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EUROPEAN LEGAL STUDIES CENTER  
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INTERNATIONAL INSOLVENCY CASE VENUE  
IN THE EUROPEAN UNION:  
THE PARMALAT AND DAISYTEK CONTROVERSIES

*Hon. Samuel L. Bufford\**

*The European Union Insolvency Regulation (the EU Regulation) is a giant step forward in promoting international cooperation among EU countries for cross-border insolvency proceedings. It adopts a modified universalist solution to cross-border proceedings insofar as they are located within the EU. However, experience has shown that it needs improvements to work effectively. A venue battle now rages between courts of several European countries over which country's courts will administer particular cross-border proceedings, and how the center of main interest is to be determined for this purpose.*

*This Article begins with a detailed examination of the two principal cases where conflicts have arisen, Eurofood and Daisytek. Eurofood is a subsidiary of Parmalat, which has produced the largest insolvency case in European history. The Irish and Italian courts have both opened main insolvency proceedings for the Eurofood subsidiary, and the controversy is now pending before the European Court of Justice (ECJ). For the Daisytek French subsidiary, both English and French courts have opened main insolvency cases, and an appeal is pending before the French Cour de Cassation, where the Ministry of Justice is expected to recommend submission to the ECJ.*

*Two very important substantive modifications would vastly improve the EU Regulation. First, the EU Regulation needs to provide for the filing in the same country (thereby permitting the filing in the same court) of members of a corporate group that are economically integrated. It is very difficult (if at all possible) to reorganize a corporate empire when its insolvency proceedings are distributed among a number of countries.*

*Second, the EU Regulation needs to clarify the definition of "center of main interest" (CoMI) and to specify what a court should consider in making the CoMI determination. A court should weigh the following factors: (1) the location of operations and management decisions of the corporation; (2) the location of the "nerve center" or place of principal decision-making for the corporation; and (3) the expectations of creditors, such as suppliers and financiers, as to the CoMI decision in the event that the company goes into an insolvency proceeding.*

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*This Article also argues for three kinds of procedural improvements: (1) decoupling the decision on whether a proceeding is a main proceeding from the decision opening the proceeding itself, to give an opportunity to the parties in interest to be heard on the subject of whether a proceeding is a main proceeding; (2) defining what constitutes a “judgment opening insolvency proceedings,” to specify what steps qualify under this term in those countries where an opening order or judgment is not a typical part of the insolvency process; (3) adopting procedures to recognize the due process rights of foreign estate administrators, foreign creditors, and other parties in interest in a cross-border insolvency proceeding.*

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## I. INTRODUCTION

A battle rages in the courts of the European Union (EU) over which country’s courts will handle some of Europe’s largest insolvency proceedings. In the case of Eurofood IFSC Ltd. (Eurofood), an Irish subsidiary of Parmalat SpA<sup>1</sup> (an Italian corporation that is the subject of the largest insolvency proceeding in European history),<sup>2</sup> the Irish Supreme Court has ruled that the Parma court administering the *Parmalat* proceeding lacked jurisdiction for its decision to open a main proceeding<sup>3</sup>

<sup>1</sup> The bankruptcy proceeding for the Parmalat business empire involves debts totaling some €20 billion in creditor claims, and expects to have assets of €3.7 billion to €5 billion (of which €2 billion is expected in recoveries from litigation) from which to pay these claims. See David Reilly & Alessandra Galloni, *Fresh Milk: Parmalat Stock to Trade Again*, WALL ST. J., Sept. 29, 2005, at C1.

<sup>2</sup> The Parmalat (Eurofood) and Daisytek cases have raised the most controversy and conflicts between national court decisions. Other cases have arisen where courts in one country have deferred to prior decisions in other countries opening main proceedings. See, e.g., *In re Rover Francesas*, May 4, 2005 (recognizing opening of main case in Birmingham, England).

<sup>3</sup> See *infra* text accompanying notes 29-44 for an explanation of “main proceeding.”

for Eurofood,<sup>4</sup> and that the Parma court also violated the International Convention on Civil Rights (ICCPR) and the European Convention on Human Rights (ECHR) in making this determination. Similarly, in both the German and the French *Daisytek*<sup>5</sup> proceedings, the courts found that the English high court in Leeds lacked jurisdiction to open a main insolvency proceeding for French and German subsidiaries. The decisions of the courts of first instance in France and Germany were reversed on appeal. Review of the French appellate decision is pending in the Cour de Cassation.<sup>6</sup>

In the *Eurofood* proceeding, the Irish Supreme Court has referred five issues to the European Court of Justice (ECJ) for determination preliminary to the Irish court issuing its decision, and a decision from the Court of Justice is pending. The French Ministry of Justice is expected to request the Cour de Cassation to refer the French *Daisytek* proceeding to the Court of Justice, as well.

The stakes are huge. The decision on which country will handle a main international insolvency proceeding determines which country's substantive and procedural law will govern the proceeding and will have a large impact on how the assets are realized for the benefit of creditors.<sup>7</sup> While the Italian *Parmalat* proceedings (including the *Eurofood* proceeding) and the English and French *Daisytek* proceedings are reorganizations, the Irish *Eurofood* proceeding is a liquidation. Furthermore, the reorganization laws of England and France differ enormously in their goals and in the requirements for approval of a reorganization plan. In addition, the venue decisions will determine which country's professionals (and judges) will handle the substantial majority of the insolvency work.<sup>8</sup>

In my view, these conflicts have resulted from both *substantive* and *procedural* shortcomings in the European Union Regulation on Insolvency Proceedings (EU Regulation).<sup>9</sup> The EU Regulation needs substantive revision to permit the filing in the same country (and presumably the same court) of companies integrally related in a corporate group. As a second substantive change to the EU Regulation, I argue that the definition of "center of main interests" needs to be refined so that courts will have clearer guidance on the appropriate factors to be considered when determining where a debtor's center of main interests is located.

In addition, I propose three kinds of improvements in response to the EU Regulation's procedural shortcomings. First, appropriate procedural steps should be adopted to ensure (1) that all of the parties in interest are given an opportunity to be heard and (2) that all the relevant evidence is received before determining whether an international insolvency proceeding is a main proceeding or a secondary proceeding under the EU Regulation. The determination of whether a proceeding

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<sup>4</sup> See *In re Eurofoods IFSC Ltd.*, [2004] IESC 45 (Ir.).

<sup>5</sup> I use "Daisytek" to refer generally to the corporate group headed by Daisytek Int'l, Inc.

<sup>6</sup> The *Cour de Cassation* is France's highest court for cases in the regular court system. This court only considers legal issues, and does not take a full appeal in the U.S. sense. A separate court, the *Conseil d'Etat*, is the highest court for administrative law cases.

<sup>7</sup> See *infra* text accompanying note 35; Roland Montefort, *European Law on Cross-Border Insolvencies; Status of French Practice after the E.U. Regulation*, AM. BANK. INST. J., Apr. 2004, at 28, 73.

<sup>8</sup> See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* ch. 8 (2005), reprinted as Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 89 (2005).

<sup>9</sup> Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC) [hereinafter EU Regulation].

qualifies as a main or secondary proceeding should be independent of the decision to open an insolvency proceeding. Second, the EU Regulation should clarify what constitutes a “judgment opening insolvency proceedings,” to account for that fact that there is no particular court order to this effect in countries such as England and Ireland. Third, rules are needed to provide general procedural due process rights for creditors, foreign liquidators, and other parties in interest.

In addition to their importance for EU law, the decisions under the EU Regulation are important for U.S. law relating to international insolvencies. U.S. cases may be susceptible to similar international discord and have suffered from such discord in the past. In fact, if Daisytek had filed bankruptcy cases in Dallas, Texas (where it filed the case for the parent corporation, Daisytek International, Inc., and eight U.S. subsidiaries) on behalf of its sixteen European companies (who filed their proceedings in England), a substantially similar problem would have arisen in these cases.<sup>10</sup> Furthermore, the recently adopted chapter 15 of the U.S. bankruptcy code<sup>11</sup> requires U.S. courts to address these issues under a much more complex legal framework,<sup>12</sup> instead of the prior section 304, that is similar in many respects to the EU Regulation.

Under chapter 15, the determination of such problems in U.S. courts turns on the meaning and application of four crucial new concepts, “center of main interests” (CoMI),<sup>13</sup> “main proceeding,”<sup>14</sup> “non-main proceeding,”<sup>15</sup> and “establishment,”<sup>16</sup> that did not previously exist at all in U.S. bankruptcy law (or non-bankruptcy law, for that matter).<sup>17</sup> Indeed, these concepts are unknown in any bankruptcy law anywhere in the world, with the exception of the EU Regulation and two other international regimes promulgated in the last decade: the UNCITRAL Model Law on Cross-Border Insolvencies<sup>18</sup> (Model Law) on which Chapter 15 is based, and the Transnational Insolvency Project<sup>19</sup> of NAFTA.<sup>20</sup>

<sup>10</sup> See generally SAMUEL L. BUFFORD ET AL., INTERNATIONAL INSOLVENCY (Fed. Jud. Center 2001).

<sup>11</sup> See Pub. L. No. 107-8 (2001) (amending 11 U.S.C. §§ 1501-32 (1978)).

<sup>12</sup> See Bankruptcy Code, 11 U.S.C. § 304 (repealed 2005).

<sup>13</sup> See 11 U.S.C. § 1516(c) (2005) (“In the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.”).

<sup>14</sup> See *id.* § 1502(4) (“‘[F]oreign main proceeding’ means a foreign proceeding pending in the country where the debtor has the center of its main interests.”).

<sup>15</sup> See *id.* § 1502(5) (“‘[F]oreign non-main proceeding’ means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.”). Both chapter 15 of the U.S. Bankruptcy Code and the Model Law on Cross-Border Insolvency use the term “non-main proceeding,” a less felicitous locution than the term “secondary proceeding,” which is used in the EU Regulation. The meanings are identical.

<sup>16</sup> See *id.* § 1502(2) (“‘[E]stablishment’ means any place of operations where the debtor carries out a non-transitory economic activity.”).

<sup>17</sup> A detailed examination of chapter 15 of the U.S. Bankruptcy Law is beyond the scope of this Article.

<sup>18</sup> Model Law on Cross-Border Insolvency, May 30, 1997, 36 I.L.M. 1386 (1997); see also U.N. Comm’n on Int’l Trade L. [UNCITRAL], *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, [1997] XXVIII UNCITRAL Y.B. pt. 3, §2, U.N. Doc. A/CN.9/442, reprinted in 6 TUL. J. INT’L & COMP. L. 415 (1998); see generally Berends, *infra* note 56.

<sup>19</sup> See AMERICAN LAW INSTITUTE, TRANSNATIONAL INSOLVENCY PROJECT: PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT (2000).

<sup>20</sup> North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 (1993).

This Article examines a dispute raging in the courts of the EU countries on the application of the first of these concepts, the CoMI. Part II summarizes the relevant provisions of the EU Regulation. Part III describes the *Eurofood* proceeding, insofar as it involves a dispute between the courts of Ireland and Italy over which country has the debtor's CoMI, and is entitled to open and administer its main proceedings. Part IV examines the proceedings of the French and German Daisytek subsidiaries that are the subject of bankruptcy filings in England, including the French subsidiary ISA Daisytek SAS (Daisytek-France) and the German subsidiaries PAR Beteiligungs GmbH (PAR), ISA Deutschland GmbH (ISA-Germany) and Supplies Team GmbH (Supplies Team). Part V describes EU Regulation shortcomings and recommends substantive and procedural improvements. Part VI contains concluding remarks.

## II. THE EU REGULATION ON CROSS-BORDER INSOLVENCY

The principal source of law for international cooperation in EU transnational insolvency proceedings is the EU Regulation,<sup>21</sup> which became effective on May 31, 2002<sup>22</sup> for all such proceedings opened on or after that date in the EU countries<sup>23</sup> (other than Denmark, which exercised its right under its EU accession treaty to opt out of the EU Regulation). The EU Regulation overrides provisions of national law for EU countries.<sup>24</sup> Two Annexes, A and B, specify the national laws of the member countries that are subject to the EU Convention. The EU Regulation is based on the principle of mutual trust among the EU countries:<sup>25</sup> they trust their sister EU countries with respect to both their insolvency laws and their court procedures.<sup>26</sup>

The EU Regulation, for the most part, adopts a universalist<sup>27</sup> view: It intends that a main proceeding encompass all of the debtor's assets on a world-wide basis

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<sup>21</sup> On the EU Regulation, see generally IAN F. FLETCHER, *THE LAW OF INSOLVENCY* (3d ed. 2002); GABRIEL MOSS ET AL., *THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE* (2002); BOB WESSELS, *EUROPEAN UNION REGULATION OF INSOLVENCY PROCEEDINGS: AN INTRODUCTORY ANALYSIS* (2003).

<sup>22</sup> The EU Regulation became effective on May 1, 2004 for the ten countries that joined the EU on that date.

<sup>23</sup> The EU Regulation was originally prepared as a stand-alone treaty for the EU Member States. See generally FLETCHER, *supra* note 21, ¶¶ 31-015–31-017. After completion of the drafting in 1995, the treaty foundered on the United Kingdom's mad cow disease problem in 1996. Mad cow disease broke out in the cattle herds in the United Kingdom in 1996, and, in consequence, the continental EU countries imposed a ban on the importation of U.K. beef. Upset with this course of events, the United Kingdom refused to sign the EU Insolvency Convention. See WESSELS, *supra* note 21, at 5–6.

<sup>24</sup> See MOSS ET AL., *supra* note 21, ¶ 3.08.

<sup>25</sup> See EU Regulation, *supra* note 9, pmb1. (22).

<sup>26</sup> See Bob Wessels, *Int'l Jurisdiction to Open Insolvency Proceedings in Europe, in Particular against (Groups of) Companies*, Int'l Insolvency Institute 14–15, [http://www.iiiglobal.org/country/european\\_union.html](http://www.iiiglobal.org/country/european_union.html) (explaining the concept of "CoMI" under the EU Regulation).

<sup>27</sup> See WESSELS, *supra* note 21, at 7. For a general description of universalism (including modified territorialism) and territorialism (its opposite), see Samuel L. Bufford, *Global Venue Controls are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L. REV. 105, 108–17 (2005). For a defense of pure universalism, see Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787 (2000). On modified universalism, see generally Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 687–94 (2000); Lucian Arye Bebhuck & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 778 (1999); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L.



and to affect all creditors, wherever located.<sup>28</sup> Only one main proceeding may be opened for a particular debtor.<sup>29</sup> The universalist posture of the EU Regulation is tempered by the possibility of secondary proceedings, which must be territorial, in non-CoMI countries.

The EU Regulation gives primacy to an insolvency proceeding that is opened in a debtor's "home country." Only that proceeding may be a main proceeding, the opening of which is entitled to recognition in other countries covered by the EU Regulation. The home country, for the purposes of a main insolvency proceeding, is the country where the CoMI of the entity is located,<sup>30</sup> which in turn is the proper location for the main proceeding.<sup>31</sup> A corporation can only have one CoMI, for purposes of the EU Regulation. Proceedings in other countries are generally limited to secondary proceedings.<sup>32</sup> However, the EU Regulation does not attempt to reconcile the vastly different insolvency regimes in place in the various EU countries.<sup>33</sup>

The opening of a main proceeding under the EU Regulation has several consequences.<sup>34</sup> First, the proceeding is governed by the laws of the country where it is opened.<sup>35</sup> Second, a judgment opening a main proceeding receives automatic recognition in all Member States with no further formalities from the date that it

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REV. 2177, 2179 (2000); Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 6–10 (1997); Donald T. Trautman et al., *Four Models for International Bankruptcy*, 41 AM. J. COMP. LAW 573, 575–76 (1993); Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 513 (1991); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2292–98 (2000); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 465 (1991). For a defense of territorialism, see LOPUCKI, *supra* note 8, ch. 8; Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000); Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999); Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143 (2005).

<sup>28</sup> See MOSS ET AL., *supra* note 21, ¶ 3.15; Miguel Virgós & Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, reprinted in MOSS ET AL., *supra* note 21, at 263. The Virgós and Schmit report was the principal report on the EU Convention on Insolvency Proceedings, which was converted into the EU Regulation by the substitution of Articles 44–47 (implementing the EU Regulation) for Articles 43–46 and 48–55 (providing formalities for treaty implementation) and an expansion of the preamble. Thus, the Virgós and Schmit report is authoritative as to the EU Regulation as well. See, e.g., Case C-341/04, *In re Eurofood IFSC Ltd*, Opinion of Advocate General Jacobs, ¶ 2 [hereinafter Eurofood A.G. Report] (stating that the Virgós & Schmit report "may provide useful guidance when interpreting the regulation").

<sup>29</sup> See Virgós & Schmit, *supra* note 28, ¶ 15; MOSS ET AL., *supra* note 21, ¶¶ 3.15, 8.33; WESSELS, *supra* note 21, at 7.

<sup>30</sup> See EU Regulation, *supra* note 9, art. 3.1; see also Wessels, *supra* note 26, at 4–10 (explaining the concept of CoMI under EU Regulation). The EU Regulation applies only if the CoMI is located in the EU. See EU Regulation, *supra* note 9, pmb. (14); MOSS ET AL., *supra* note 21, ¶3.09. Thus the EU Regulation does not apply to the EU aspects of a cross-border insolvency case if the CoMI is not located in the EU. See *id.* ¶ 3.09.

<sup>31</sup> See EU Regulation, *supra* note 9, art. 3.1.

<sup>32</sup> *Id.* arts. 3.2–3.

<sup>33</sup> See *id.* pmb. ¶ 12.

<sup>34</sup> See WESSELS, *supra* note 21, at 1–2.

