts to the certain reality of corporate groups. The phenomenon of corporate groups, a perfect archetype of the confrontation between

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7 Le Lamy droit commercial (2022), *Groupe de sociétés*.
11 Frédéric Durand & Quentin Urban (2012), *Groupe de sociétés*, Lextenso.
law and fact, is a source of great interest to legal doctrine\(^\text{12}\). The striking contrast between the economic importance of groups and the timid action of the legislator, whose silences the judge tries to fill, is an ideal breeding ground for legal reflection. This is reflected in the numerous theses and articles devoted to the subject.

In any case, the principle is clear, each company in the group retains its full legal autonomy. The relationship between the parent company and its subsidiaries is likely to raise difficulties. Are subsidiaries really autonomous, when the parent company may be able to appoint or dismiss managers or take decisions in general meetings? The ambiguity between the legal independence of the subsidiary and the control exercised by the parent company is palpable. This ambiguity will reveal its full extent when one of the companies in the group runs into difficulties\(^\text{13}\). Once again, the law of companies in difficulty constitutes the test bed and the disruptive element of other concepts and mechanisms of common rights.

Moreover, because it does not have legal personality, a group cannot be the subject of a single collective procedure. As a consequence, this often leads to a cascade of separate proceedings being opened. The state of economic dependence between a parent company and its subsidiaries does not exempt the court from finding that each of the companies is in a state of suspension of payments\(^\text{14}\).

This leads us to conclude that there are many problems in applying collective procedures to the group of companies. This law is very incomplete. On the one hand, there is the absence of a single regulation for groups of companies in terms of dealing with business difficulties. On the other hand, if several collective proceedings are opened within the same group, there is no single procedure.

Several proceedings can be opened within the same group, except in the case of confusion of assets or fictitiousness. This multiplicity of proceedings can lead to several difficulties insofar


\(^{14}\) Le Lamy droit commercial (2022), *Groupe de sociétés*. 

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as each court will adopt its own judgment. This may then run counter to the economic, legal, social and financial interests of the group.

Another difficulty in applying collective proceedings to the group lies in the case where companies that have merged their assets with those of the company subject to the collective proceedings are extended to the collective proceedings without it being necessary to first establish that they have ceased payments. The extension of collective proceedings is in itself considered a source of difficulty in this area.

The interest of the subject does not lie in dealing with the concept of the corporate group in itself. Rather, it aims to examine the relationship between the corporate group and the law on companies in difficulty.

This raises a fundamental problem. The question is how does the corporate group deal with the law on companies in difficulty and how can the insolvency of the group be improved?

In order to analyze this issue properly, the first part of this paper will deal with the legal basis for opening collective proceedings to a corporate group (I). In the second part, I will try to look at ways of improving the treatment of the insolvency of corporate groups (II).

I- The legal basis for opening collective proceedings to a group of companies

Since each company in the group has legal personality, it should be treated independently, as if the other companies did not exist. Thus, a company in receivership may well not honour its commitments, while the rest of the group is doing well. However, even if all the companies in the group are in suspension of payments, the autonomous assets of each company - even if it is a wholly-owned subsidiary - are the pledge of its own creditors, and they must be made up of as many active and passive masses as there are debtor companies in receivership.\textsuperscript{15}

Indeed, among the financial sanctions provided for by Moroccan law against the directors of companies in difficulty, there are those consisting of the extension of the judicial recovery procedure. This sanction takes the form of the commission of one of the acts listed exhaustively in Articles 739 and 740 of the Commercial Code. The triggering and exercise of this action has

\textsuperscript{15} Arlette Martin-Serf (2016), Fasc. 41-10 : Sauvegarde, redressement et liquidation judiciaire des entreprises - Conditions de fond. Personnes morales, Jurisclasseur.
been entrusted, according to the provisions of Article 742 of the Commercial Code, either to the court, which seizes it ex officio, or it is seized at the request of the public prosecutor's office or the receiver. However, only Article 585 of the said code mentions the case of the extension of the procedure for confusion of assets.