<sup>35</sup> See EU Regulation, *supra* note 9, art. 4; MOSS ET AL., *supra* note 21, ¶ 5.33; WESSELS, *supra* note 21, at 18–31; Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 TEX. INT'L L.J. 119, 128–39 (1998); Virgós & Schmit, *supra* note 28, ¶ 153.

becomes effective in the home state.<sup>36</sup> Third, the administrator in the main proceeding may exercise his or her powers in every EU state, including repatriating assets,<sup>37</sup> registering the judgment,<sup>38</sup> and publishing notice in Member States. These effects may only be challenged in the home court for the main proceeding.<sup>39</sup>

In addition, a judgment opening a main proceeding in any EU country imposes the forum country's domestic effects of that proceeding throughout the EU,<sup>40</sup> except where the EU Convention provides otherwise as to rights in rem,<sup>41</sup> setoff rights,<sup>42</sup> and sellers' rights based on reservation of title.<sup>43</sup> For example, an automatic stay or moratorium under the laws of the forum country for the main proceeding applies to all creditors in every EU country.<sup>44</sup>

Under the EU Regulation, a bankruptcy proceeding in a country where the debtor's CoMI is not located must be a secondary proceeding.<sup>45</sup> The EU Regulation permits the opening of a secondary proceeding in any country where the debtor has an establishment,<sup>46</sup> which means, "any place of operations where the debtor carries on a non-transitory economic activity with human means and goods."<sup>47</sup> Because a secondary proceeding can only be opened in a country where the debtor has an establishment, the EU Regulation prohibits the opening of an insolvency proceeding in a non-CoMI country where the debtor does not conduct non-transitory economic activity with human means and goods.<sup>48</sup>

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<sup>36</sup> See EU Regulation, *supra* note 9, art. 16; WESSELS, *supra* note 21, at 33–35; Virgós & Schmit, *supra* note 28, ¶ 143; MOSS ET AL., *supra* note 21, ¶ 8.133.

<sup>37</sup> See EU Regulation, *supra* note 9, art. 18.1.

<sup>38</sup> See *id.* art. 22.

<sup>39</sup> See *id.* art. 17.2.

<sup>40</sup> See EU Regulation, *supra* note 9, art. 4 (noting that the law of the country that opens main proceedings applies unless otherwise provided in the EU Regulation); *In re Maxwell Communication Corp.*, 92 F.3d 1036, 1045–50 (2d Cir. 1996) (stating that standard rules of conflict of laws (or international private law, as the subject is known outside the United States) apply in many contexts in insolvency proceedings, and in some instances these rules dictate the application of foreign law in the forum of the main proceeding); Virgós & Schmit, *supra* note 28, ¶ 90.

<sup>41</sup> See EU Regulation, *supra* note 9, art. 5; Virgós & Schmit, *supra* note 28, ¶¶ 94–105.

<sup>42</sup> See EU Regulation, *supra* note 9, art. 6.

<sup>43</sup> See *id.* art. 7.

<sup>44</sup> The consequences may be different under the EU Regulation if the country where the main proceeding is opened lacks an automatic stay. For example, under Dutch law there is no automatic stay, and a stay is typically issued by the court. As another example, in Hungary, a stay is issued only if it is approved in the meeting of creditors. See Act XLIX of 1991 § 9 (as amended), available at [http://www.insol-europe.org/downloads/accession/HungarianInsolvencyAct\\_EN.pdf](http://www.insol-europe.org/downloads/accession/HungarianInsolvencyAct_EN.pdf) (On Bankruptcy Proceedings, Liquidation Proceedings and Members' Voluntary Dissolution). Because the exceptions in the EU Regulation appear to apply only to moratoria that arise automatically upon the opening of a proceeding, Article 25 may require that a stay that is not automatic does affect rights in rem, set off rights and sellers' rights based on reservation of title.

<sup>45</sup> See EU Regulation, *supra* note 9, art. 3.2–3.

<sup>46</sup> See *id.* This provision was deliberately drawn narrowly to limit the opportunities of creditors to obtain personal or tactical advantages by means of secondary proceedings. See MOSS ET AL., *supra* note 21, ¶ 8.26.

<sup>47</sup> EU Regulation, *supra* note 9, art. 2(h). An establishment differs from a subsidiary in that it is not separately incorporated. Economic activity consisting solely in assets or investments does not qualify as an "establishment." See Virgós & Schmit, *supra* note 28, ¶ 70.

<sup>48</sup> See WESSELS, *supra* note 21, at 11.

There are two main purposes for secondary proceedings: to assist and support the main proceeding and to protect local creditors from the main proceeding.<sup>49</sup> The adoption of the law of the forum country for the main proceeding, and its exportation throughout the EU, are substantially modified if a secondary proceeding is opened in another EU country.<sup>50</sup> Under the EU Regulation, a secondary proceeding is governed by the local law of the country where it is opened.<sup>51</sup> While the EU Regulation requires that a secondary proceeding be a liquidation proceeding,<sup>52</sup> it also authorizes the administrator in the main proceeding to obtain a stay of the liquidation for three months at a time,<sup>53</sup> and to propose a reorganization as authorized by the insolvency laws of the country where the secondary proceeding is opened.<sup>54</sup>

#### A. Center of Main Interests

The jurisdictional challenge under the EU Regulation is to determine where the CoMI is located. The EU Regulation answers this question, at least in part: “In the case of a company or legal person, the place of the registered office shall be presumed<sup>55</sup> to be the centre of main interests in the absence of proof to the contrary.”<sup>56</sup> Recital 13 of the preamble to the EU Regulation amplifies on this concept as follows: “The ‘centre of main interests’ 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.”<sup>57</sup>

The EU Regulation gives critical importance to two factors in determining the location of the CoMI. First, the CoMI is located at the place where the debtor conducts the administration of its interests on a regular basis, which essentially means the place where it administers its commercial, industrial, professional, and general economic activities.<sup>58</sup> Second, this is an objective test based on what is apparent to third parties, and especially to creditors.<sup>59</sup> Thus, a creditor’s view of where the CoMI is located is an important factor. Miguel Virgós and Etienne

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<sup>49</sup> See *id.* It is noteworthy that, while the first purpose promotes a universalist perspective, the second purpose is clearly territorial.

<sup>50</sup> See EU Regulation, *supra* note 9, arts. 27–38.

<sup>51</sup> See *id.* art. 28.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* art. 33.

<sup>54</sup> See *id.* art. 34.1.

<sup>55</sup> Under the EU Regulation (unlike U.S. law), the presumption that a corporate debtor’s CoMI is located at its place of registration carries some evidentiary weight: it is a factor that the court may consider, along with the evidence presented, in determining the location of the debtor’s CoMI. See *In re ci4net.com Inc.*, High Court, Ch. Div. (Companies Court), May 20, 2004; [2004] EWHC 1941 (Eng.); Michaël Raimon, Centres des Intérêts Principaux et Coordination des Procédures dans la Jurisprudence Européen sur le Règlement Relatif aux Procédures d’Insolvabilité, 132 J. DROIT INT’L 739, 750 (2005).

<sup>56</sup> See EU Regulation, *supra* note 9 art. 3.1.

<sup>57</sup> *Id.* pmb. 13. In EU law, the EU Regulation preambles have been treated as authoritative as the main text of the regulation. See, e.g., *In re Eurofood IFSC, Ltd.*, [2004] IESC 47, at 10, available at <http://www.courts.ie/judgments.nsf>.

<sup>58</sup> See Virgós & Schmit, *supra* note 28, ¶ 75. Notably, if a court finds that a corporation’s CoMI is not located at its place of registration, its insolvency case will not be governed by the law of its country of incorporation. See Raimon, *supra* note 55, at 750 (discussing cases). A debtor may not change its CoMI after it has filed an insolvency case, even though the court has not yet issued an order opening the case. See Case C-10/04, *Staubitz-Schreiber*, 2006 WL 89153 (E.C.J. Jan. 17, 2006).

<sup>59</sup> See EU Regulation, *supra* note 9, pmb. (13).

Schmit explain the rationale for this rule: “Insolvency is a foreseeable risk. It is therefore important that international jurisdiction be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the proceeding of insolvency to be calculated.”<sup>60</sup> Under both the Model Law and the EU Regulation, each company has a single CoMI, and can have only one main proceeding.<sup>61</sup>

Further, under the EU Regulation, the CoMI analysis must be made separately for each legal entity.<sup>62</sup> Except in a general way, the EU Regulation does not provide for the coordination of the insolvency cases of related entities. More specifically, it does not authorize the filing or opening of a main case for a particular company in a specific country because a parent company or other affiliate has opened a main case in that country.

### III. THE EUROFOOD INSOLVENCY CASES

The Parmalat corporate empire collapsed in deep financial crisis in late 2003,<sup>63</sup> with charges of massive financial fraud and the arrest in Italy of several of its principal managers, including the two Italian directors of Eurofood.<sup>64</sup> Regulatory, legal and criminal charges remain pending in various countries, including Italy and the United States.<sup>65</sup> The fallout of the Parmalat SpA<sup>66</sup> insolvency filing in Parma, Italy in late 2003 led to the filing of insolvency proceedings for Eurofood, its Irish subsidiary, in both Ireland and Italy, and to the international venue problems that these filings created.

#### A. Parmalat’s Collapse

Parmalat is one of the largest business failures in European history. While beginning as a small, family-owned milk distribution company, the business grew into an international dairy conglomerate operating in more than thirty countries, with more than 30,000 employees and gross annual receipts exceeding €7.5 billion.<sup>67</sup> Its principal subsidiary, Parmalat Finanziaria SpA, was listed on the Italian stock exchange.

The background events leading to the filing of the involuntary bankruptcy petition against Eurofood in Dublin played out over a period of approximately eight weeks beginning on December 4, 2003, when the Parmalat Group defaulted on a large debenture due on that date because of an insuperable liquidity crisis.<sup>68</sup>

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<sup>60</sup> See Virgós & Schmit, *supra* note 28, ¶ 75.

<sup>61</sup> See, e.g., André J. Berends, *The Uncitral Model Law on Cross-Border Insolvency: A Comprehensive Overview*, TUL. J. INT’L & COMP. L. 309, 355 (1998).

<sup>62</sup> See WESSELS, *supra* note 21, at 18–20; Virgós & Schmit, *supra* note 28, ¶ 76.

<sup>63</sup> See Trib. Amm. Reg., 10 June 2004, n. 6998/2004, slip op. at 4 (on file with author) [hereinafter *Eurofood-Italy*].

<sup>64</sup> See *In re Eurofood IFSC Ltd.*, [2004] No. 33 cos (Dublin H. Ct.), slip op. at 3–4 [hereinafter *Eurofood-Dublin*].

<sup>65</sup> See *id.* at 4.

<sup>66</sup> SpA is the Italian abbreviation for “società per azione,” the typical corporate form for a large Italian corporation.

<sup>67</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 3–4.

<sup>68</sup> See *Eurofood-Italy*, *supra* note 63, slip op. at 4.

Parmalat's announcement of this default on December 8 led to an international financial crisis.<sup>69</sup>

The Italian government responded on December 23 by issuing decree-law No. 347,<sup>70</sup> to amend its law providing for extraordinary administration of companies.<sup>71</sup> The new law permits a very rapid decision on the opening of an insolvency proceeding for a debtor with at least a thousand employees and debts of at least €1 billion.<sup>72</sup> Only Parmalat and four or five other Italian companies (notably including Fiat) meet the size requirements for extraordinary administration. Under the new procedure, a company seeking extraordinary administration applies first to the Minister of Productive Activities for admission into extraordinary administration.<sup>73</sup> Afterwards, a court must issue an order opening the insolvency proceeding upon a finding that the company is insolvent.<sup>74</sup>

Pursuant to the new law enacted on the previous day, on Christmas Eve 2003, Parmalat SpA (Eurofood's parent) filed its request for extraordinary administration with the Minister of Productive Activities.<sup>75</sup> The minister immediately granted the request, and appointed Dr. Enrico Bondi as extraordinary administrator.<sup>76</sup> On December 27, the Parma court confirmed that Parmalat SpA was insolvent and opened an extraordinary administration case for it.<sup>77</sup> Five other Parmalat entities filed extraordinary administration cases in Parma in the intervening month, following the same procedure, and thirteen more filed by the time that Eurofood filed its own case in Parma on February 9, 2004.<sup>78</sup>

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<sup>69</sup> It first appeared that approximately €4 billion were unaccounted for in the Parmalat empire. See FACTBOX—*Five Facts About the Parmalat Scandal*, <https://www.lexis.com/research> (Sept. 28, 2005). It turned out that the financial problems were more serious than was thought at that time. It is now reported that Parmalat has approximately €20 billion in creditor claims, and expects to have assets of €3.7 billion to €5 billion (of which €2 billion is expected in recoveries from litigation) from which to pay these claims. See *Fresh Milk: Parmalat Stock to Trade Again*, WALL ST. J., Sept. 29, 2005, at C1.

<sup>70</sup> See Decreto-Legge 23 dicembre 2003, n. 347, Gazz. Uff. Dec. 24, 2003, n. 298, modified by Legge 18 febbraio 2004, n. 39, Gazz. Uff. Feb. 20, 2004, n. 42, modified further by Legge 5 luglio 2004, n. 166, Gazz. Uff. July 6, 2004, n. 156 [hereinafter Law 347/2003].

<sup>71</sup> See Gazzetta Ufficiale della Repubblica Italiana, [Gazz. Uff.] Aug. 9, 1999 no. 185, Legislazione Italiana, [Lex] Parte I, Legislative Declaration, July 8, 1999 no. 270. Under the new law, a business must either be reorganized pursuant to a plan within two years or sold in the first year. If neither goal is reached, the business must be liquidated. See Luciano Panzani, *Conflict of Jurisdiction in European Cross Border Insolvency Law: The Eurofood Case* (2004) (on file with author). Justice Panzani is a member of the Italian Supreme Court, and the Judicial Member of the Italian commission that is drafting revisions to the Italian insolvency law.

<sup>72</sup> See Law 347/2003, *supra* note 70, art. 1.

<sup>73</sup> See *id.* art. 2.

<sup>74</sup> See *id.* art. 4.

<sup>75</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 4.

<sup>76</sup> See *id.*

<sup>77</sup> See *Eurofood-Italy*, *supra* note 63, slip op. at 5. The proper Italian venue for a corporate insolvency case is the court where the corporation is registered. Pursuant to typical European procedure, corporations in Italy are registered with their local court.

<sup>78</sup> See *Avviso ai Creditori del Gruppo Parmalat*, available at <http://cp22.etdotcom.it/it>.

*B. The Eurofood Subsidiary*

Eurofood was formed on November 5, 1997.<sup>79</sup> Its headquarters were located in the International Finance Services Centre (hence the “IFSC” in Eurofood’s name), an urban renewal center located at Custom House Dock in Dublin. The center is dedicated to businesses providing internationally traded financial services to non-residents of Ireland.<sup>80</sup> Each business at that location enjoys tax haven benefits not available to other businesses in Ireland, and is subject to a number of conditions, including certification by the Minister of Finance.<sup>81</sup> Eurofood’s certificate required it to operate at that location, and limited its operating authority to providing financing facilities to the Parmalat Group.<sup>82</sup> Because of its location and favored tax status, Eurofood was required to obtain approval from the Ministry of Finance to move its location or to make any change in management (including a change in its directors).<sup>83</sup> It was also subject to regulation by the Irish revenue authorities and the Central Bank of Ireland.

Eurofood had no employees of its own. Its day-to-day administration was conducted by Bank of America in Ireland pursuant to an administration agreement that was governed by Irish law and contained an Irish jurisdiction clause.<sup>84</sup> Eurofood was subject to Irish accounting requirements, and its books and records were maintained in Dublin.<sup>85</sup>

Eurofood had engaged in only three financing transactions during its history. The first two occurred in 1998. Eurofood issued notes for a private placement of U.S. \$80 million to provide collateral for a loan by Bank of America to finance Parmalat operations in Venezuela.<sup>86</sup> On the same date, Eurofood borrowed an additional U.S. \$100 million from a lending consortium headed by Metropolitan Life Insurance Co. to finance Parmalat business operations in Brazil.<sup>87</sup> Finally, in 2001, Eurofood engaged in a swap transaction with Bank of America for U.S. \$2 million to finance its operations in Ireland.<sup>88</sup> Eurofood’s only substantial asset was a guarantee of its debts by the Parmalat parent corporation, whose ability to deliver on these guarantees was in deep question in early 2004.<sup>89</sup>

Until November 12, 2003, Eurofood had four directors, two Irish and two Italian. All fifteen of its board of directors meetings were conducted in Dublin, except for one that was conducted by a conference call.<sup>90</sup> On November 12, one of the Italian directors resigned, and the other resigned on January 20, 2004. Both were

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<sup>79</sup> For a summary of the Eurofood background, see Craig Martin, *Eurofood Fight: Forum Shopping Under The E.U. Regs.*, 24 AM. BANKR. INST. J., Mar. 2005, at 36.

<sup>80</sup> See *In re Eurofood IFSC, Ltd.*, [2004] IESC 47, slip op. at 2 (Ir.) [hereinafter *Eurofood-Ireland*].

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 2.

<sup>84</sup> See *Eurofood-Ireland*, *supra* note 80, at 2.

<sup>85</sup> See *id.* at 3.

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 3.

<sup>90</sup> See *Eurofood-Ireland*, *supra* note 80, at 2–3.

in Italian custody when the Eurofood winding up petition<sup>91</sup> was filed in Dublin on January 27, 2004.<sup>92</sup>

*C. The Irish Eurofood Proceeding in Dublin*

Bank of America filed an involuntary winding up case for Eurofood under Irish law in the Dublin High Court<sup>93</sup> on January 27, 2004 and requested the appointment of a temporary administrator.<sup>94</sup> On the date of filing, Eurofood was hopelessly insolvent<sup>95</sup> because of the serious doubt that Parmalat could honor its guarantee of the Eurofood debt. Bank of America filed the case in part because Eurofood had informed it that Parmalat may attempt to move its CoMI out of Ireland.<sup>96</sup>

On the same day, the Dublin High Court appointed Pearse Farrell as provisional liquidator for Eurofood.<sup>97</sup> Because the Dublin case for Eurofood was an involuntary case, the Dublin court issued no order on that date to open a winding up of Eurofood. The court also made no determination on the issue of whether the case was a “main proceeding” within the meaning of the EU Regulation, or where Eurofood’s CoMI was located. The court set a further hearing on February 23, 2004 to take up these issues after notice to the appropriate parties in interest.<sup>98</sup>

There are several reasons why Bank of America may have preferred a winding up in Dublin to an extraordinary administration case in Italy. First, and probably most important, they probably thought that the winding up of an Irish company should be conducted by an Irish court under Irish law. Second, they were probably more comfortable with a proceeding in a local court, before a judge with whom they were familiar, handled by their local legal counsel. In contrast, a case in Italy would require the hiring of Italian counsel, to proceed before a very junior and inexperienced judge, and would be in a language that presumably they did not know. Third, a Eurofood winding up case in Dublin would likely receive substantial attention from the judge whereas Eurofood could become lost (as apparently actually happened) among a hundred related companies in the Parma court, many of which had far more pressing legal problems than Eurofood. Fourth, the Irish winding up law is much more friendly to creditors such as Bank of America than the Italian insolvency law.

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<sup>91</sup> A winding up under Irish law is a compulsory liquidation under the supervision of an Irish high court. See Companies Act 1963, Act No. 33/1963, §§ 212–250, available at <http://www.irishstatutebook.ie>.

<sup>92</sup> See *id.* Eventually both directors (along with nine other Parmalat officials) arranged plea bargains and received suspended prison sentences. See *Eleven Convicts in Parmalat Fraud*, A.P. REUTERS, June 29, 2005, available at <http://www.iht.com/articles/2005/06/28/business/parma.php>.

<sup>93</sup> Under the EU Regulation, a winding up under Irish law is one of the kinds of insolvency proceedings that invokes the provisions of the Regulation. See EU Regulation, *supra* note 9, art. 2(a), app. A.

<sup>94</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 5.

<sup>95</sup> See *id.* at 3.

<sup>96</sup> See *id.* at 4–5. Whether a court has jurisdiction to open insolvency proceedings for a debtor that moves its CoMI after the filing of a request to open a case, but before the court has acted on the request, is before the ECJ. See Case C-1/04, *In re Susanne Staubitz-Schreiber*, 2004 O.J. (C 71) 10.

<sup>97</sup> See *id.*

<sup>98</sup> See Companies Act 1963, Act No. 33/1963 § 216, available at <http://www.irishstatutebook.ie> (providing for a hearing).

*D. The Eurofood Proceeding in Parma*

1. Procedure

Two days later, on January 29, 2004, Mr. Farrell gave notice of his appointment to Dr. Bondi,<sup>99</sup> who immediately took action in Italy. A week later, on February 5, Dr. Bondi presented an application to Italy's Minister of Productive Activities for Eurofood's admission into extraordinary administration under Italian law and his appointment as administrator.<sup>100</sup> Although informed of the pending Irish proceeding for Eurofood, the Minister granted the application on February 9.

On February 10, the next day, Dr. Bondi filed a proceeding in Parma for Eurofood<sup>101</sup> as a companion to the nineteen other proceedings for Parmalat-related entities then pending. The court in Parma immediately set a hearing on Tuesday, February 17 at noon on opening the *Eurofood* proceeding, and particularly to determine whether Eurofood was insolvent.<sup>102</sup> The court further ordered Dr. Bondi to give notice of the hearing to "interested parties."<sup>103</sup> On February 12, Dr. Bondi filed a report with the Parma court on Eurofood,<sup>104</sup> but he did not provide a copy to Mr. Farrell.<sup>105</sup>

Also on February 10, Dr. Bondi removed one of Eurofood's two Irish directors (a lawyer in Dublin), and appointed three new Italian directors.<sup>106</sup> Even though Eurofood's Irish license to operate required approval from the Irish Department of Finance for any change in directors, Dr. Bondi did not seek such approval. Apparently, the new board took no action relevant to the opening of main proceedings for Eurofood in either Ireland or Italy.

On February 16, 2004, Farrell filed a motion in the Dublin court requesting permission to participate in the Parma hearing and for an earlier hearing on the Irish winding up petition. The court granted him permission to travel to Italy, but refused to advance its own hearing.<sup>107</sup>

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<sup>99</sup> See *Eurofood-Italy*, *supra* note 63, slip op. at 5.

<sup>100</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 8. Eurofood did not satisfy the jurisdictional requirements for extraordinary administration under Italian law: a thousand employees and annual revenues of a hundred billion euros. However, under Italian law (which is similar to 28 U.S.C. § 1408 (2005)), once a qualifying corporation is admitted to extraordinary administration, any related business entity in the corporate enterprise is permitted to file in the same court. See Law 347/2003, *supra* note 70, art. 3 (as amended); *Eurofood-Italy*, 3, *supra* note 63, slip op. at 15.

<sup>101</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 8.

<sup>102</sup> Under subsequent Italian law, the court has only five days in which to make a decision on the opening of a proceeding for extraordinary administration. See Law 347/2003 (as amended), *supra* note 70, § 4; Panzani, *supra* note 71, at 4.

<sup>103</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 9 (quoting from March 1, 2004 affidavit filed by Francesco Gianni on behalf of Dr. Bondi).

<sup>104</sup> See *Eurofood-Italy*, *supra* note 63, slip op. at 5; Martin, *supra* note 79, at 36.

<sup>105</sup> See *Eurofood-Ireland*, *supra* note 80, at 15 (opinion by Justice Fennelly); Eurofood A.G. Report, *supra* note 28, ¶ 39.

<sup>106</sup> It is not known whether the new directors met or whether the new board of directors approved the extraordinary administration filing for Eurofood. While any such approval would have to have been after the fact, the Italian law (like typical U.S. corporate laws) may authorize retroactive board approval of corporate actions. This issue was not discussed in the Eurofood judicial decision.

<sup>107</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 10.



## 2. Decision of the Parma court

On Friday, February 20, the Parma court issued its ruling opening an extraordinary administration proceeding for Eurofood on the grounds that it was clearly insolvent.<sup>108</sup>

In order to open a proceeding for extraordinary administration, the Parma court had to find that it had jurisdiction, which Mr. Farrell disputed. The Parma court found Italian jurisdiction, based on Italian law permitting the exercise of jurisdiction over a foreign corporation if its administrative headquarters or principal purposes are located in Italy.<sup>109</sup> The court found that the activity of Eurofood management and the “propelling center of the enterprise” was located in Parma. The court based this decision on a distinction between “executive administrators,” who were the two Italian directors, and “non-executive administrators,” who were the Irish directors.<sup>110</sup> Based on Dr. Bondi’s evidence (which likely was very different from that presented to the Dublin court), the Parma court found, in fact, that the real management of Eurofood was conducted in Parma.<sup>111</sup> In addition, the court found that the economic purpose of Eurofood was entirely tied to the Parmalat corporate group based in Parma.<sup>112</sup> The court found that creditors of Eurofood should not be surprised with an Italian court taking jurisdiction over its insolvency proceeding, because Eurofood was essentially an “empty box,” and its only asset was the corporate guarantee of its Italian parent Parmalat SpA,<sup>113</sup> whose “mother proceeding” was located in Italy.<sup>114</sup>

The Parma court found unpersuasive Mr. Farrell’s argument that Eurofood was incorporated in Ireland and that it was managed there pursuant to a management agreement with Bank of America. The court found this to be only a “logistical agreement,” and opined that the court should look at the substance of the administration, not its form.<sup>115</sup> In contrast, the court found that Eurofood was:

simply a conduit for the financial policy of Parmalat S.p.A. . . . with the exclusive aim of facilitating flows of money with the group with a view to an undisputed tax advantage. . . but as its exclusive point of reference the interests of the parent company of which it can be considered purely a financial division.<sup>116</sup>

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<sup>108</sup> See *In re Eurofood IFSC Ltd.*, Parma Civil & Criminal Court, Feb. 19, 2004, slip. op. at 10–11 (unpublished opinion on file with author) [hereinafter *Eurofood-Parma*]. It is difficult to determine precisely what the Parma court decided. It never clearly states its conclusions on the important issues. Its decision is very poorly written, and the sentences are very long and convoluted. The main analysis consists in three sentences that take nearly two full pages.

<sup>109</sup> See *id.* at 2.

<sup>110</sup> See *id.* at 3–4. The court gave no legal basis for making such a distinction. There is no support for such a distinction in Irish law, under which Eurofood was incorporated.

<sup>111</sup> See *id.* at 4.

<sup>112</sup> See *id.* at 5. A consideration of the relations between Eurofood and the other Parmalat entities is not legitimate under the EU Regulation. See *infra* text accompanying notes 295–300; see also Virgós & Schmit, *supra* note 28, ¶ 76. I recommend that the EU Regulation be amended to accommodate the joint needs in the insolvency context of corporate groups. See *infra* text accompanying notes 295–304.

<sup>113</sup> See *Eurofood-Parma*, *supra* note 108, slip op. at 5–6.

<sup>114</sup> See *id.* at 10.

<sup>115</sup> See *id.* at 7.

<sup>116</sup> See *id.* at 8.

The court found that the controlling authority for the enterprise was located in Italy.<sup>117</sup> Thus, the Parma court effectively found that Eurofood's CoMI was located in Italy, and it could open a main proceeding for Eurofood.

The court in Parma further found that the proceeding in Dublin had not progressed to the point where the EU Regulation would prevent the opening of a main proceeding for Eurofood in Italy. The mere filing of the Irish proceeding and the appointment of a provisional liquidator, in the court's view, did not constitute an "opening" of the proceeding, as defined in EU Regulation Article 3(3),<sup>118</sup> that required recognition under EU Regulation Article 16.

### *E. Subsequent Irish Proceedings*

#### 1. The Dublin High Court Decision

After the Parma decision on Friday, February 20, the Dublin High Court heard the application for opening a main proceeding for Eurofood on March 2–4, 2004 and handed down its decision to open the proceeding on March 23, 2004. This opinion seethes with disapproval of the procedures followed in the Parma court.

The Dublin High Court held that Eurofood's CoMI was located in Ireland, and that the Irish proceeding was the main proceeding for Eurofood. Two elements are required, the court held, to give rise to the opening of main proceedings in an insolvency proceeding in Ireland: first, the CoMI must be located in Ireland; second, the insolvency proceedings must actually be opened in Ireland.<sup>119</sup>

##### a. Time of Opening of Proceeding in Dublin

Taking the second point first, the court found that an insolvency proceeding, as defined in the EU Regulation, was opened in Ireland on January 27, 2004. The court arrived at this conclusion on two grounds. First, it found that the appointment of a provisional liquidator on that date was a "judgment" within the meaning of the EU Regulation<sup>120</sup> for the purposes of the provision on opening a main proceeding.<sup>121</sup>

Second, the court found that its March 23 decision to open a main proceeding for Eurofood related back to the January 27 date, and thus required recognition by the Parma court pursuant to Article 16.1.<sup>122</sup> Article 16.1 requires the courts of any other EU country to recognize a judgment, from a court with jurisdiction, that opens a main proceeding "from the time that it becomes effective in the State of the opening of proceedings." By virtue of the relation back rule in the Irish Companies

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<sup>117</sup> See *id.* at 7–8.

<sup>118</sup> EU Regulation, *supra* note 9, art. 3(3). Article 3(3) provides in relevant part: "Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings."

<sup>119</sup> See *Eurofood-Parma*, *supra* note 108, slip op. at 21.

<sup>120</sup> See EU Regulation, *supra* note 9, art. 2(e).

<sup>121</sup> *Eurofood-Dublin*, *supra* note 64, slip op. at 21–22. *Accord* Virgós & Schmit, *supra* note 28, ¶ 147 ("It is sufficient for [a judgment] to have effect in the State of opening and for its effects not to have been stayed.").

<sup>122</sup> See EU Regulation, *supra* note 9, art. 16.1.

Act,<sup>123</sup> even the March 23 decision took effect as of January 27, according to the Dublin court.<sup>124</sup> Thus its January 27 decision, in its view, predated the decision of the court in Parma.<sup>125</sup>

As to the location of Eurofood's CoMI, the Italian administrator argued that the Irish court failed to make any finding on this subject in its January 27 hearing. The Dublin court found that it was not necessary to make an express declaration on this subject, if, in fact, the CoMI was located in Ireland.<sup>126</sup> This determination was implicit, the court found, in its determination to appoint a provisional liquidator on that date.<sup>127</sup>

#### b. Location of CoMI in Ireland

The Dublin court began its discussion on Eurofood's CoMI by observing that it enjoyed the presumption that it was located in Ireland because Eurofood's registered office was in Ireland at all relevant times.<sup>128</sup> The CoMI normally corresponds to the location of the debtor's head office.<sup>129</sup>

Any further consideration of this issue, according to the court, must consider that this center should correspond to the place where the debtor conducts the administration of its interests on a regular basis, and therefore is ascertainable by third parties, and especially by potential creditors.<sup>130</sup> All of the evidence before the Dublin court indicated that the actual creditors considered Eurofood to have its CoMI in Ireland. These creditors were not heard at all, the court noted, by the Parma court.<sup>131</sup> The clear perception of the existing creditors of Eurofood, according to their evidence, was that they were dealing with investments issued by a company located in Ireland that was subject to Irish fiscal and regulatory provisions.<sup>132</sup>

Given its finding that it was the first to open a main proceeding for Eurofood, the Dublin court found that the court in Parma lacked jurisdiction to open a main proceeding for the same company.<sup>133</sup>

The Dublin court also found that the public policy exception in Article 26 applied in the *Eurofood* proceeding. In particular, the European Convention on

<sup>123</sup> See Companies Act 1963 (Act No. 33/1963 § 216, available at <http://www.irishstatutebook.ie> (providing for a hearing).

<sup>124</sup> This relation back rule, the court noted, mirrored a similar provision in the law of England and Wales. See *Eurofood-Dublin*, *supra* note 64, slip op. at 22.

<sup>125</sup> The Eurofood A.G. opinion, filed in the ECJ case, articulates a third ground for finding that the Dublin case was opened on January 27, 2004. Section 220 of the Irish Companies Act, 1963, the opinion points out, provides that the winding up of a company is deemed to commence at the time of presentation of a petition for winding up (absent a prior resolution passed by the company). See Eurofood A.G. Report, *supra* note 28, ¶¶ 22, 93.

<sup>126</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 23.

<sup>127</sup> This reasoning is quite questionable. A secondary proceeding may be opened before a main proceeding, under the EU Regulation. See EU Regulation, *supra* note 9, art. 3.4. A liquidator is clearly needed in a secondary proceeding, because it must be a liquidation. See *id.* art. 3.3. Thus, the appointment of a liquidator is ambiguous as to whether the proceeding is a main or a secondary proceeding.

<sup>128</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 23.

<sup>129</sup> See *id.* at 25 (citing Virgós & Schmit, *supra* note 28).

<sup>130</sup> See *id.* at 23–24.

<sup>131</sup> See *id.* at 27.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.* at 29.

Human Rights includes the right to a fair hearing, which the Parma court violated in failing to give the creditors an opportunity to be heard, and failing to give either the creditors or the Irish provisional liquidator sufficient notice of the hearing in order to prepare a defense.<sup>134</sup>

## 2. The Irish Supreme Court Decision

Dr. Bondi took an appeal to the Irish Supreme Court of the *Eurofood-Dublin* decision. Acting very quickly, on July 27, 2004, the Irish Supreme Court issued an opinion in two parts (*Eurofood-Ireland*).<sup>135</sup> The Supreme Court considered three main issues: first, whether insolvency proceedings had been opened first in Ireland or in Italy; second, whether Eurofood's CoMI was in Ireland or in Italy; and third, whether there was such an absence of fair procedures in the Parma court that its decision should not be recognized in Ireland.<sup>136</sup>

It was generally agreed, the Court stated, that the Court would be required to refer certain questions relating to these issues to the Court of Justice for the European Community.<sup>137</sup> To assist the Court of Justice in deciding these issues, the Supreme Court made rulings on relevant facts and issues of Irish law.<sup>138</sup>

### a. Factual Determinations

The Irish Supreme Court found that the only disputed issue of fact was the extent to which the Eurofood board of directors meetings were in Dublin. While Dr. Bondi disputed whether many of the meetings were held in Dublin, the Court found the evidence overwhelming that the meetings were properly and regularly held in Dublin, and that Dr. Bondi had provided no evidence to support his contention otherwise.<sup>139</sup>

In addition, Dr. Bondi contended that the two Italian directors were "executive" directors, while the two Irish directors were "non-executive" directors.<sup>140</sup> The Court found no basis for this distinction, either in law or in the corporation's articles of association.<sup>141</sup>

### b. Opening of Main Insolvency Proceedings

The first issue addressed by the Irish Supreme Court was at what time, under the Irish procedure utilized in the *Eurofood* proceeding, the winding up proceeding was "opened" under Irish law, for the purposes of the EU Regulation. In the Irish Supreme Court's view, there were two ways in which the Irish winding up petition

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<sup>134</sup> See *id.* at 30–32.

<sup>135</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 2.