Two factual situations may prompt judges to decide to extend collective proceedings opened for one company against another that is legally autonomous and thus constitute the legal basis for opening collective proceedings. These are confusion of assets and liabilities (A) on the one hand, and fictitiousness (B) on the other.

**A- Confusion of assets and liabilities within the group of companies**

The system of confusion of assets and liabilities is currently set out in Article 585 of the Commercial Code, the first paragraph of which states that "The procedure opened may be extended to one or more other undertakings as a result of the confusion of their assets and liabilities with those of the undertaking subject to the procedure (...)".

It should be emphasized that this article is an integral part of the new law 73-17, which repeals and replaces Book V of law 15-95 on the Commercial Code. Indeed, the former Article 570 of Book V did not cover all aspects of the extension of collective proceedings. The legislator only mentioned it from the point of view of the court's jurisdiction, stating that "(...) the court initially seized shall remain competent". However, the new Article 585 provides us with more elements as to the modalities and the course of the extension of the collective procedure without establishing a clear definition of the concept of confusion of assets, which remains within the competence of the case law.

Thus, the said article refers to the conditions for triggering the extension procedure in the event of confusion of assets and liabilities, which can only take place at the request of the receiver, the head of the company subject to the procedure, the public prosecutor or ex officio by the court (paragraph 2 of Article 585). The same article also provides in its third paragraph that "the court shall rule after having heard or duly called in chambers the head of the undertaking subject

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16 The reconstitution of the confusion of assets within Law 73-17 affirms that it is considered an undeniable reality that the legislator cannot divert.
to the proceedings and the heads of the other undertakings”, which is also a novelty compared to the former article 570.

For its part, case law has also played an important role in the context of this extension mechanism, particularly in the context of the definition of the confusion of assets and liabilities. The issue of the confusion of assets and liabilities is important, as it constitutes a derogatory rule to the autonomy of the assets of each company with a distinct legal personality. The limited liability regime is thus called into question, since the parent company, or even sister companies, risk being included in a collective procedure initially opened against a subsidiary.

Unlike the case of the fictitious company, whose legal personality is merely a mask behind which the assets of the master of the business are hidden, the confusion of assets and liabilities involves two or more natural or legal persons whose assets and liabilities are intertwined to such an extent that it is no longer possible to distinguish who is the owner, creditor or debtor of what. The assets and liabilities of the companies are effectively intermingled, which gives rise to abnormal financial flows with the intention or effect of benefiting one asset to the detriment of the other, and therefore to the detriment of the creditors of the owner of the latter asset.

More specifically, the group lends itself to cash pooling operations, asset transfers or financial flows. This means that it is not sufficient to establish the existence of financial movements from one company to another in order to characterise the confusion. The concept must be seen in a restrictive light, unless it leads to the result that any group achieves a confusion of assets and liabilities. This cannot be accepted. The efforts made by the case law have made it possible to specify the contours of this pre-legal construction which is the extension of collective proceedings for confusion of assets and liabilities.

It is now known that there are two criteria for the confusion of assets: the confusion of accounts and the existence of abnormal financial flows.

The boundary between these two criteria is not perfectly watertight, since an accounting anomaly may reflect an unexplained and therefore abnormal financial flow. There is a confusion

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of accounts in the presence of an "imbrication of the assets and liabilities" of the companies of the group or, to use an expression found in the French Court of Cassation, in the case of a general disorder of the accounts and inextricable imbrication\(^\text{20}\).

In the same vein, abnormal financial flows occur when one of the companies in question has enriched itself at the expense of the other without consideration\(^\text{21}\). This is the case when advances have been made by one company to another solely to feed the latter's cash flow without consideration and to enable it to continue its activity by concealing its indebtedness. Moreover, occasional or temporary transactions are normally not sufficient to justify the confusion of assets. A repetition of abnormal acts must generally be necessary\(^\text{22}\).

Thus, the existence of financial relations between companies of the group can only justify an extension of proceedings if they are abnormal, without consideration, revealing a confusion of assets.