<sup>136</sup> See *id.* at 5.

<sup>137</sup> See *id.* at 6.

<sup>138</sup> See *id.* at 7.

<sup>139</sup> See *id.* at 7–8.

<sup>140</sup> The Parma court in the *Eurofood-Parma* proceeding had found that the Italian directors were "executive directors" and that the Irish directors were "non-executive directors." See *Eurofood-Parma*, *supra* note 108, slip op. at 3–4; see also *supra* note 110 and accompanying text.

<sup>141</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 8.

could have taken priority over the Italian petition. First, the decision appointing a provisional liquidator may constitute a “judgment opening insolvency proceedings” for the purposes of Article 16.<sup>142</sup> Alternatively, the Dublin court’s later decision to order a winding up relates back to the date of presentation of the petition.<sup>143</sup> In either case, the applicable date would be January 27, 2004, which was before the petition was presented in Parma, and the Italian court would be required to recognize the prior Irish court decision to open a main proceeding for Eurofood.

The court found that, under Irish law, the legal effects of a winding up proceeding (which was filed against Eurofood, and which is a proceeding subject to the EU Regulation)<sup>144</sup> are “deemed to commence at the time of the presentation of the petition for the winding up.”<sup>145</sup> While recognizing that a winding up may not be ordered even though a petition has been filed or a provisional liquidator has been appointed, the Court found that a proceeding is deemed to have been opened on the date of the presentation of the petition, provided that the court subsequently issues a winding up order.<sup>146</sup>

The Irish Supreme Court found the EU Regulation less than clear on the issue of when an insolvency proceeding is opened, such that the opening is entitled to community-wide recognition.<sup>147</sup> Article 16 provides for the recognition of a “judgment opening insolvency proceedings.” The Irish Supreme Court found some ambiguity in the meaning of this phrase, because it does not exactly match the definitions in Article 2. Article 2(e) provides that a “judgment” in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator.” While an Irish provisional liquidator clearly qualifies as a liquidator under this provision, Article 2(e) does not refer to a “judgment appointing a liquidator.” The question, in the Court’s view, then, was whether an order appointing a provisional liquidator constituted a judgment opening the proceeding that was subject to recognition under Article 16. The court found that it required a preliminary ruling from the ECJ on this issue.

### c. Center of Main Interests

In contrast, the Irish Supreme Court found the evidence overwhelming that Eurofood’s CoMI was located in Ireland at all relevant times.<sup>148</sup> While this is governed by EU law, the Court found that this is predominantly a matter of fact (on which the trial court’s decision is entitled to greater deference), and that the facts before the Dublin court were clear.<sup>149</sup>

The Court pointed to the applicable EU Regulation provision, Article 3.1, which states:

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<sup>142</sup> See *id.* at 9–10.

<sup>143</sup> See *id.*

<sup>144</sup> See EU Regulation, *supra* note 9, Annex A.

<sup>145</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 11 (quoting the Companies Act 1963 § 220(2)).

<sup>146</sup> See *id.* at 10.

<sup>147</sup> See *id.* at 9–10.

<sup>148</sup> See *id.* at 10–11.

<sup>149</sup> See *id.*

The court of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered offices shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

Further, the Court noted that Recital 13 states: "The 'centre of main interests' 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."

The Court found two elements in Recital 13. As to the place of the administration of its interests on a regular basis, the court found the evidence overwhelming that all of Eurofood's administration of its interests took place in Ireland.<sup>150</sup> Indeed, Dr. Bondi did not even contest that Eurofood conducted the administration of its interests in Ireland, except with respect to some of the meeting of its board of directors, and the Court found his evidence insubstantial.<sup>151</sup>

The second element is that the CoMI should be ascertainable by third parties, and especially by creditors. The creditors in this proceeding presented detailed evidence of the lengths to which they went to satisfy themselves that the Eurofood's CoMI was in Ireland.<sup>152</sup>

The Irish Supreme Court was very troubled by Bondi's response on these issues. Bondi relied on five arguments, the Court found.<sup>153</sup> First, Eurofood was a wholly owned subsidiary of Parmalat. Second, its sole purpose was to provide financing for companies in the Parmalat Group. Third, company policy was decided at Parmalat headquarters in Italy, by Parmalat executives and Eurofood exercised no independent decision-making. Fourth, Eurofood had no employees in Ireland.<sup>154</sup> Fifth, Eurofood's liability to its creditors was guaranteed by Parmalat.

The Court found these arguments troubling because they were "deeply inimical to the need for respect for separate 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."<sup>155</sup> Essentially, Dr. Bondi's argument was that Eurofood was operated as an agency of Parmalat, and did not have functional separate existence. If the test were ultimate financial control, rather than legal and corporate existence, the Court stated, this would have "very serious implications for the future of international corporate structures . . . ."<sup>156</sup>

#### d. Recognition of the Parma Decision Opening a Main Proceeding for Eurofood

In a separate opinion, the Irish Supreme Court decided that recognition of the decision of the Italian court would be contrary to Irish public policy.<sup>157</sup> The relevant principle of Irish law, the Court found, is the principal requiring fair procedures in all judicial and administrative proceedings, which has both common law and

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<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.* at 11.

<sup>153</sup> *See id.*

<sup>154</sup> In fact, Eurofood had no employees at all.

<sup>155</sup> *See Eurofood-Ireland, supra* note 80, slip op. at 11.

<sup>156</sup> *See id.*

<sup>157</sup> *See id.* at 13–20.

constitutional foundations.<sup>158</sup> This fairness requirement includes a right to reasonable notice of the nature of the decision at issue and the evidence on which it is sought.<sup>159</sup> If an Irish court would find the procedures inadequate for an Irish judicial or administrative body, the Court held, the decision of a foreign court suffering from the same procedural irregularities should not be recognized.<sup>160</sup>

The Irish Supreme Court was particularly disturbed by the fact that Dr. Bondi made no effort to contest any of the facts found by the Dublin High Court on the due process violations in the Parma court proceeding.<sup>161</sup> It was uncontested that Dr. Bondi failed to serve the Irish provisional administrator with copies of the Parma petition or other papers, despite several verbal and written requests for them. The administrator complained that he was significantly hindered in making his presentation to the Parma court for lack of these documents. Further, with full knowledge of these complaints, Dr. Bondi's counsel appeared in the Irish Supreme Court with no explanation for this conduct.<sup>162</sup> "It is not possible," the Court responded, "to refrain from criticizing the behaviour of the Appellant in the strongest terms."<sup>163</sup>

Even recognizing the need for urgent action in a large insolvency proceeding, the Irish Supreme Court found that if Dr. Bondi had failed to provide copies of his documents in the same manner in an Irish court, the resulting decision, taken without providing fair procedures, would be so manifestly contrary to public policy in Ireland, that it would be void under the Irish law.<sup>164</sup>

The Irish Supreme Court recognized, however, that Irish public policy is not decisive on its obligation to recognize the decision of the Italian court. The EU Regulation is a matter of EU law, which takes priority over Irish law. Thus, the Court decided, it must defer to the Court of Justice for a ruling on the application of the EU Regulation to this issue.<sup>165</sup>

#### e. Reference to the European Court of Justice

Based on the analyses described above, the Irish Supreme Court determined that it could not decide the appeal in the *Eurofood* proceeding without first referring<sup>166</sup> five issues to the ECJ.<sup>167</sup> The ECJ is the supreme court for the determination of

<sup>158</sup> See *id.* at 17.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at 18.

<sup>162</sup> See *id.* Dr. Bondi's counsel stated in oral argument that "he had no instructions on the matter."

<sup>163</sup> *Id.*

<sup>164</sup> See *id.*; accord Panzani, *supra* note 71, at 4.

<sup>165</sup> See *id.* at 19–20.

<sup>166</sup> Article 234 of the EC Treaty provides: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty . . ." See Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3, art. 234 [hereinafter EC Treaty]. Article 234 further authorizes any court or tribunal of a Member State, "if it considers that a decision on the question is necessary to enable it to give judgment, [to] request the Court of Justice to give a ruling" on such a question. See *id.* Such a reference in the ECJ is mandatory in a case pending before a national court of last resort. See *id.*

<sup>167</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 11–13; see also Case C-341/04, *In re Eurofood IFSC Ltd.*, 2004 O.J. (C 251) 7 (acknowledging the filing of the questions referred by the Irish Supreme Court).

questions on the interpretation of the EU Regulation.<sup>168</sup> The Court has jurisdiction to review issues under the EU Convention only upon reference of a national court of last resort,<sup>169</sup> and then only if the court considers that a decision of the ECJ is necessary for the national court to give judgment in a matter pending before it.<sup>170</sup> Decisions of the Court are binding on the national court that has requested its opinion.<sup>171</sup>

The first issue is whether the January 27, 2004 proceedings in the Dublin court constituted a judgment opening an insolvency proceeding, within the meaning of the EU Regulation.<sup>172</sup> Secondly, the Court inquired whether, if the January 27 proceedings were not sufficient to constitute such a judgment, the relation back provision in the Irish Companies Act made the commencement effective as of January 27.<sup>173</sup> Third, the Court inquired whether the Parma court had jurisdiction to open main insolvency proceedings where the company is registered in Ireland and conducts its interests there on a regular basis.<sup>174</sup> Fourth, the Court inquired which factors control the location of a company's CoMI where it conducts the administration of its interests on a regular basis in Ireland, but its parent corporation in Italy can and does control policy for the subsidiary.<sup>175</sup> Finally, the Court asked

<sup>168</sup> See MOSS ET AL., *supra* note 21, ¶ 2.29.

<sup>169</sup> See Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, art. 68; MOSS ET AL., *supra* note 21, ¶ 2.32.

<sup>170</sup> In this circumstance, it is mandatory for the national court of last resort to make a reference to the ECJ. See EC Treaty art. 68.

<sup>171</sup> See *id.*

<sup>172</sup> The Court formulated the issue as follows:

Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening of insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346 of 2000?

*Eurofood-Ireland*, *supra* note 80, slip op. at 12.

<sup>173</sup> The Court framed the issue as follows:

If the answer to Question 1 is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening of insolvency proceedings for the purposes of that Regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act, 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?

*Id.*

<sup>174</sup> The Court framed this inquiry as follows:

Does Article 3 of the said Regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situated and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?

*Id.*

<sup>175</sup> The Court posed the question this way:

Where (a) the registered offices of a parent company and its subsidiary are in two different member states, (b) the subsidiary conducts the administration of its



the ECJ to determine whether the Irish courts could invoke the public policy exception in the EU Regulation to deny recognition to the opening of insolvency proceedings in Parma where the rights to fair procedures and a fair hearing were violated and, in particular, the provisional administrator was denied copies of the essential papers.<sup>176</sup>

These issues remain pending before the ECJ. The Irish Supreme court declared that, “it is a matter of great urgency to have rulings on these questions,” and requested that the Court of Justice give special priority to them.<sup>177</sup> However, the ECJ denied urgent review.<sup>178</sup>

The decision of the ECJ could be very helpful in interpreting the CoMI provisions in the EU Regulation. The court’s decision could clarify the application of the definition and could determine what is necessary for a “judgment opening insolvency proceedings” under Article 16.1 of the EU Regulation. The case was argued on June 12, 2005,<sup>179</sup> and a decision is expected in 2006.<sup>180</sup>

#### *F. The Italian Court of Appeals Decision*

Mr. Farrell, acting for Eurofood and Bank of America, took appeals of all of the relevant decisions as to both Eurofood and Parmalat SpA issued by the Minister of Productive Activities and the Parma court, and requested that all of these decisions

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interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state where its registered office is situated and (c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the “centre of main interests,” are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

*Id.* at 12–13.

<sup>176</sup> The Court framed the last question as follows:

Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said Regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?

*Id.* at 13.

<sup>177</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 12.

<sup>178</sup> See Case C-341/04, *Bondi v. Bank of America* (Sept. 15, 2004), available at <http://curia.eu.int/en/content/juris>.

<sup>179</sup> Eight countries (including Ireland and Italy), as well as the EU Commission, filed written observations with the ECJ, and all but three were represented at the hearing. See *Eurofood A.G. Report*, *supra* note 28, ¶ 45.

<sup>180</sup> The advocate general of the ECJ issued an opinion on September 27, 2005 that recommended that the Court issue a preliminary opinion that the Irish courts should administer the Eurofood insolvency case. See *id.*

be annulled. The Italian appellate court heard oral argument on June 10, 2004 and dismissed the appeals by both parties by judgment filed on July 16.<sup>181</sup>

The court noted that, if the appeal were successful, the Parma proceedings would become secondary proceedings; if not, the Irish proceedings were secondary proceedings.<sup>182</sup> The court also found it significant that the Irish proceedings were brought by creditors for the sole purpose of winding up the business of Eurofood, with no concern for a possible rescue of the enterprise.<sup>183</sup>

The appellate court found that the opening of an Italian extraordinary administration proceeding is a two-step process: first, the minister's issuance of a decree admitting a company into extraordinary administration and, second, the court's finding that the debtor is insolvent and establishing procedures for the proceeding.<sup>184</sup> For Eurofood, the first step took place on February 9 and the second on February 20, 2004.

The court further found that, for the purposes of mandatory recognition under the EU Regulation,<sup>185</sup> no proceeding for Eurofood had yet been opened in Ireland by those dates. The Dublin decision of January 27, 2004 was too limited to constitute the "opening" of a proceeding pursuant to the provisions of Irish law, according to the court, because the Dublin court had only appointed a provisional liquidator as a precautionary measure without going into the merits even in a summary manner.<sup>186</sup> The Italian appellate court found that the March 15, 2004 Dublin decision, even if retroactive, could not take precedence over the February decisions in the Parma court, which were already in full effect.<sup>187</sup> Thus, the court found, it did not matter whether the Irish court correctly determined on March 15 that Eurofood's CoMI was located in Ireland (a view with which the Italian appellate court disagreed).<sup>188</sup>

The court of appeal further found that the Italian legislature properly enacted the December 23, 2003 legislation to deal with the financial crisis of large groups of companies "that are global both in orientation and in location,"<sup>189</sup> and granted the Minister of Productive Activities the power to admit a company into extraordinary administration solely on the basis of its control relationship with its parent, to promote the uniform reorganization of companies in the group, all of which are caught up in the parent corporation's financial difficulty.<sup>190</sup>

The court of appeal rejected the bank's challenge to the admission of Eurofood into extraordinary administration without notice to creditors, on the grounds that the minister's decree to admit Eurofood into extraordinary administration was a matter of utmost urgency that could not await formalities of notice,<sup>191</sup> and that, in any event,

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<sup>181</sup> See *Eurofood-Italy*, *supra* note 63, slip op.

<sup>182</sup> See *id.* at 9–10.

<sup>183</sup> See *id.* at 10.

<sup>184</sup> See *id.* at 12–14.

<sup>185</sup> See EU Regulation, *supra* note 9, art. 16(1).

<sup>186</sup> See *Eurofood-Italy*, slip op. at 10–11.

<sup>187</sup> See *id.* at 12.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.* at 15.

<sup>190</sup> See *id.*

<sup>191</sup> See *id.* at 24.

the initiation of a bankruptcy proceeding is not subject to objection by creditors.<sup>192</sup> Creditors could seek an appropriate remedy, the court said, after the proceeding is initiated.<sup>193</sup>

The court also found that the extraordinary administrator properly has the power to request extraordinary administration for subsidiary companies because of the need for uniform management of the businesses belonging to the group.<sup>194</sup> The court further found that, given the public interest in maintaining a large business subject to extraordinary administration (the five or six largest in Italy), “there is an obvious and undeniable need not to dissipate the economic worth underlying the Group, which cannot be effectively realised without a single insolvency procedure and uniform management of each and every business, irrespective of the scale of the subsidiary enterprises.”<sup>195</sup>

All of the evidence indicates that the Irish Supreme Court had no knowledge of this Italian appellate opinion when it issued its own opinion on July 27, 2004. There is no reference to this decision, or even to the fact of the appeal of the Parma court’s decision, in either of two decisions that the Irish Supreme Court issued on July 27.

#### IV. THE *DAISYTEK* PROCEEDINGS

The Daisytek corporate group was a global distributor of computer supplies and professional tape products.<sup>196</sup> Its European subsidiaries were resellers and wholesale distributors of electronic office supplies throughout Europe.<sup>197</sup>

In early 2003, Daisytek defaulted on financial covenants in its secured credit facility with its bank group, headed by Bank of America.<sup>198</sup> This default precipitated a severe downturn in the liquidity of the Daisytek corporate group, and ultimately led to the filing of bankruptcy proceedings in the United States, England, France, and Germany.<sup>199</sup>

A controversy quickly ensued over which court, the English or the French court, should conduct the main reorganization proceeding for Daisytek-France. A similar dispute arose between the English and the German courts over which court should preside over the main proceedings for two of the German subsidiaries.

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<sup>192</sup> See *id.* U.S. law is similar. A creditor may move for the dismissal of a bankruptcy proceeding on a variety of grounds. See, e.g., 11 U.S.C. §§ 707(a) (liquidation case), 1112(b) (reorganization case). However, no creditor is permitted to object at the outset to a voluntary filing by the debtor.

<sup>193</sup> See *Eurofood-Italy*, *supra* note 63, slip op. at 24. The procedure is the same in the United States.

<sup>194</sup> See *id.* at 25.

<sup>195</sup> *Id.*

<sup>196</sup> See *Sony Elecs., Inc. v. Daisytek, Inc. (In re Daisytek, Inc.)*, No. 03-34762-HDH-11, 2004 WL 1698284, ¶ 1 (N.D. Tex. July 29, 2004) [hereinafter *Daisytek-US*].

<sup>197</sup> See *In re Daisytek-ISA Ltd.*, [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254 Ch. Leeds. (May 16, 2003) (UK), at \*1 [hereinafter *Daisytek-Leeds*].

<sup>198</sup> See *Daisytek-US*, 2004 WL 1698284, ¶ 1.

<sup>199</sup> See *id.*

### A. *The U.S. Cases*

The bankruptcy of the Daisytek corporate empire began with the filing of eight voluntary chapter 11 cases<sup>200</sup> in the bankruptcy court in Dallas, Texas on May 7, 2003. The Dallas filing of a chapter 11 case for the overall holding company, Daisytek International, Inc., followed on June 3, 2003. These cases were all administratively consolidated and remain pending in Dallas.<sup>201</sup>

The Dallas filing did not include any of Daisytek's sixteen European subsidiaries. Daisytek made a separate filing for the European entities in England on May 16. This Article focuses on the European *Daisytek* insolvency cases.

### B. *The English Proceedings*

Daisytek had sixteen subsidiaries (the European group) with registered offices in the EU: twelve in the United Kingdom (ten in England, one in Scotland, and one in Northern Ireland), three in Germany, and one in France. The European group was a reseller and wholesale distributor of electronic office supplies throughout Europe.<sup>202</sup> Approximately half of the group's sales were to large and small retailers in the European market and half of the sales were to end users.<sup>203</sup> None of these corporations was included in the Dallas bankruptcy filings.

On May 16, nine days after the filings in Dallas, Daisytek filed proceedings in the Leeds English High Court in for the sixteen members of the European group and requested administration<sup>204</sup> of each of the corporate entities under Section 8 of the Insolvency Act of 1986 for England and Wales.<sup>205</sup> The purpose of the petitions for administration was to achieve a more advantageous realization of their assets than

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<sup>200</sup> The chapter 11 cases in Dallas were filed for Daisytek, Inc., Arlington Industries, Inc., Daisytek Latin America, Inc., Tapebargains.com, Inc., Virtual Demand, Inc., B.A. Pargh Co., The Tape Co., and Digital Storage, Inc. There is also an adversary proceeding on file in the Dallas court against Daisytek Canada, Inc., which is apparently a member of the corporate group for which no bankruptcy case has been filed. For a reported opinion arising in the Dallas proceedings reported in Westlaw, see *Daisytek-U.S.*, 2004 WL 1698284.

<sup>201</sup> Joint administration, also known as administrative consolidation or procedural consolidation, is common for cases involving two or more affiliated corporations or other related entities that have filed bankruptcy cases. Joint administration typically involves the maintenance of a single case file, claims register, and docket in the clerk's office, the combining of notices concerning the case, and the use of a consolidated service list for pleadings and papers filed in the case. See, e.g., *Gill v. Sierra Pac. Const., Inc.* (*In re Parkway Calabasas, Ltd.*), 89 B.R. 832, 836 (Bankr. C.D. Cal 1988), *rev'd*, B.A.P. 9th Cir. 1990 (unpublished opinion), *rev'd*, 949 F.2d 1058 (9th Cir. 1991) (adopting trial court opinion); see also Fed. R. Bankr. P. 1015 advisory committee note. Under administrative consolidation, the separate identities of each of the corporate entities is maintained. See *id.* Corporations in bankruptcy can be merged under U.S. law pursuant to an order for substantive consolidation, which is an entirely different procedure. For a comprehensive discussion of substantive consolidation, see *In re Owens Corning*, 419 F.3d 195, 205–12 (3d Cir. 2005).

<sup>202</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 1.

<sup>203</sup> See *id.*

<sup>204</sup> "Administration" is the most common English process for corporate reorganization. It differs substantially from reorganization under chapter 11 in the United States. In addition, the administration process in England has been revised extensively since the filing of the Daisytek European group proceedings. See RICHARD F. BRAUDE ET AL., *COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE* ¶ 21.05[3] (2003).

<sup>205</sup> See Insolvency Act 1986 c 45, pt. II, s 8 (Eng.).

would be achieved in a winding-up or the continued survival of some or all of the parts.<sup>206</sup>

Daisytek presumably filed the cases in England because the English courts do not recognize the U.S. automatic stay. An additional reason, presumably, for filing in England was to take advantage of the EU-wide effect of the English automatic stay.<sup>207</sup> The French and German proceedings were also presumably filed in England to achieve administrative economies for the reorganization of the related entities in a single court with the British entities.

The Leeds court was satisfied that the English law requirements were met for commencing administration proceedings for the fourteen companies admitted into administration. Each was insolvent or likely to become insolvent soon.<sup>208</sup> In addition, the court found that administration would likely produce a greater realization of assets for each entity.<sup>209</sup>

The corporate structure of the European Daisytek group is complex.<sup>210</sup> Daisytek ISA is the holding company for the group. Its sole immediate subsidiary is ISA International plc (International), located in Bradford, England. International, in turn, is the immediate holding company of ISA International Holdings Ltd. (International Holdings), the holding company for the non-English companies. Thus, International Holdings was the parent corporation for Daisytek-France, the French operating company and for PAR Beteiligungs GmbH (PAR), the German holding company for the two German operating companies.

Six of the sixteen companies were dormant. These included four immediate subsidiaries of International, and two subsidiaries of ISA Wholesale plc (Wholesale), which was the English trading company in the European group. The Leeds High Court found that each of the dormant companies was insolvent because, although lacking assets, each had given guarantees to the main European group financiers, GMAC Commercial Finance plc and Barclays Bank plc, for debts owing by other group members.

The employees in the European group were concentrated in five corporations. Wholesale employed four hundred and fifty people and operated nine offices in the British Isles (including two in Dublin, Ireland).<sup>211</sup> Daisytek-France had one hundred and forty-five employees in France.<sup>212</sup> The two German trading subsidiaries had an undisclosed number of employees in Germany. International apparently had a handful of employees in Bradford to provide administrative services for the other entities.

According to the findings of the Leeds High Court, International performed the head office functions for the European group, which included the negotiation of supply contracts with major suppliers. International had given guarantees to major

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<sup>206</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 1.

<sup>207</sup> See *supra* note 44 and accompanying text.

<sup>208</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶¶ 2, 4.

<sup>209</sup> See *id.*

<sup>210</sup> For a description of the European corporate structure for Daisytek, see *id.* at \*1–2. The organizational structure of the entire corporate empire is depicted in Appendix A.

<sup>211</sup> See *id.* at \*2.

<sup>212</sup> See *Klemka v. SAS ISA-Daisytek*, Judgment of 26 mai 2003, 8th Ch., trib. comm. Pontoise (Fr.), slip op. at 3 [hereinafter *Daisytek-Pontoise*].

suppliers, which included a guarantee of the outstanding balances owing to suppliers from Daisytek-France and PAR.

Immediately upon filing the sixteen petitions for administration, Daisytek obtained administration orders from the chancery division of the Leeds High Court for fourteen of the sixteen proceedings. The administration orders covered the ten English companies, the three German companies, and the French company.<sup>213</sup>

An administration order under the insolvency law of England and Wales<sup>214</sup> may only be issued if the debtor is insolvent.<sup>215</sup> For the German companies and the French company, the Leeds High Court found that they were either already insolvent or likely to become so within a short time: The increased pressure from creditors and the declining levels of inventory made it likely that soon they would not be able to pay their respective liabilities as they came due.<sup>216</sup>

### 1. Jurisdiction to Open Main Proceedings for the Foreign Companies

The only factor that gave the Leeds court pause in issuing administration orders for the foreign corporations (the three German companies and the French company) was the issue of whether the CoMI of each of these companies was in England or Wales, so that the court would have jurisdiction under the EU Regulation to open main proceedings for each of them.<sup>217</sup>

The EU Regulation contemplates that, ordinarily, the first proceeding to be opened will be a main proceeding.<sup>218</sup> A court has jurisdiction to open a main proceeding only if the court is located in the territory<sup>219</sup> where the center of the debtor's main interests is located.<sup>220</sup> The ten English companies enjoyed a presumption that, absent proof to the contrary, the center of their main interests was the location of their registered offices.<sup>221</sup> Thus, an English court presumptively had jurisdiction to open a main insolvency proceeding for each of them. However, this presumption had to be overcome for an English court to have jurisdiction to open main proceedings for the French and German companies.<sup>222</sup>

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<sup>213</sup> On request of counsel for the debtors (for undisclosed reasons), the High Court deferred its decisions on orders of administration for Hundleby Computer Supplies Ltd., a Scottish company, and Source Supplies Ltd., a Northern Ireland company.

<sup>214</sup> The insolvency law of the United Kingdom is not unified. There is one insolvency law for England and Wales. Scotland and Northern Ireland each have separate insolvency laws, enacted by the U.K. Parliament, which differ in some respects from the law for England and Wales. However, the English law, not the Scottish law, governs corporate insolvencies in Scotland. *See, e.g.,* Margaret R. Cole et al., *The Insolvency Laws of the United Kingdom*, in 2 INTERNATIONAL INSOLVENCY, U.K. 5 (Carl Felsenfeld et al., eds. 2003).

<sup>215</sup> *See* Insolvency Act 1986 c 45, pt. II, s 8(1)(a) (Eng.).

<sup>216</sup> *See Daisytek-Leeds*, 2003 WL 21353254, ¶ 2.

<sup>217</sup> *See id.*

<sup>218</sup> *See* EU Regulation, *supra* note 9, art. 3.1.

<sup>219</sup> One of the reasons that the EU Regulation uses the term “territory” in place of the term “state” (which, in international terminology means “nation”) is that the insolvency law of the United Kingdom is not unified, so that England and Wales are the relevant territories where a corporation's registered office must be located to take advantage of the presumption of the location of the center of main interests. *See Daisytek-Pontoise*, *supra* note 212, slip op. at 3.

<sup>220</sup> *See* EU Regulation, *supra* note 9, art. 3.1.

<sup>221</sup> *See id.*

<sup>222</sup> Because of the request to reserve decision on granting administration orders for the Scottish and the Northern Ireland companies, the Leeds court did not address the location of the center of main

## 2. Determination of CoMI

The only substantive provision in the EU Regulation for the determination of the location of the CoMI of a company is the presumption in Article 3.1 that it is located at the place of the company's registered office. Recital 13 in the Preamble, however, states that "[t]he 'centre of main interests' should<sup>223</sup> correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."<sup>224</sup>

In deciding the location of the CoMI of the German and French companies, the Leeds court determined that the court must "consider both the scale of the interests administered at a particular place and their importance and then consider the scale and importance of its interests administered at any other place which may be regarded as its center of main interests . . . ."<sup>225</sup> In addition, the court found it very important that the center of a debtor's main interests be "ascertainable by third parties."<sup>226</sup> The court further cited the rationale for the rule, as stated in the Virgós and Schmit Report:

Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which . . . entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of the insolvency to be calculated.<sup>227</sup>

The most important third parties, in the view of the Leeds court, are the potential creditors.<sup>228</sup> For a trading company, these creditors are likely to be its financiers and its trade suppliers.<sup>229</sup>

The Leeds court found that a large majority of creditors of the German companies, measured by the amount owing to them<sup>230</sup> (which the court considered the relevant criterion), knew that the important functions of the German companies were carried out in Radford, England, and that the scale of these functions was very significant.<sup>231</sup> In contrast, the court found that the local functions of the German companies in Germany were limited.<sup>232</sup> Only 30% of the trade purchases, the court

interests for these entities. As to the EU Regulation, the center of main interests for each was located in the United Kingdom. Whether England was the proper venue for these companies was an issue under internal U.K. law.

<sup>223</sup> The official text of the regulation says "should" at this point. However, the Leeds court in its decision quotes the provision as saying "shall."

<sup>224</sup> See EU Regulation, *supra* note 9, pmb1. ¶ 13. The Leeds court applied this statement as if it was an operative part of the EU Regulation. See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 2.

<sup>225</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 3; accord *In re Aim Underwriting Agencies (Ireland) Ltd.*, [2004] EWCH 2114, 2004 WL 2246316 (Ir.); see also *MOSS ET AL.*, *supra* note 21, ¶ 8.39 ("The focus is more on the location of the place where head office functions are carried out than on the location of the head office.").

<sup>226</sup> See *id.* (citing *Geveran Trading Co. v. Skjevesland*, 2002 WL 31947334 (Eng.)).

<sup>227</sup> Virgós & Schmit, *supra* note 28, ¶ 75.

<sup>228</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 3.

<sup>229</sup> See *id.*

<sup>230</sup> It is not clear that the amount owing is the proper measure of creditor interest. Under this approach, a single large bank debt may prevail over a large number of supplier creditors, for the determination of the CoMI. For a critique of this approach, see Raimon, *supra* note 55, at 750.

<sup>231</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 3.

<sup>232</sup> See *id.* at \*4.

found, were negotiated in Germany.<sup>233</sup> While eighty-five percent of the customers were in Germany, the court gave this less weight because customers are typically debtors of the businesses rather than creditors.<sup>234</sup>

The Leeds court found that the three German companies all had their registered offices in Neuss, Germany, and that they conducted their businesses from premises in Freilassing, Magdeburg and Mulheim. Thus, their CoMI was not at the location of their registered offices. Although their business headquarters, for the purposes of conducting business in Germany, assuredly were located in Germany and they each had German bank accounts, the Leeds court found that these factors were not dispositive.

The Leeds court found that eight factors tied the management of each of the German companies to England.<sup>235</sup> First, the business of each of these subsidiaries was funded by German subsidiaries of the Royal Bank of Scotland and through a factoring agreement with an English subsidiary of the bank, and their financial information was compiled in accordance with English accounting principles and reviewed and approved by International in Bradford. Second, any purchase exceeding €5000 required International's approval in Bradford. Third, all senior employees of the German subsidiaries were recruited in consultation with International. Fourth, all information technology and support were managed in Bradford. Fifth, all European-wide customers of the German subsidiaries, which accounted for fifteen percent of their sales, were negotiated and serviced by International. Sixth, International negotiated all of the contracts with the major suppliers for the German subsidiaries, and seventy percent of the purchases were under contracts negotiated and dealt with from Bradford. Seventh, all corporate identity and branding were administered by International. Finally, the chief executive officer of Daisytek-ISA drew up the management strategy for the German subsidiaries, visited those subsidiaries two days per month, and spent thirty percent of his time on their management. The Leeds court found this evidence sufficient to rebut the presumption that the CoMIs of the German subsidiaries were located in Germany.<sup>236</sup>

As to Daisytek-France, the Leeds court found that the evidence was essentially the same as for the German subsidiaries.<sup>237</sup> The court found two differences. First, International provided financial support for the French company, while the German companies had their own financing.<sup>238</sup> Second, the chief executive of International spent forty percent of his time (mostly in Bradford) administering the French company, while he only spent thirty percent on the German companies.<sup>239</sup>

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<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *See id.* at \*3.

<sup>236</sup> *See id.* at \*3-4. *Cf. In re Aim Underwriting Agencies (Ireland) Ltd.*, No. 4181/2004, 2004 WL 2246316, at \*2-5 (Ch., July 2, 2004) (Ir.) (finding that center of main interests of Irish company was located in United Kingdom).

<sup>237</sup> *See Daisytek-Leeds*, 2003 WL 21353254, ¶ 4. The essential identity of the information for the French company and the German companies alone is sufficient to cast suspicion on the sufficiency of the evidence before the court in Leeds on the location of the center of main interests of these foreign companies.

<sup>238</sup> *See id.* at \*4.

<sup>239</sup> *See id.*



Consequently, the Leeds court found that Daisytek-France's CoMI was also located in Bradford, England.

No party in interest took an appeal of this decision by the High Court in Leeds. The outcome could have been quite different if an appeal had been taken.<sup>240</sup>

### C. *The French Proceeding*

The management of Daisytek-France, the French subsidiary, declared a cessation of payments and filed a voluntary insolvency proceeding in the commercial court in Pontoise, France on May 23, 2003.<sup>241</sup> The French directors required the French management to file the proceeding<sup>242</sup> because they faced sanctions, as well as criminal liability, if the corporation continued to conduct business for more than fifteen days after its cessation of payments.<sup>243</sup>

#### 1. Decision of French Commercial Court in Pontoise

At a hearing on May 26, 2003, the Pontoise Commercial Court took up the issue of the opening of a main insolvency case for Daisytek-France under French law.<sup>244</sup> At the hearing, the court had both a certified copy of the May 16 decision of the Leeds court and an authenticated translation into French. Nonetheless, the Pontoise court issued an order opening a main proceeding for Daisytek-France,<sup>245</sup> and appointed a French administrator<sup>246</sup> and a creditors' representative.<sup>247</sup>

The three English administrators for Daisytek-France promptly brought third-party proceedings in the Pontoise court to contest the opening of a main proceeding for Daisytek-France, and on July 1, 2003, the court dismissed their proceedings. In its July 1 decision, the Pontoise court noted that the English proceedings were opened before its May 26 decision to open its own proceedings for Daisytek-France.<sup>248</sup> However, the court found that the Leeds proceedings for Daisytek-France were not opened in compliance with the EU Regulation on two grounds.

<sup>240</sup> See *infra* discussion accompanying notes 342–45.

<sup>241</sup> French insolvency law (contained in the Code de Commerce) mandates that a debtor file its proceeding within fifteen days after its cessation of payments. See C. COM. art. L. 621-1. "Cessation of payments," under the French law, arises for an enterprise when it is "impossible to pay current liabilities with its liquid assets." See *id.*

<sup>242</sup> Given the English bankruptcy filing for Daisytek-France, one could question the authority of the French directors and management to act on its behalf. However, this issue was not litigated, either in France or in England.