The Court of Appeal of Casablanca offers a remarkable illustration in this matter through the judgment n°5209/2006 of 10/11/2006. In this case, the justifications on which the Court of Appeal based its guidelines in order to decide on the extension of the procedure, consist in the confusion of the assets and funds of two or more companies or the existence of abnormal financial flows between several companies. This activity could not exist if each of these companies had its own distinct assets. Thus, as the Court of Appeal stated in this case: "among the manifestations of the existence of abnormal financial flows, the assumption of responsibility by one company for the charges and expenses of another, the collection of invoices from the latter on its own account or the payment of invoices that are expensive in relation to the nature of the service rendered due to the existence of a privileged relationship between the beneficiary company and the company that paid the invoices\(^\text{23}\)". In this judgment, the abnormal financial flows were expressed between the two companies, namely Cari Confort and Cari Confort Plus, by the existence of the same head office, the same corporate purpose and the same managers. In the same way, it appeared to the trustee that one of the companies had paid an injunction of


\(^\text{22}\) Hu Xinyu (2010), *Le groupe de sociétés en droit français et chinois*, op.cit, p. 431.

payment ordered by the court against the other company and the existence of cheques in the name of the first company signed by the director of the second company.

Another decision bearing n°135 rendered by the Commercial Court of Casablanca dated November 05, 2018 also provides us with an illustration in this matter whose expectation can be summarized as follows: “Whereas the confusion of assets or their interweaving imposing the extension of the judicial liquidation procedure refers to the existence of a real interdependence and interweaving between several corporate assets as if it were a single corporate asset, to the point that it becomes difficult for an expert to distinguish one asset from another, that the confusion of assets and liabilities justifying the extension of the procedure essentially refers to the intermingling of the assets and liabilities of two or more companies or to the existence of abnormal financial flows between several companies which should not have taken place if each of the companies had separate assets and liabilities, and that one of the figures of these flows is the assumption by one company of the costs and expenses of another company or the payment of invoices to another company”24.

It should be noted in passing that the confusion of assets and liabilities must have occurred prior to the decision to open the collective proceedings whose extension is being considered. Moreover, if one of the companies in the group encounters difficulties, its chances of recovery must be assessed in the light of its own capacities and not those of the group to which it belongs, in the absence of any commitment on the part of the holding company or another subsidiary.

Moreover, the consequences of extending the proceedings are clear. Indeed, there is nothing to prevent an application for the extension of a judicial reorganization procedure to a company that is already in such a procedure, or that is already subject to such a procedure by a previous extension judgment. Conversely, however, a single procedure is impossible without an extension of proceedings. Therefore, the court which finds that the assets and liabilities of two or more companies belonging to a group are confused will combine the proceedings into a single proceeding and impose a common solution25.

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25 This is in line with the provisions of the first paragraph of Article 585 of the Commercial Code, "The procedure opened may be extended to one or more other undertakings as a result of confusion of their assets with those of the undertaking subject to the procedure (...)".

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Furthermore, given the confusion of assets and the uniqueness of the collective proceedings, the joint reorganization plan cannot be divided. The extension of proceedings ceases with the judgment resolving the plan.

However, the uniqueness of the procedure has certain limits. Extension is impossible if one of the companies concerned has already been the subject of a reorganization plan, either by way of transfer or continuation. In this context, the res judicata effect of the judgment adopting the plan prevents a subsequent decision to extend the collective procedure.

With regard to the determination of the date of cessation of payments, the extension of the procedure does not require proof of the cessation of payments of the company to which the procedure is extended\textsuperscript{26}. The court takes into account a single date of cessation of payments for the application of the nullities of the suspect period.

In the same context, the uniqueness of the collective proceedings of companies whose assets and liabilities are confused also implies that the judge, ruling on a request for postponement of the date of cessation of payments of the companies concerned, determines that date on the basis of a comparison between the liabilities due and the available assets of those companies which constitute the same undertaking.

It should be noted that when the court orders the extension of the proceedings, it orders the joining of the different procedures. It thus considers that there is a single company and a single estate. The effect of such an extension will be to allow creditors to be protected by the existence of a single estate consisting of the addition of the assets of the company in collective proceedings and those of the companies covered by the extension.

Lastly, as a matter of business security, the extension has no retroactive effect and the extension judgment only produces its effects for the future concerning the company to which the collective procedure is extended. The same solution applies to divestment and nullities of the suspect period. Claims arising between the opening judgment and the extension judgment must be considered as prior claims, given the non-retroactive nature of the extension judgment.

\textsuperscript{26} Arlette Martin-Serf (2016), Fasc. 41-10 : Sauvegarde, redressement et liquidation judiciaire des entreprises - Conditions de fond. Personnes morales, op.cit.
B- Fictionality within the group of companies

Another contribution of Law 73-17 mentioned above is the reference to the fictitious legal person which did not appear in the former Article 570. Article 585 provides in its first paragraph that: 'The procedure opened may be extended to one or more other enterprises as a result of confusion of their assets with those of the enterprise subject to the procedure or where it is a fictitious legal person'. Once again, as is the case for the notion of confusion of assets, the fictitious nature of the legal person has not been defined by the Moroccan legislator. The spirit of Article 585 suggests that the fictitious nature of a legal person may also trigger the opening of a single collective procedure against several companies, one of which is in difficulty.

Once again, the judicial recognition of the fictitiousness of the company should be examined in order to shed light on this key concept, a recognition that has also been taken up by the doctrine.

A company is said to be fictitious when the persons who present themselves as partners are only nominees or accomplices of the real master of the business. The company is merely a front to hide the actions of the person behind it, with fraudulent intent. Hypotheses of fictitiousness are much rarer than those of confusion of assets. In other words, a fictitious company is a supposed subject of law that turns out not to be one. This is a grouping that claims to be a company but which was not formed with a view to making profits, which did not give rise to the pooling of contributions or whose partners are not motivated by the slightest affection societies. It is merely a puppet waved by a master of the business with avowed motives.

A unanimous doctrine teaches that it is necessary to go beyond the appearance of a plurality of companies and convince oneself that the different debtors are one. There is no patrimony proper to the fictitious company, but a "single company" artificially dismembered. There would therefore be a reason for extending the collective proceedings: if the parent company is subject to collective proceedings, these must be extended to the fictitious subsidiary.

It should be noted that the regimes of fictitious companies and confusion of assets and liabilities share the same basis justifying the extension of the procedure, namely the abuse of the legal

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27 Xavier Delpech (2016), Extension de la procédure collective, Fiches d'orientation Dalloz.
personality of the company. The difference remains, however, in the act of abuse. While the confusion of assets and liabilities results from the careless intermingling of autonomous assets, the fictitious nature of the company is defined by the pure appearance of the company.

Could it be that group companies are more likely to qualify as a shell company because they are more or less economically and financially dependent on the parent company, and because the managers of group subsidiaries are subject to the central authority of the group?

On the one hand, the case law clearly rejects the assessment of fictitiousness based on economic interdependence, constantly emphasizing that the observation of the operating units of the same company, composed of several companies of the group, is not sufficient to characterize the fictitiousness of one or other company. The sanction of fictitiousness is therefore powerless to prevent the freedom to set up companies, which allows the division of a single company into several separate companies. Similarly, in general, a non-operating holding company cannot be held to be fictitious, even if it was unable to assume its financial role as a holding company vis-à-vis its subsidiary, on which it was totally dependent, apart from the similarity of acronyms, registered office and managers.

On the other hand, the case law is not clear as to whether the lack of decision-making autonomy of a subsidiary constitutes fictitious character. In the famous Metaleurop case in France, the judgment of the Douai Court of Appeal of 2 October 2003, subsequently overturned by the High Court, seems to be attracted by the idea of equating the fictitious nature of a company with its dependence on the parent company. The ruling emphasizes that "a company appears fictitious when it is devoid of any decision-making autonomy" and that it is important that "the pooling of resources and the subordination to that of the group of the interests of the companies making up the group does not exceed the degree of organization inherent in such an economic entity and the controlled companies must retain control of the functions essential to their autonomy".