<sup>243</sup> A director of a French corporation (of any type provided by French law) who fails to cause the filing of an insolvency case for the corporation within fifteen days of the corporation's cessation of payments risks criminal liability for "using ruinous methods" to obtain funds to avoid or delay the commencement of insolvency proceedings for the corporation. See C. com. art. L. 626-2(1). In addition, such a director risks personal bankruptcy. See *id.* art. L. 625-5 (5). Alternatively, the court may impose a variety of other civil disabilities for a minimum of five years. See *id.* arts. L. 625-8–625-10.

<sup>244</sup> The scheduling of this hearing only three days after the filing of the case (which included an intervening weekend) was remarkably swift under French practice. Normally, it takes at least ten to fourteen days to open a voluntary insolvency case in France.

<sup>245</sup> See *Klempka v. ISA Daisytek SAS*, 2003 WL 22936778, [2004] I.L.Pr.6 (C d' A 2003) (Fr.), ¶ 1 [hereinafter *Daisytek-Versailles*].

<sup>246</sup> See C. COM. art. L 621-8.

<sup>247</sup> See *id.*

<sup>248</sup> See *Daisytek-Versailles*, 2003 WL 22936778, ¶ 3.

First, the court found that the filing of a proper insolvency proceeding for Daisytek-ISA did not give the English court jurisdiction to open a proceeding for its French subsidiary: the EU Regulation has no provision for corporate groups, and each company in such a group has a separate legal personality and must be treated independently.<sup>249</sup> The Leeds decision, in its view, was tantamount to the denial of the separate legal identity of Daisytek-France.<sup>250</sup> Second, the Pontoise court found that the location of an establishment in England did not support English jurisdiction to open a main proceeding for two reasons: (1) an establishment is not a separate legal personality and (2) under the EU Regulation, an establishment only gives rise to jurisdiction to open a secondary proceeding, not a main proceeding.<sup>251</sup>

The Pontoise Commercial Court apparently gave no consideration to the fact that Daisytek-France had filed its own voluntary bankruptcy proceeding in Leeds, and that the Leeds court judge had made a separate finding that its CoMI was located in Bradford, England.<sup>252</sup> Perhaps the court missed this point because the judge of the commercial court in Pontoise was not a lawyer.<sup>253</sup>

The English administrators took an appeal of the Court of Appeal in Versailles. Shortly after the appeal was taken, on July 16, 2003, the Pontoise court approved a rescue plan for Daisytek-France pursuant to which the business was sold to a third party.<sup>254</sup>

## 2. Versailles Court of Appeal Decision

The Versailles Court of Appeal reversed the commercial court's opening of a main proceeding for Daisytek-France in its decision issued September 4, 2003.

### a. Court's Analysis of EU Regulation's Jurisdictional Provisions

Analyzing EU Regulation Article 3, the Versailles court found that this provision establishes four principles.<sup>255</sup> First, the court having jurisdiction to open the main insolvency proceeding must be located within the territory where the CoMI is located. Second, no court in another territory has such jurisdiction. Third, for a company, the CoMI is presumed to be where the registered office is located. Fourth, where the company's CoMI is not located in the country where the registered office is located, the only court with jurisdiction to open an insolvency proceeding is that situated where the CoMI is located, subject to adequate proof on this issue; in such a

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<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *Daisytek-Pontoise*, *supra* note 212, slip op. at 3–4.

<sup>253</sup> It is typical for judges in commercial courts in France to lack law degrees. A commercial court judge is typically a business person provided by the local chamber of commerce. The purpose of this practice is to give practical business solutions to commercial law problems, rather than sophisticated legal analysis. See Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM BANKR. L.J. 437, 443 (1996).

<sup>254</sup> See Daniel Valdman, ISA Daisytek Synthesis (handwritten notes on file with author). The Commercial Court in Pontoise appointed Mr. Valdman as administrator in the *Daisytek-France* case. The Versailles Court of Appeals does not mention the July 16, 2003 plan confirmation in its September, 2003 decision.

<sup>255</sup> See *Daisytek-Versailles*, 2003 WL 22936778, ¶ 4.

circumstance, a court in the territory where the registered office is located lacks jurisdiction to open an insolvency proceeding. In summary, the sole criterion for establishing jurisdiction to open a main insolvency proceeding is the location of the company's CoMI.<sup>256</sup>

The Versailles court stated that the Pontoise court was correct in two of its rulings. First, the Pontoise court correctly decided that the location of an establishment is irrelevant to the determination of the CoMI's location.<sup>257</sup> Second, it correctly found that the concept of a group of companies is equally irrelevant to this jurisdictional issue.<sup>258</sup>

#### b. Versailles Court's Analysis of English Court's Finding on CoMI

The Versailles court next turned to an analysis of how the Leeds court arrived at its decision that the CoMI for Daisytek-France was located in Bradford, England. The Leeds High Court, the Versailles court noted, gave specific consideration to the issue of its jurisdiction, and correctly noted that such jurisdiction must be predicated upon the location of the CoMI of the foreign corporations in England or Wales.<sup>259</sup> The Versailles court also noted that the Leeds court had determined that, in order to overcome the presumption that the CoMI was located at the registered office, the debtor had to show that its CoMI was located in England.<sup>260</sup> Further, the Leeds court listed the significant acts for the German and French companies that had taken place in Bradford, and concluded that these facts effectively made Bradford their CoMI.<sup>261</sup>

The Versailles court concluded that the Leeds court properly determined its jurisdiction based on the location of Daisytek-France's CoMI, and did not base this decision on either the location of an establishment for its business or on the concept of a group of companies.<sup>262</sup> Notably, the Versailles court did not analyze whether the Leeds court decided this issue correctly. The court only examined whether the Leeds court considered the proper issues.<sup>263</sup>

In consequence, the Versailles Court of Appeal found, EU Regulation Article 16 mandates that a judgment, by a court of an EU member with jurisdiction, opening insolvency proceedings must be recognized in all other EU Member States.<sup>264</sup> The court held that, because the Leeds court applied the correct legal standard in determining where Daisytek-France's CoMI was located, and found that the facts supporting its jurisdiction were adequately demonstrated, the EU Regulation required that the Leeds court judgment opening a main insolvency proceeding for Daisytek-France be recognized in France.<sup>265</sup>

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<sup>256</sup> *See id.*

<sup>257</sup> *See id.* ¶ 4–5.

<sup>258</sup> *See id.* ¶ 5.

<sup>259</sup> *See id.* ¶ 5.

<sup>260</sup> *See id.*

<sup>261</sup> *See id.*

<sup>262</sup> *See id.*

<sup>263</sup> Even the limited review of the Leeds decision was arguably too extensive. Under the EU Regulation, a court in a second country should only consider whether the first court had jurisdiction. *See* EU Regulation, *supra* note 9, art. 3.

<sup>264</sup> *See Daisytek-Versailles*, 2003 WL 22936778, ¶ 6.

<sup>265</sup> *See id.* For a critique of this decision, see Raimon, *supra* note 55, at 754–58.

## d. Procedural Issues

Finally, the Versailles court turned to several procedural issues raised by the French Daisytek-France administrator. Two of these objections are important for this Article. First, the administrator argued that the English administration order was not published in the Commercial Register.<sup>266</sup> Second, he contended that the English administrator had not convened a meeting of the Daisytek-France works council, as required by French law.<sup>267</sup>

The court recognized the French law requirement of publication in the Commercial Register of a decision opening an insolvency proceeding.<sup>268</sup> However, the court found that the lack of publication had no consequence for the effect of the English court decision which, under the EU Regulation,<sup>269</sup> prevented a French court from opening a main proceeding.<sup>270</sup> The Versailles court further found that EU Regulation Article 17 requires that, with no further formalities, the English administration order produce the same effects in France (or any other EU member state) as it does in England.<sup>271</sup>

As to the French law obligation to convene a meeting of the works council representatives, the court made two responses. First, it noted that the administrators in the English proceeding had no capacity to convene such a meeting.<sup>272</sup> Second, the court opined that the failure to call such a meeting could only be challenged by taking an appeal from the decision opening the main proceeding in Leeds, which the French administrator had failed to do.<sup>273</sup>

In consequence, the Versailles court found that the Leeds court had validly opened a main proceeding for Daisytek-France, and that, pursuant to the provisions of the EU Regulation, no French court had jurisdiction to open a subsequent main proceeding for the company.<sup>274</sup> Thus, the decision of the Pontoise Commercial Court to open a main insolvency proceeding for Daisytek-France violated the EU Regulation.<sup>275</sup>

There is another procedural issue (with substantial substantive consequences) that the Versailles court did not address. While the appeal was pending, on July 16, 2003 the Pontoise court confirmed the reorganization of Daisytek-France by authorizing a split into two parts and confirming the sale of the direct sales business to one purchaser and the sale of the indirect sales business to a second purchaser. The administrator appointed in Leeds (PricewaterhouseCoopers) demanded a

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<sup>266</sup> See Decree No. 85-1388, December 27, 1985, J.O., Dec. 29, 1985, p. 15281 art. 21 (as amended), (requiring publication in the Commercial Register of an order opening an insolvency case) (abrogated by Decree No. 2005-1677, Dec. 28, 2005, J.O., Dec. 29, 2005, p. 20324 art. 354).

<sup>267</sup> See C. COM. art. L. 621-4 (requiring the court to summon representatives of the works council (or delegates of the work force if there is no works council) before ordering the opening of an insolvency proceeding).

<sup>268</sup> See *Daisytek-Versailles*, 2003 WL 22936778, ¶ 6.

<sup>269</sup> See EU Regulation, *supra* note 9 art. 17.

<sup>270</sup> See *Daisytek-Versailles*, 2003 WL 22936778, ¶ 6. The English proceeding administrators argued that in fact they had asked the Pontoise Commercial Court to publish the English administration order, and the court office refused to make the publication. See *id.*

<sup>271</sup> See *id.*

<sup>272</sup> See *id.* ¶ 6-7.

<sup>273</sup> See *id.*

<sup>274</sup> See *id.* ¶ 7.

<sup>275</sup> See *id.* ¶ 6.

turnover of the proceeds.<sup>276</sup> The French judicial administrator had to negotiate a solution to the issues arising out of the sales, including his compensation and the compensation of his professionals.<sup>277</sup>

*E. The German Proceedings*

On May 19, 2003, the German business manager of the German subsidiaries filed an application in the county court in Düsseldorf to open main bankruptcy proceedings for the three German Daisytek companies: PAR, Supplies Team, and Daisytek-Germany. On the same day, the Düsseldorf court appointed a preliminary insolvency administrator for Supplies Team and Daisytek-Germany.<sup>278</sup> The only grounds stated for opening the insolvency proceedings was “overindebtedness.”<sup>279</sup>

The manager of the German subsidiaries failed to inform the court that main proceedings had been opened for each of these entities the previous week in England.<sup>280</sup> The newly appointed administrator brought the Leeds filings to the attention of the German court on June 4 and, two days later, the court issued an order that the Leeds decision would have no binding effect on the Düsseldorf court because the Leeds court did not either mention or follow the EU Regulation.<sup>281</sup> On June 12, the English insolvency administrators moved the Düsseldorf court to enter the Leeds judgment (including a German translation) in the court records, which the German court denied on June 23 on the same grounds as the June 6 order.<sup>282</sup>

On July 9, the preliminary insolvency administrator moved the Düsseldorf court to open insolvency proceedings for the Supplies Team and Daisytek-Germany proceedings. The court granted the motions the next day and appointed the temporary administrator as the insolvency administrator in both proceedings.<sup>283</sup>

Having failed the first time to obtain recognition of the Leeds order opening main insolvency proceedings for the German subsidiaries, the English insolvency administrator, on July 23, filed an extraordinary complaint against the opening order on the grounds that it violated EU Regulation Article 3, and promised further grounds for court action.<sup>284</sup> By decision of July 29, the Düsseldorf court refused to take action on this complaint, on the grounds that the Leeds decision was null and

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<sup>276</sup> See Valdman, *supra* note 254.

<sup>277</sup> See *id.*

<sup>278</sup> See Judgment of Mar. 3, 2004, AG Düsseldorf, 501 IN 126/03, slip op. at 1 (Ger.). [hereinafter *Düsseldorf*]

<sup>279</sup> See *id.* Under the German insolvency law, overindebtedness is one of the grounds for filing a voluntary bankruptcy proceeding. InsO § 16, available at <http://www.iuscomp.org/gla/statutes/InsO.pdf> (“The opening of insolvency proceedings shall require the existence of a reason to open such proceedings.”); § 19 (“Overindebtedness shall also be a reason [in addition to illiquidity or imminent illiquidity] to open insolvency proceedings for a corporation . . . Overindebtedness shall exist if the assets owned by the debtor no longer cover its existing obligations to pay.”).

<sup>280</sup> See *Düsseldorf*, 501 IN 126/03, slip op. at 1.

<sup>281</sup> See *id.* Apparently, as of June 6, 2003, the Düsseldorf court did not have a copy of the published opinion by the Leeds court issued on May 16, 2003.

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

<sup>284</sup> See *id.*

void as to Supplies Team.<sup>285</sup> The English administrator filed his “further grounds” on August 21, which included statements of the English solicitor, who was counsel to Supplies Team, and the Leeds court judgment.<sup>286</sup>

The Düsseldorf county court then referred the extraordinary complaint to the District Court, which, on October 23, reversed the county court’s July 29 order denying relief to the English administrator, and remanded the matter for further proceedings.<sup>287</sup> Because of a transition in the county court, the remand went to a new judge, who for the first time on January 12, 2004, ordered a full briefing by the parties in interest.<sup>288</sup> On March 8, 2004 the debtor filed a motion to open a secondary proceeding under the EU Regulation.<sup>289</sup>

On March 12, the Düsseldorf court withdrew the prior order opening a main proceeding and granted the motion to open a secondary proceeding.<sup>290</sup> The court found that the prior judge’s refusal to recognize the judgment of the Leeds court opening a main proceeding was invalid, and that the court’s subsequent refusals to alter this position were incorrect.<sup>291</sup> The earlier opening of a main proceeding in Leeds had to be respected pursuant to EU Regulation Article 16, the court found.<sup>292</sup>

The prior judge was misled, the court found, by the local manager, who failed to inform the court that she knew of the Leeds decision opening a main proceeding for Supply Team, and her giving the court the impression that the Leeds decision was made without her knowledge in violation of due process. The manager had subsequently admitted that she had consented to the Leeds filing.<sup>293</sup>

The proceedings for PAR were simpler. On August 1, 2003, the Düsseldorf court opened a secondary proceeding for PAR, after recognizing the pending main case in Leeds.<sup>294</sup>

## V. EU REGULATION—NEEDED IMPROVEMENTS

It is clear that there were major deficiencies in the procedures in the handling of several of the *Daisytek* and *Eurofood* proceedings. There are also major shortcomings in the substantive law under the EU Regulation. I first address the substantive issues.

### A. Substantive Improvements

The *Daisytek* and *Eurofood* cases bring to light two kinds of substantive improvements that the EU Regulation needs. First, the Regulation needs revision to

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<sup>285</sup> The Düsseldorf county court based this decision on a legal opinion of Professor Dr. Christoph Parulos of July 3, 2003, which the temporary administrator filed with the July 9 request to open an insolvency proceeding for Supplies Team.

<sup>286</sup> See *Düsseldorf*, 501 IN 126/03, slip op. at 1.

<sup>287</sup> See *id.*

<sup>288</sup> See *id.*

<sup>289</sup> See *id.*

<sup>290</sup> See *id.*

<sup>291</sup> See *id.* at 2.

<sup>292</sup> See *id.*

<sup>293</sup> See *id.*

<sup>294</sup> Email from Hon. Andreas Lemmert, Judge of Court of Appeals Cologne/Oberlandesgericht Köln (Ger.) (Feb. 25, 2004) (on file with author).

take account of corporate groups in venue decision-making. Second, the Regulation needs a better definition of CoMI to specify whether a particular factor should predominate in the CoMI determination, or whether a court should evaluate all of the relevant factors.

### 1. Corporate Groups

The first important change needed in the substantive law underlying the EU Regulation is to provide for the filing in the same venue of all insolvency proceedings for the members of a corporate group that constitute an integrated economic unit.

Virtually all multinational corporate empires are corporate groups, not single corporations. Indeed, there are often hundreds of legally separate entities,<sup>295</sup> and they may be doing business in scores of countries.<sup>296</sup> Some of them operate independent businesses. Others are integral parts of a larger business operation. Still others fall in between.<sup>297</sup>

The EU Regulation does not address the problem of corporate groups. It assumes that each legal entity should be evaluated separately to determine where its CoMI is located, which is the proper venue for its main insolvency proceeding.<sup>298</sup> More specifically, the EU Regulation does not authorize the filing or opening of a main proceeding for a particular company in a specific country because a parent company or other affiliate has opened a main proceeding in that country.<sup>299</sup> The EU Regulation makes no provision for any degree of cooperation between proceedings for related entities,<sup>300</sup> and it makes no provision for substantive consolidation.<sup>301</sup> This approach is unsatisfactory because a corporate group that is an integrated economic unit can only be reorganized or liquidated efficiently<sup>302</sup> if the reorganization is done collectively for the entire group.<sup>303</sup>

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<sup>295</sup> The Mercedes Benz-Chrysler corporate empire, for example, includes nearly a thousand separate legal entities. Consolidated Financial Statements of DaimlerChrysler AG at December 31, 2004, Statement of Investments in affiliated, associated and related Companies according to §313 HGB (German Commercial Code), available at [http://www.daimlerchrysler.com/Projects/c2c/channel/documents/628144\\_Subsiary\\_List\\_Group\\_2004\\_e.pdf](http://www.daimlerchrysler.com/Projects/c2c/channel/documents/628144_Subsiary_List_Group_2004_e.pdf).