It can be deduced from this that the doctrine is fairly divided on how to characterize fictitiousness. For some, the fictitious company can be presented as a "shell company", "front company" or "empty shell". For others, fictitiousness results from the absence of one of the

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30 Hu Xinyu (2010), Le groupe de sociétés en droit français et chinois, op.cit, p. 432.
31 Catherine D’Hoir-Lauprêtre (2012), Les groupes de sociétés : vers une meilleure corrélation entre pouvoirs et responsabilités, op.cit - n° 122.
constituent elements of the company, namely affectio societatis. The two presentations may be linked.

As far as judicial review is concerned, this must be carried out on the sole basis of the existence of a desire to abuse the legal personality of the company, with the sole aim of escaping part of the company's assets from creditors' proceedings, or of acting in fraud. It is in this sense that the judges of the court of first instance are granted the sovereign power of appreciation with regard to the existence or absence of affectio societatis.

Furthermore, by analogy with the rigorous assessment of the confusion of assets, it seems to us that the fictitious nature of a company cannot easily be established in the context of a group of companies. It can only be established in the event of the discovery of a real intention on the part of the partners which is completely unrelated to the corporate life, an intention to conceal irregular or fraudulent acts under the cover of the corporate form.33

It should be noted in passing that confusion of assets and liabilities and fictitiousness should not be confused. Whereas confusion of assets and liabilities presupposes that persons have behaved as if the assets and liabilities were common to them, a fictitious company may not have held any assets and liabilities. It is therefore possible to distinguish between these two situations on the basis of the intention and conduct of the partners and the manager. Thus, the fictitious partnership would only be a fiction, a simulation because no affectio societatis, no real intention to associate, could be observed on the part of the partners. The assets of this fictitious company are therefore necessarily managed by a third party.

However, the extension of proceedings is a source of difficulty for companies subject to extension. To remedy this, two contractual techniques can be put in place by groups of companies. These are cash pooling and the conclusion of assistance agreements. The latter are strategies for preventing or even combating a possible extension.34

Cash pooling allows groups to optimize their cash resources, to lend their surpluses very quickly, through specialized bodies, and to obtain just as quickly within the group, the "fresh money" needed by a given structure\(^{35}\).

The implementation of this cash management system for groups of companies is possible in different ways. The parent company or a pivot company centralizes the cash flow of the group companies at its own level by transferring the balances or entries of all the companies' accounts to a central account, or the parent company receives a power of attorney to carry out the financial flows useful for the management of the group directly on the accounts of the companies concerned\(^ {36}\). In addition, this technique has a definite advantage for the group, which tries to protect itself against the risk of "contamination" of the procedure. Indeed, the cash pooling contract erects security barriers designed to prevent the group as a whole from being affected by the difficulties of one or other of its structures\(^ {37}\).

Assistance agreements are now frequently used in business relationships. For a fee generally calculated as a percentage of turnover, a subsidiary obtains from its parent company the benefit of assistance in a variety of fields: IT, office automation, accounting, finance, external relations, etc.

**II- Towards an improvement in the treatment of the insolvency of groups of companies in Moroccan insolvency law**

The aim is to improve the coherence and the apprehension of the treatment of the insolvency of groups of companies in Moroccan law. In order to do so, it is appropriate to refer to the recent reforms that French and European law have undergone in this area. Indeed, comparative law provides for a series of measures allowing, among the most important, the possibility of grouping proceedings before a single court (A) or promoting the coordination of proceedings initiated before several courts (B).

\(^{35}\) Ibidem, p. 26
\(^{37}\) Stéphanie Pitz (2002), *Peut-on concevoir la « faillite » d’un groupe de sociétés ?*, op.cit. p.27.
A- Consolidation of proceedings before a single court

At the time of the opening of insolvency proceedings, and apart from the case of confusion of assets and liabilities or the fictitious nature of the legal person, the rules of which are provided for in Article 585 of the Commercial Code, there is no specific competence for groups of companies.

As a result, the courts in different jurisdictions are seized, which generally leads to independent proceedings for each of the companies in the same group, with distinct or even divergent objectives and interests. Moreover, there is a multiplicity of legal representatives, implying a management of the case by nature different, oriented by the constraints of each case taken in isolation without possibility to make prevail the interest of the group. Therefore, to remedy these procedural inconsistencies, Moroccan law must adopt a simpler procedure oriented in the interest of the group as a whole, with reference to its foreign counterparts, by facilitating the de-location of collective procedures opened against several companies of the same group in order to group them together in a single court.

In the same context, it is a question of instituting an original derogation from the rules of territorial jurisdiction which allow collective proceedings to be entrusted to a court which is not in principle territorially competent and, in this way, to centralize proceedings initiated against several companies of a group in a single court. The only condition is that the court must be of the same nature, which prohibited the transfer of a commercial court to a court of first instance or vice versa. This new mechanism is optional, flexible and fast38.

In addition, the Court of Cassation may refer the case to another court when the interests involved so justify. This will make it possible for the same court to initiate the collective proceedings of several companies of a group under the jurisdiction of different courts.

Previously in French law, the possibility of relocating the proceedings was reserved for the President of the court and the public prosecutor. Since the decree of June 30, 201439, the request for referral can also come from the debtor or a pursuing creditor, a provision that the Moroccan

The legislator may also adopt. In addition, the request for referral can be made both at the beginning and during the course of the proceedings, the number of proceedings grouped together within the same court should not be limited\textsuperscript{40}.

It should be noted that the ordinance of March 12, 2014 reforming the French law of companies in difficulty and the draft revision of Regulation (EC) No. 1346/2000 on insolvency proceedings in the EU, finally expressly apprehend the concept of group of companies\textsuperscript{41}. Let us hope for a similar recognition at the level of Moroccan law by instituting an express recognition at the level of book V of the commercial code or at the level of the law on the public limited company.

However, in practice\textsuperscript{42}, the Order of 12 March 2014 has not provided an effective response to the need to centralize procedures for dealing with the difficulties of companies belonging to the same group.

It is for this reason that the Macron Act of 6 August 2015 for growth, activity and equal economic opportunity created new rules of jurisdiction in French law providing for the centralized treatment of groups of companies in difficulty. This law provided a pragmatic response to the difficulty raised by the wording of Article R. 662-7 of the Commercial Code. Article L. 662-8 of the Commercial Code, which was just created by the Order of 12 March 2014, has been thoroughly amended.

In its initial wording resulting from the Order of 12 March 2014, Article L. 662-8 of the Commercial Code only provided for the possibility of appointing an administrator and an agent common to all proceedings ("When several courts are seized of proceedings concerning companies controlled by the same company or controlling the same companies within the meaning of Article L. 233-3, an administrator and an agent common to all proceedings may be appointed").

In its new wording resulting from the Macron Act, Article L. 662-8 provides: "The court shall have jurisdiction to hear any proceedings concerning a company that owns or controls, within the meaning of Articles L. 233-1 and L. 233-3, a company for which proceedings are pending.

\textsuperscript{40} See in this sense Hélène Bourbouloux (2015), Vers une amélioration du traitement de l’insolvabilité des groupes, op.cit.

\textsuperscript{41} Philippe Roussel Galle (2015), Les groupes de sociétés enfin appréhendés par le droit des entreprises en difficulté en France et en Europe !, Droit des sociétés n° 4, Avril 2015, alerte 17.

\textsuperscript{42} See in this sense the Paris Commercial Court case (Cass., ord. 1st pres., June 29, 2015, no. 1501493.)
before it. It shall also have jurisdiction to hear any proceedings concerning a company which is owned or controlled, within the meaning of Articles L. 233-1 and L. 233-3, by a company for which proceedings are pending before it”.

Henceforth, the court is therefore competent to hear any proceedings concerning a company that is owned or controlled within the meaning of Articles L. 233-1 and L. 233-3 of the Commercial Code for which proceedings are pending before it. Thus, the court dealing with the difficulties of a holding company or a subsidiary may take jurisdiction over any subsidiary or holding company of the same group43.

In groups in which certain holdings are in difficulty, the court may therefore declare itself competent to deal with all the proceedings of companies whose registered offices are located in different places.