<sup>296</sup> Parmalat involved more than a hundred affiliated entities doing business in thirty countries. When BCCI Holdings collapsed, it was doing business in some seventy-two countries.

<sup>297</sup> For a similar proposal, although somewhat different in its details, see Robert van Galen, *The European Insolvency Regulation and Groups of Companies* (2004), available at [http://www.iiiiglobal.org/country/european\\_union/Cork\\_paper.pdf](http://www.iiiiglobal.org/country/european_union/Cork_paper.pdf).

<sup>298</sup> See, e.g., *id.* (proposing revisions to the EU Regulation to provide for joint bankruptcy proceedings for corporate groups); Eurofood A.G. Report, *supra* note 28, ¶ 117 (“[E]ach subsidiary in a group must be considered individually.”); Wessels, *supra* note 26, at 178–80 (stating that the EU Regulation provides no rule for groups of affiliated companies); Virgós & Schmit, *supra* note 28, ¶ 76 (making the same point as Wessels, *supra*).

<sup>299</sup> It appears that the European Regulation authorizes a liquidator in a main proceeding to open a secondary proceeding for a related entity in the same country, notwithstanding that the related entity’s CoMI is located elsewhere. See EU Regulation, *supra* note 9, art. 29, pmb1. (19).

<sup>300</sup> See, e.g., MOSS ET AL., *supra* note 21, ¶ 8.56.

<sup>301</sup> See *supra* note 198; MOSS ET AL., *supra* note 21, ¶ 8.56.

<sup>302</sup> It is common wisdom, which is true in many cases, that a business is much more valuable as an integrated whole that is sold as an operating business than its parts are worth separately. For example, the English forklift manufacturer Lancer Boss would have realized considerably greater value if it had been sold as a single business with its German subsidiary instead of undergoing separate liquidations. This is

Both the Leeds High Court and the Versailles Court of Appeal noted that this factor could not be considered in determining the location of the CoMI of Daisytek-France. The Italian court of appeals, on the other hand, disregarded the lack of corporate group provisions in the EU Regulation and applied Italian corporate group law to justify the opening of an Italian Eurofood main proceeding in the court where the *Parmalat* case was pending.<sup>304</sup>

The sensible solution is to administer economically integrated group members in the home country of the integrated group, and to administer economically independent group members separately in their respective home countries. A sketch follows on how such a rule could operate.

#### a. Proposed Modification to CoMI Definition

The CoMI definition should be modified to provide that the venue decision for a corporate group under EU Regulation Article 3 be based on the collective CoMI of all of the legal entities that operate together as an integrated economic unit. Thus, where two or more companies are economically integrated and operate as a single economic group, the CoMI decision for the corporate group would displace a decision based on the CoMI of separate legal entities. In contrast, where a company that is part of a corporate group is not integrated with the others into a single economic unit, the court should decide its proper venue separately, based on the location of its own CoMI (as the EU Regulation and Model Law now provide).

A corporate entity in a group of related entities should be recognized as economically integrated into the group, for international venue purposes, if it depends on business derived from other members of the group for its economic survival and livelihood. A typical corporate group has a number of entities (perhaps hundreds) that depend on other members of the group for corporate survival, and this relationship is often reciprocal. They often resemble parts of a machine that have no reason for existing apart from the entity of which they form a part.

On the other hand, corporate groups often have entities (again, perhaps hundreds) that can survive independently from the group itself, and do not depend on the group for their existence and livelihood. An individual corporate entity that has sufficient economic independence to stand on its own, without the business activities of the rest of the corporate group, would not be economically integrated into the

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known as the “going concern” bonus in reorganization cases. If a business is not worth more as a going concern, it should be liquidated.

<sup>303</sup> If the subsidiary is not economically integrated into the corporate group and can stand on its own, it can be reorganized separately. Such separate reorganization has been accomplished or is in process for several of the Parmalat subsidiaries. See, e.g., Senator Charles E. Schumer, New York, *Parmalat Decision to Not Sell U.S. Assets Both Preserves Competition for Farmers and Helps Prevent Milk Price Hikes*, May 18, 2004, available at [http://schumer.senate.gov/SchumerWebsite/pressroom/press\\_releases/2004/PR02637.Parm051804.html](http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2004/PR02637.Parm051804.html) (announcing the restructuring of Parmalat’s U.S. operations); Felsberg e Associados, *Parmalat Files the First Request for Judicial Restructuring in São Paulo*, July 12, 2005, available at [http://www.felsberg.com.br/ingles/felsberg\\_news\\_contents.asp?i=16463&desc=if](http://www.felsberg.com.br/ingles/felsberg_news_contents.asp?i=16463&desc=if) (describing the separate reorganization of Parmalat’s Brazilian subsidiary in Sao Paolo, Brazil).

<sup>304</sup> See *Eurofood-Italy*, *supra* note 63, slip op. at 25 (holding that parent corporation in extraordinary administration has the right to request extraordinary administration proceedings for its subsidiaries based on “the need to allow, according to the logic of intra-company group dealings, uniform management of the business belonging to the group”).



group. Such an entity could have its own independent insolvency proceeding (which could be in another country).

A typical corporate empire has corporate entities of both kinds, some whose livelihoods are inextricably tied to the other members of the group, and others that are perfectly capable of standing alone, though they may make important contributions to the corporate group.

Some members of a corporate group may not fit neatly into either of these two categories. I recommend a default rule providing that, unless a member of a corporate group can function economically on its own, it is considered a dependent member of the group, and is entitled to file its insolvency proceeding in the same country (and presumably the same court) as the parent or master corporation.

Where an economically integrated member of a corporate group is a foreign corporation (that is, it is incorporated in a country separate from that where the parent corporation files its insolvency proceeding), the corporate law applicable to it may impose obligations that do not exist in the country where the parent's insolvency proceeding is filed. For example, the Daisytek-France union representatives (or other worker representatives if the employees were not unionized) had a right to be heard under French insolvency law before the opening of an insolvency proceeding.<sup>305</sup> In my view, such a company should be required to comply with the applicable business laws of its country of incorporation in connection with filing its insolvency proceeding abroad. Thus, the court should have been required to hear the worker representatives under applicable French law before opening an insolvency proceeding for Daisytek-France in England.

Admittedly, making a CoMI decision for a corporate group or economic unit will be more difficult than making such a decision for an individual legal entity. It will be necessary first to define which legal entities form a part of the integrated economic unit for which the CoMI decision is to be made. In contrast, if the decision is made separately for each legal entity, there is no issue of identifying the entity in question. Courts will need judges with suitable training to make such decisions, which may lead to the wider adoption of specialized bankruptcy courts or the assignment of bankruptcy proceedings to specialized commercial courts with appropriately trained judges.<sup>306</sup>

My proposed rule would also not provide an easy solution for a company that is only partially integrated into the corporate group, and may or may not be able to operate separately. This decision would turn on the facts of the particular case, which may call for a difficult judgment by the trial judge. As the *Eurofood* and *Daisytek* proceedings illustrate, this kind of decision will not likely arise often as to entities of substantial importance. However, it is the job of a judge to make difficult

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<sup>305</sup> See C. COM. art. L 621-4.

<sup>306</sup> Some countries already have specialized bankruptcy courts. These countries include the United States, Thailand, and Slovakia. In other countries, such as Morocco, bankruptcy cases go to commercial courts that handle other commercial cases, but not non-business cases. At the other end of the spectrum are countries such as Germany, where bankruptcy cases go to county courts (which are essentially small claims courts staffed with very junior judges). In France, where most bankruptcy cases go to the Commerce Tribunal, commercial cases are staffed with judges elected by the chamber of commerce, who usually have no legal training. See Koral & Sordino, *supra* note 253, at 443; Jean-Michel Lucheux, *Draft Bill on Reorganization, Projet de Loi de Sauvegarde des Entreprises*, available at [http://www.iiiglobal.org/country/france/Draft\\_Bill\\_France.pdf](http://www.iiiglobal.org/country/france/Draft_Bill_France.pdf).

decisions, and this is no different in kind from many others that judges are routinely required to make. Furthermore, creditors *ex ante* will know that they are dealing with such a company in most cases and will price their credit accordingly.

It is much harder to manipulate the CoMI of a corporate group than it is to manipulate the CoMI of a particular corporation.<sup>307</sup> This is especially true for a large corporate group such as Parmalat. Moving the CoMI of a corporate group such as General Motors, IBM, or General Electric out of the United States, or the CoMI of Fiat out of Italy, would be a formidable task. Furthermore, the possibility of filing secondary proceedings in those countries that have an establishment ameliorates very substantially the procedural difficulties of a foreign main proceeding. Thus, use of the CoMI of the corporate group for bankruptcy venue purposes promotes *ex ante* predictability and reduces transaction costs.

#### b. U.S. Experience with Corporate Groups in Bankruptcy

The U.S. experience is that it is usually best for the insolvency proceedings for related companies to be administered in the same court. For this reason, U.S. law has a rather broad provision for the filing of bankruptcy proceedings by related entities in the same court. The statute provides in relevant part: “[A bankruptcy case] may be commenced in the district court for the district— . . . (2) in which there is pending a case under title 11 concerning such person’s affiliate, general partner, or partnership.”<sup>308</sup>

Generally, any corporation that holds a twenty percent interest in a debtor may file its own bankruptcy case in the same court as the debtor.<sup>309</sup> Equally, any company in which the debtor holds a twenty percent interest may also file in the same court.<sup>310</sup> If two cases with the specified relationship are filed in separate courts, the court in which the first case was filed determines where the cases should proceed, and whether in the same district or in separate districts.<sup>311</sup> The court makes this determination based on “the interest of justice or the convenience of the parties.”<sup>312</sup> Pursuant to this provision, a group of related companies almost always file their bankruptcy cases in the same court in the United States.

There is no comparable provision in the EU Regulation. Under the EU Regulation, each company must justify the country where its main bankruptcy proceeding is to be opened by showing that the CoMI of that particular legal entity is located in that country.<sup>313</sup> The EU Regulation should be amended to include a provision like that in the U.S. law on the venue of related corporate entities.

My recommendation for the EU Regulation (which I also make with respect to the UNCITRAL Model Law on Cross-Border Insolvencies)<sup>314</sup> is substantially narrower than the U.S. practice: I would authorize the filing of affiliate proceedings

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<sup>307</sup> See Guzman, *supra* note 27, at 2214.

<sup>308</sup> 28 U.S.C. § 1408 (2005).

<sup>309</sup> See 11 U.S.C. § 101(2)(A) (2005).

<sup>310</sup> See *id.* § 101(2)(B).

<sup>311</sup> See U.S.C.S. § 1014(b) (Fed. R. of Bankr. P. 2005).

<sup>312</sup> See *id.*

<sup>313</sup> See WESSELS, *supra* note 21, at 9–11.

<sup>314</sup> See BUFFORD ET AL., *supra* note 10, at 135–38.

in the same court as the master proceeding only for economically integrated affiliates, rather than for all affiliates.

There is an important reason for taking a narrower approach. The choice of venue largely determines the substantive and procedural rules applicable to an insolvency proceeding: For the most part, domestic law and procedural rules govern.<sup>315</sup> The choice of venue among domestic courts in a particular country is much less important than the choice of venue between countries: Within a particular country, there is usually a single applicable insolvency law and procedures, and a single or closely comparable applicable non-insolvency regime.<sup>316</sup> In contrast, the variations in insolvency laws among countries are vastly greater, and implicate national policies to a far greater extent. The narrow scope of venue that I recommend for related entities gives recognition to the importance of differing national policies expressed in their insolvency laws: There will be fewer proceedings under my approach where a particular corporation's proceeding will not be filed in the country where its own CoMI is located.<sup>317</sup>

### c. Impact of My Recommendation on *Daisytek* and *Eurofood* Proceedings

According to my view on corporate groups, both Daisytek-France and the German Daisytek operating subsidiaries should not have had main proceedings in England because, apparently, they were essentially stand-alone operations (except for the activities of one manager in England). In contrast, under my approach the *Eurofood* proceeding most certainly would be properly venued in Italy, and not in Ireland.

## 2. Definition of CoMI

There are three different perspectives on the CoMI of a particular corporation that are recognized in the reported cases. It appears that the EU Regulation contemplates that these different perspectives will all be considered by the court making the determination of the CoMI of a corporation in a particular case. However, the courts have tended to give priority to one perspective over the others in their decisions.

One perspective on a corporation's CoMI is to focus on the corporation's "nerve center," or the location where executive decisions are made.<sup>318</sup> In *Eurofood-Parma*, for example, the trial court found that the effective headquarters of the company, consisting in management activity and the main directive center of the company, were situated at the parent's headquarters in Parma, Italy.<sup>319</sup> The "real management"

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<sup>315</sup> See *supra* text accompanying notes 35–44.

<sup>316</sup> One exception to this generalization is the United Kingdom. See *supra* note 214. Even in the United Kingdom, the separate laws in Scotland and Northern Ireland are very similar, and the scale of their differences is very small compared with differences among the insolvency laws of various countries.

<sup>317</sup> The location of the CoMI is the basis for international venue for main insolvency proceedings. See *supra* text accompanying notes 30–31.

<sup>318</sup> Cf. MOSS ET AL., *supra* note 21, ¶ 8.39 ("[T]he focus is more correctly the question of the location of the place where head office functions are carried out than on the location of the head office.").

<sup>319</sup> See *Eurofood-Parma*, *supra* note 108, slip op. at 3–4. Circulaire Relative à l'Entrée en Vigueur du Règlement n° 1346/2000 du 29 Mai 2000 Relatif aux Procédures d'Insolvabilité, Bulletin Officiel du

of the business, the court found, was carried out by the Italian employees of the Parmalat Group in Parma.<sup>320</sup> This “de facto situation,” the court held, should prevail over the formal incorporation of the business in Ireland.<sup>321</sup> In addition, the Parma court found, the two large transactions that the corporation undertook were managed by the Parmalat executives in Parma.

A variation on this perspective appears in the *Daisytek-Leeds* decision, which focused on the scale of interests administered in a particular country and their importance to the corporation.<sup>322</sup> Another variation on this view appears in the *Eurofood-Italy* decision, which found decisive the control relationship with the parent corporation, which was in extraordinary administration in Italy.<sup>323</sup>

A second perspective is to focus on the actual operations and conduct of the business, and to inquire where this takes place. This kind of inquiry may not lead to a clear choice of one country, particularly where the business operations are extensive in more than one country. This perspective is illustrated in the *Eurofood-Dublin* case, where the court explored in substantial detail the location of the corporation’s business offices, the location of the corporation’s board members and their meetings, and the source of limitations on its corporate charter (based on Irish law). This kind of inquiry may not lead to a clear choice of one country, particularly where the business operations are extensive in more than one country.

A third perspective is to examine the expectations of the creditors of the debtor, such as the suppliers and the financiers.<sup>324</sup> In *Daisytek-Leeds*, the court found that the financing for the French and German subsidiaries was all arranged in England, and that seventy percent of the goods supplied to the French and German subsidiaries were supplied under contracts arranged by the headquarters office in England.<sup>325</sup>

In my view, a court should treat each of these perspectives as factors for consideration in determining the CoMI in a particular case. None should have decisive importance. At the same time, the weight given each factor will vary depending on the nature of the business and the extent of operations or executive decision-making involved in the particular case. This requires a particularized examination of the facts in each case.<sup>326</sup>

It must be admitted that, in the final analysis, courts may differ in the evaluation of these factors and may arrive at different conclusions.<sup>327</sup> Article 16 deals with this

Ministère de Justice Num. 89, (1e janvier–31 mars 2003) (noting that a corporation’s CoMI is located at the effective center of the management of its business).

<sup>320</sup> See *Eurofood-Parma*, *supra* note 108, slip op. at 4.

<sup>321</sup> See *id.* at 4–5.

<sup>322</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 3.

<sup>323</sup> See *Eurofood-Italy*, *supra* note 63, slip op. at 15.

<sup>324</sup> The suppliers may have quite different expectations from the financiers with respect to the CoMI of a corporation. For example, the suppliers of a subsidiary of an international corporate empire may be located entirely in the country where the subsidiary conducts its business, while the financiers may be located in the country where the corporate empire obtains its financing.

<sup>325</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶ 3–4.

<sup>326</sup> See Raimon, *supra* note 55, at 745–53 (discussing cases).

<sup>327</sup> It is doubtful, in my view, that the discrepancy between the *Eurofood-Dublin* decision and that in *Eurofood-Parma* rests substantially on differing views of the proper weight allowable to these factors. The difference in these decisions appears to rest principally on the difference in evidence presented to those courts, and the inability of the Irish liquidators to present their evidence to the Parma court before it made its CoMI decision. See *infra* text accompanying notes 359–75.

situation: the first court in time to issue a “judgment opening insolvency proceedings” has priority, subject only to a requirement that the court have jurisdiction.<sup>328</sup>

### *B. Procedural Improvements*

Procedural issues are crucial to the determination of the location of the main proceeding for a company with international transactions. The result of such a determination is substantial: It determines which country’s laws will, for the most part, govern the rights of creditors and other interested parties in the proceeding.<sup>329</sup> The governing law for most issues in the main proceeding is the law of the country where the main proceeding is opened.<sup>330</sup> The choice of forum governs such rights as the scope of the automatic stay or moratorium and the rights to be relieved therefrom, the availability of interim relief pending the opening of an insolvency proceeding, the rights of workers in the proceeding, the priority of claims, the right to reorganize, and the voting requirements for approval of a reorganization plan. Thus, a procedure is needed to guarantee a full and fair consideration of the issues that determine the location of the CoMI.