Moreover, the purpose of such a reform would be to bring together the member companies of the same group before the same jurisdiction. This is only a measure of good administration of justice, not a technique of combining the assets of the companies involved. The different proceedings initiated against each of the companies will simply be followed by the same court. However, in the event that several companies in the group are in difficulty, their different treatment may be a source of complications that can be avoided by using the coordination tools proposed by the legislator.

B- Possibility of the implementation of the coordinated procedure

The law strives to keep pace with reality. Companies structured in groups, more or less integrated, but always managed according to a common commercial and financial policy, are exposed to difficulties, whether they are specific to one entity, common to a whole sector of activity, or more generalized to the whole group. The freedom of maneuver of the corporate officers and the free disposal of the assets of each company belonging to the group cease with the appearance of these difficulties, more particularly in the event of cessation of payments by one of the group's subsidiaries.

In this context, it would be necessary to organize a coordinated management of companies linked by capital or control ties. It is at this price that coherent solutions can be built, through recovery plans organized at the group level or through an orderly realization of assets, for a better valuation of the assets.\footnote{Jean-Luc Vallens (2014), \textit{Les groupes de sociétés en difficulté, une nouvelle donne}, RTD Com. p.869.}

In the same vein, it should be pointed out that within the framework of this procedure, there is no centralization of the collective proceedings in a single court but, on the contrary, the opening of proceedings by a plurality of national courts. It would therefore be appropriate to appoint a receiver as well as a judicial representative common to all the proceedings. This is a real coordination procedure concerning more particularly the receivership and the judicial liquidation. In order to implement this coordination, it is specified that several courts must be seized of proceedings concerning companies controlled by the same company or controlling the same company.\footnote{Article L. 662-8 of the French Commercial Code.}

The innovation would be to institute a procedure for the coordination of proceedings initiated against the companies of a group. The purpose of this procedure, which is implemented on a purely voluntary basis, is to improve coordination and allow for a coordinated restructuring of the group.

In addition, coordination may apply to proceedings of different nature, which constitutes both a risk of complexity and a necessary flexibility, depending on the indebtedness of each entity of the group.\footnote{Jean-Luc Vallens (2014), \textit{Les groupes de sociétés en difficulté, une nouvelle donne}, op.cit, p.869.} This being the case, coordination will not have the same objective, for example, if it is a question of coordinating proceedings aimed at reorganization for one of the companies and proceedings aimed at liquidation for another.

In a parallel manner, the French ordinance of 2014 mentions that several courts must be "seized" and not that several proceedings must be opened: as a result, coordination is conceived from the moment of seizure, even before a collective proceeding is opened, in particular with a view to setting up this coordination in a pragmatic manner even before the opening judgment.
Moreover, as regards the coordination methods, a coordination mission may be given to one of the designated trustees, depending on the respective importance of the companies. Several criteria can be used, such as the number of employees or, failing that, the largest turnover.

Similarly, the appointment of the coordinator may be made by the other trustees referring the matter to the competent court with the authorization of each official receiver.

In short, coordination concerns the mandataries and the trustees. The trustee or the representative appointed in the proceedings of the company with the largest workforce, or failing that, the largest turnover, may be assigned a coordination mission. The coordinating trustee will be required to draw up a report on the situation of the companies subject to the proceedings while receiving assistance from the trustees of the various proceedings.

This report may include proposals in the common interest of the companies. The coordinating trustee receives the draft plans submitted to the different jurisdictions and his observations are transmitted to them. In this way, he can usefully work towards the emergence of coherent solutions that go beyond local interests. It is regrettable that it is not responsible for proposing a plan to coordinate the plans adopted for each company in the group at the level of French law. Its proposals and observations have no authority, and may remain a dead letter if local interests prevail over the common interest of the companies in the group.

Going further, the European legislator prescribes cooperation and communication between jurisdictions and even envisages the opening of a collective coordination procedure, which should "aim at facilitating the efficient management of insolvency proceedings opened against group members and have an overall positive impact on creditors. In addition, practitioners are encouraged to develop protocols to govern their relationships, as French administrators and mandatories judiciaries have begun to do in recent years. Insolvency practitioners thus become the transmission belt allowing a global treatment of the group, in the interest of its members and its creditors, which constitutes in itself a small revolution marked by pragmatism that absolutely must be adopted in Moroccan law.

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In short, whether it is a question of grouping the proceedings before a single court or establishing a coordinated procedure, these two measures are intended to avoid possible competition between the various bodies involved in each procedure, to simplify the transmission of information between them and to coordinate their respective actions, but also, where appropriate, to envisage a global solution for dealing with the difficulties of companies in the same group, without undermining the independence of each of them. A global solution does not mean a common solution. If the reorganization of one of the companies cannot be envisaged, the court will open or pronounce its judicial liquidation, whereas, for a parent or sister company that is still viable, it will consider adopting a reorganization plan. Differentiated outcomes, which in principle do not allow for a single treatment of all companies combined.

**Conclusion**

In conclusion, it can be said that the procedure for coordinating proceedings initiated against companies in a group constitutes, as previously envisaged, one of the most important innovations that our law could consider adopting. But for such a procedure to be requested from a Moroccan court, it would be necessary for the Moroccan legislator to intervene. Seizing the group as a whole remains a challenge that must be met so that insolvency does not rhyme with liquidation!

Therefore, the organization of a coordination of group proceedings seems indispensable. Firstly, the main proceedings should be opened at the place of the group's center of main interests. Secondly, parallel proceedings, principal proceedings coordinated by the trustee in charge of the parent company's proceedings, should be envisaged in order to take into account the structure of the group and the links between independent companies. The coordination of parallel proceedings raises original difficulties. The absence of a hierarchy between them complicates their coordination. The presence of a coordinator should be required. The parallelism of the procedures must not call into question the coherence of the solutions at the group level. However, a simple exchange of information between professionals may not be enough. Cooperation between the judges of the different jurisdictions concerned is a fundamental issue, but it has yet to be invented. The independence of judges and the respect of fundamental rights must therefore be reconciled with the coordination of their decisions.
Finally, the secondary proceedings, i.e. those opened after the initiation of the first proceeding, should be organized in a hierarchy specific to the group structure. The main proceeding should become a "pilot proceeding" ensuring coordination of the proceedings under its authority. It is at the price of a reinforced hierarchy that group-wide reorganization can be envisaged through the adoption of a single reorganization plan, if possible, or continuation plans - or even disposal plans - skillfully coordinated to take into account the legal autonomy of the entities making up the group. Diversity within unity is the challenge.

A redefinition of the founding notions in this matter at the level of the law 73-17, quoted above, as well as the law relating to the Limited Company, should not be avoided. The group of companies should, without ambiguity, be able to have a legal personality. The secondary proceedings, if they are necessary, should not be merely liquidation. The appointment of a main trustee, a true conductor of the insolvency at the group level, should ensure the coordination of the parallel main and secondary proceedings if he considers them appropriate. The competent court should also be given a central role in the coordination of the various proceedings initiated to deal with the group's insolvency.
Bibliography


Anne-Cécile Soulard (2016), Traitements des groupes, évolutions et révolutions : regroupement, coordination par les AJMJ... en droit interne et européen, Petites affiches n° 63.


Benoît Grimonprez (2010), Pour une responsabilité des sociétés mères du fait de leurs filiales, Revue des sociétés.


Blandine Rolland (2005), Consideration sur la fictivite d'une filiale dans le cadre d'une action en extension de procédure de redressement judiciaire, Petites affiches - n° 20.

Catherine D'hoir-Lauprêtre (2012), Les groupes de sociétés : vers une meilleure corrélation entre pouvoirs et responsabilités », Petites affiches - n° 122.


François-Xavier Lucas (2001), Les filiales en difficulté, Petites affiches - n° 89.


France Guiramand , Alain Héraud (2007), Droit des sociétés, édition Dunod.

Gaël Couturier, Philippe Roussel Galle, Hélène Bourbouloux (2010), Le groupe de sociétés en procédure collective, Petites affiches - n° 80.


Jean-Luc Vallens (2014), Les groupes de sociétés en difficulté, une nouvelle donne, RTD Com.