The EU Regulation is notably lacking in procedural rules. The strategy of the EU Regulation is to rely on domestic procedural rules to govern EU Regulation procedures. Because each of the EU member countries has a domestic bankruptcy law, this strategy is largely well founded. However, the EU Regulation contains distinctive substantive and procedural provisions that are not reflected in domestic bankruptcy procedures, and which need supplementary procedural rules.

Because the procedural rules would specifically apply to rights under the EU Regulation, it is appropriate that the procedural rules be adopted at the EU level. Presumably, the EU has the power to issue a supplementary procedural regulation to establish procedures for the application of the EU Regulation in the national courts of the member countries.

The application of the EU Regulation to date shows that it needs three important procedural improvements to make it workable. The first major improvement needed is the adoption of procedures governing a decision on the location of the debtor’s CoMI, which, in turn, determines the country where a main proceeding should be located. In particular, this decision must be unlinked from the decision to open an insolvency proceeding and other “first day” orders, and the procedures need to provide a fair venue hearing, on notice to all creditors and other interested parties, and an opportunity to be heard.

The second major improvement is to adopt a definition of the “opening” of a proceeding, to provide for the procedures under the laws of countries such as Ireland and the United Kingdom, which do not include a traditional judicial order for opening a proceeding.

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<sup>328</sup> See EU Regulation, *supra* note 9, art. 16.

<sup>329</sup> See *supra* text accompanying notes 34–44.

<sup>330</sup> See EU Regulation, *supra* note 9, art. 4 (stating that the law of the forum state governs an international insolvency proceeding governed by the EU Regulation, except to the extent that the EU Regulation provides otherwise).

The third set of procedural reforms needed fall generally under the category of “due process.” Procedural rights that need recognition include (a) advance notice of important hearings in a proceeding (including the decision on the CoMI), (b) providing copies of relevant papers for a hearing, (c) recognizing a right for all parties in interest (including foreign liquidators) to be heard and to present evidence, (d) granting a right to appeal, including a right to consideration by the ECJ, and (e) coordinating procedural rules in the various countries so that no party obtains a procedural advantage by virtue of filing in a particular country with more efficient procedural rules.

Under chapter 15, the U.S. domestication of the UNCITRAL Model Law,<sup>331</sup> the procedural situation is more favorable. In addition to the bankruptcy code, the Federal Rules of Bankruptcy Procedure provide a substantial set of procedural rules promulgated by the U.S. Supreme Court (on the recommendation of the U.S. Judicial Conference and its committees, and with the consent of Congress). While the Federal Rule of Bankruptcy Procedure does not presently include rules for the application of the provisions in chapter 15, these rules are in the drafting process.<sup>332</sup> In addition, many federal judicial districts have adopted substantial local procedural rules for their bankruptcy courts that supplement the federal rules.<sup>333</sup> The procedural insufficiencies of the EU Regulation thus can be avoided in the United States by the promulgation of appropriate additions to the Federal Rules of Bankruptcy Procedure.

#### 1. Procedures for Determining CoMI

Many of the venue problems that have arisen in the administration of international insolvency proceedings in recent years have resulted from inadequate procedural rules. This inadequacy is particularly important in the decisions on the location of the CoMI in the *Eurofood* and *Daisytek* proceedings. The timing of the CoMI decision needs to be delayed to a certain extent, so that the quality of the evidence for the decision can be improved and the parties in interest can be heard.

##### a. Timing of the Decision on Whether a Proceeding Is a Main Proceeding

The determination whether a transnational insolvency proceeding is a main proceeding, based on the location of the CoMI, tends to be made at the outset of a proceeding, within a few days of its filing. In a civil law country, this decision is typically made at the same time as the decision opening the proceeding.<sup>334</sup> In a common law country, the decision is frequently included in the “first day order” package.<sup>335</sup>

The decision whether a proceeding is a main proceeding is too important an issue in a transnational insolvency proceeding to decide at the outset, before all of the parties in interest have an opportunity to be heard. This decision needs careful

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<sup>331</sup> See Pub. L. No. 105-8 (2005).

<sup>332</sup> It takes approximately three years for the promulgation of revisions to the Federal Rules of Bankruptcy Procedure. Thus, it will take some time for the new rules governing chapter 15 practice to come into force.

<sup>333</sup> See, e.g., C.D. Cal. Bankr. R. (2005).

<sup>334</sup> See, e.g., *Eurofood-Parma*, *supra* note 108, slip op.

<sup>335</sup> See, e.g., *Daisytek-Leeds*, 2003 WL 21353254.

consideration after all of the interested parties have been provided notice and an opportunity to be heard. The EU Regulation does not provide a procedure to assure notice to the interested parties and an opportunity to be heard before the decision on this issue is made. Furthermore, the local procedures in EU countries have produced mixed results.

The Dublin High Court followed appropriate procedures in its *Eurofood* proceeding to assure that all of the parties in interest would have notice of the hearing on the determination whether its proceeding was a main proceeding, so that they would have sufficient time to prepare and present the relevant information for this determination, and that they would have a full and fair opportunity to present their views to the court. The court took a month and a half for briefing and hearings on this issue, and issued its ruling nearly two months after the initial filing of the proceeding.<sup>336</sup>

The Parma court did require a measure of notice to the parties in interest of its February 17 hearing on the opening of its *Eurofood* proceeding. When Dr. Bondi filed the *Eurofood* proceeding on Tuesday, February 10, the court ordered him to give notice to the “interested parties” of the February 17 hearing. On Friday, February 13, at 5:15 p.m., Dr. Bondi delivered his notice to Mr. Farrell of the February 17 hearing in Parma.<sup>337</sup> The notice was a short form, which stated the date and time of the hearing, and that its purpose was to determine Eurofood’s solvency, given that it had already been admitted into extraordinary administration.<sup>338</sup> Notably, the notice gave no warning that the Parma court would take up any issues related to whether its proceeding qualified as a main proceeding under the EU Regulation, or where Eurofood’s CoMI was located. While the Italian court had directed that copies of the papers filed in Parma (which included nineteen exhibits) be given to Farrell, he was not able to obtain copies (despite repeated written and verbal requests) until after the hearing in Parma.<sup>339</sup>

Despite the direction of the Parma court to Dr. Bondi to give notice to the appropriate interested parties, he gave no notice to either Bank of America (the petitioning creditor in Dublin) or the noteholders represented by Metropolitan, who clearly qualified as parties in interest.<sup>340</sup> Bank of America learned about the hearing on Sunday, February 15 (on a holiday weekend), and was unable to have legal counsel attend the February 17 hearing.<sup>341</sup> The noteholders, represented by Metropolitan, received notice on Sunday night, February 15, the day before a national holiday and were also unable to present evidence at the Parma hearing, or even arrange for local Italian counsel to attend the hearing. Their only submission was a letter delivered to the Irish provisional liquidator, which was presented to the Parma court in the post-hearing briefing.

On Tuesday, February 17, the court in Parma held its hearing on opening a *Eurofood* proceeding in Italy. Farrell appeared and requested an adjournment to provide additional time to present relevant evidence.<sup>342</sup> Eurofood’s bank creditors

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<sup>336</sup> See *Eurofood-Dublin*, *supra* note 64, slip op.

<sup>337</sup> See *id.* at 8.

<sup>338</sup> See *id.*

<sup>339</sup> See *id.* at 10–11.

<sup>340</sup> See *id.* at 9.

<sup>341</sup> See *id.* at 11–12.

<sup>342</sup> See *id.* at 11.

were unable to attend. The Parmesan court denied an adjournment, but gave Mr. Farrell an additional thirty hours (until 7 p.m. on Wednesday) to serve additional briefing.<sup>343</sup>

After the February 17 hearing, the court permitted Mr. Farrell's counsel to make copies of some of the papers that Dr. Bondi had filed. However, the press of time and the limited copying facilities prevented Mr. Farrell from copying the entire filing. Mr. Farrell filed his additional briefing on Thursday morning, and Bondi filed an additional brief as well.

Thus, while there was some notice of the February 17 Parma hearing on its *Eurofood* proceeding, the notice was insufficient and mostly ineffective.

None of the Daisytek decisions to open a main proceeding for its French and German subsidiaries provided even as much notice and opportunity to be heard as the Parma court provided in *Eurofood*. In Leeds, the first day hearings resulted in decisions to open main proceedings for fourteen Daisytek affiliates.<sup>344</sup> For the French and German affiliates, apparently no notice was provided to their French or German creditors. French law required that notice be given to Daisytek-France's one hundred and forty-five French employees,<sup>345</sup> who had substantial rights under French law, including the right to be heard before the opening of an insolvency proceeding<sup>346</sup> and the right to a representative in the insolvency process.<sup>347</sup> For all we know, if the parties in interest from France and Germany had been given notice, an opportunity to be heard, and an opportunity to present evidence, the evidence on which the Leeds court made its findings may have been controverted.

In the proceeding filed for Daisytek-France in Pontoise, no notice was given to the English administrators (and apparently not to any creditors, either) before the Pontoise Commercial Court ordered the opening of a main proceeding.<sup>348</sup> However, both the workers and the public prosecutor were given notice and appeared.<sup>349</sup> The English administrators appeared afterwards on a motion to intervene, which the Pontoise court denied.<sup>350</sup>

The defects in the German procedure for the opening of the main proceedings for Supplies Team GmbH and ISA Deutschland GmbH arose from a different problem. In those proceedings, the German administrator simply failed to provide the information to the court that she had authorized the English filings for these two companies.<sup>351</sup> When this came to light and was presented to the German court, however, the court refused to set aside the opening of the main proceedings.<sup>352</sup> The district court reversed on these grounds, and on remand (after a new judge had taken over the responsibilities in the court), the county court opened secondary proceedings for each of these companies.<sup>353</sup> In contrast, the county court took a

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<sup>343</sup> See *id.* The *Parma* court gave Mr. Farrell until 11 a.m. on Thursday to file the brief.

<sup>344</sup> See *supra* discussion accompanying notes 203–12.

<sup>345</sup> See C. COM. art. L 621-4.

<sup>346</sup> See *id.*

<sup>347</sup> See *id.* art. L. 621-8.

<sup>348</sup> See *Daisytek-Pontoise*, *supra* note 212, slip op.

<sup>349</sup> See *id.*

<sup>350</sup> See *Daisytek-Versailles*, 2003 WL 22936778, ¶ 3.

<sup>351</sup> See *Düsseldorf*, 501 IN 126/03, slip op. at 1.

<sup>352</sup> See *id.*

<sup>353</sup> See *id.*



longer time before opening a proceeding for the German parent corporation, PAR and its initial decision was to open a secondary proceeding.<sup>354</sup>

My view is that a decision on whether a proceeding is a main proceeding or a secondary proceeding should be delayed for a month or two after notice of the filing is given to creditors, to provide both notice of a hearing on this issue and an opportunity to be heard to all of the parties in interest.<sup>355</sup> The notice should also go to those administrators and committees of creditors (if there are any) that have already been appointed in proceedings in other countries (whether inside or outside the EU) with respect to either the same corporate entity or a related entity. The law should further provide that such administrators and committees, as well as creditors in those related insolvency proceedings, have standing to be heard on the decision of opening a main or a secondary proceeding.

Procedural rules on the decision to declare a proceeding a main insolvency proceeding need to include both a right to be heard and a right to notice.<sup>356</sup> Under the Italian rules applicable to the Italian *Eurofood* proceeding, for example, creditors were not recognized as parties in interest on the decision to declare the proceeding a main proceeding, and thus they had no right to be heard.<sup>357</sup> While the Parma court ordered the Italian administrator (Dr. Bondi) to give notice to the interested parties, he only gave (belated) notice to the Irish provisional liquidator and gave no notice to Eurofood's three creditors, who apparently would have participated in the Italian hearing had they been given the opportunity to do so.<sup>358</sup>

Under the EU Regulation, this procedural problem cannot be solved at the national level. However, it can be solved at the EU level by supplementing the EU Regulation with procedural rules to assure a reasonable degree of procedural fairness to the parties, or "due process," as it is called in the United States.

#### b. Nature and Quality of Evidence on CoMI

Courts must make their decisions based on the evidence presented to them. Courts are simply not at liberty to search out their own evidence, or even to tell the parties what evidence to present. Given the presumption that a corporation's CoMI is found where its registered office is located,<sup>359</sup> evidence of the location of its registered office should be sufficient unless a party in interest disagrees. It is clear that the evidence presented to the Parma court in the *Eurofood* proceeding differed markedly from the evidence presented to the Dublin court. The remedy for this

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<sup>354</sup> See E-mail to author from Hon. Andreas Lemmert, *supra* note 294.

<sup>355</sup> *But see* MOSS ET AL., *supra* note 21, ¶ 8.148 (stating that English procedural forms require a decision, at the time of opening, on whether the proceeding is a main or a secondary proceeding). I disagree with the timing of this decision.

<sup>356</sup> See, e.g., *Eurofood-Ireland*, *supra* note 80, slip op., at 17–19 (finding that the Irish liquidator was not given fair notice of the Parma hearing sufficient to permit him to participate meaningfully and was improperly denied copies of the papers presented to the Parma court).

<sup>357</sup> See Tommaso Manferoce, *Gli Organi, Gli Effetti e l'Accertamento del Passivo* ¶ 103.3, in *IL FALLIMENTO E LE ALTRE PROCEDURE CONCORSUALI* 263 (Luciano Panzani ed. 2003); Lucio Ghia, *The Italian Legislation Provided for the Parmalat Case Under a Critic Point of View*, available at <http://www.iiiglobal.org/country/italy/parmalat.pdf> (last visited Feb. 17, 2005) ("[T]he creditors have been deprived of their rights of credits" in the amended statute enacted for the Parmalat proceeding).

<sup>358</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 16 (opinion by Judge Fennelly).

<sup>359</sup> See *supra* notes 55–56 and accompanying text.

problem lies in giving the parties enough time to collect and present the relevant evidence before making a decision on the CoMI.<sup>360</sup>

The nature and quality of the evidence supporting a decision to open a main proceeding is very important. It appears that, in the *Eurofood* and *Daisytek* proceedings, the high court in Dublin was the only first instance court with quality evidence to support this decision. While the Dublin court appointed a temporary liquidator on an ex parte motion based only on an unopposed affidavit of the managing director of Bank of America,<sup>361</sup> it postponed the decision on whether the proceeding qualified as a main proceeding for two months, so that the Italian administrator would have a full opportunity to be heard.

The evidence before the Dublin High Court on the first day of the *Eurofood* proceeding was much more limited. The court based its decision to appoint Pearse Farrell as provisional liquidator on a lengthy affidavit presented by Wayne Porritt, the managing director of Bank of America NA.<sup>362</sup> In part, the affidavit expressed the bank's concern that Parmalat may appoint new directors, replace the existing Irish directors, and take other actions that could result in relocating Eurofood's CoMI abroad.<sup>363</sup> There is no reflection in the court's decision that the decision to appoint a temporary administrator was so urgent that it could not postpone this decision for at least two or three days to give the creditors and other parties in interest an opportunity to appear at the hearing and present evidence.

The Leeds Court's decision to open a main proceeding for Daisytek-France fails to disclose the evidence to support its decision. Apparently, the only evidence provided to the Leeds court was a fairly detailed affidavit from the chief executive officer of Daisytek-ISA Ltd., the master English holding company for the European Daisytek enterprise, that was filed with the bankruptcy petition.<sup>364</sup> Finally, it is fair to assume that the Leeds court did not allocate much time to hearing or examining the evidence as to the French and German Daisytek subsidiaries, because the court made similar decisions in fourteen *Daisytek* proceedings that day.<sup>365</sup>

Similarly, the Parma court based its decision in *Eurofood* principally on extensive papers that Dr. Bondi filed, including nineteen exhibits, which he never provided to the Irish liquidator (either before or after the hearing in Parma).<sup>366</sup> The nature of the evidence that Dr. Bondi presented to the Parma court is not disclosed in either the Parma court's decision or the appellate decision. More troublesome, it was also not disclosed to Mr. Farrell, the administrator appointed in the Irish case, at all

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<sup>360</sup> See *infra* text accompanying notes 398–400.

<sup>361</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 6.

<sup>362</sup> See *id.* at 6.

<sup>363</sup> See *id.* at 7.

<sup>364</sup> See *Daisytek-Leeds*, 2003 WL 21353254, ¶1–4. A similar procedure was followed in the *Enron Directo* case, Chancery Division, 4 July 2002. *Enron Directo* was a *sociedad limitada* incorporated in Spain. It was placed in administration by order of a London court after an ex parte hearing based solely on a witness statement by one of its English directors and a similar statement by the administrator of an affiliate. See Freshfields Bruckhaus Deringer, *Bankruptcy Jurisdiction in the U.S. and Europe: Reconsideration Needed at 10* (2005), available at <http://www.freshfields.com/publications/pdfs/2005/13114.pdf> (last visited Jan. 29, 2006) [hereinafter Freshfields].

<sup>365</sup> Indeed, in the court's eighteen paragraph decision on the fourteen applications, only paragraph 17 addresses the facts concerning Daisytek-France's CoMI.

<sup>366</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 15–16.

before the hearing, and only in part afterwards.<sup>367</sup> We may fairly conclude, however, that Dr. Bondi's evidence was extensive; we know that it included nineteen exhibits.<sup>368</sup> After the hearing, the court gave the English administrators only thirty hours to file any supplemental evidence or arguments.<sup>369</sup>

The French commercial court that decided to open a competing main proceeding for Daisytek-France in Pontoise had somewhat more, albeit also one-sided, evidence in support of its decision. Bruce Robinson, the Daisytek-France president, presented a declaration in writing and orally confirmed that the high court in Leeds had opened a bankruptcy proceeding for Daisytek-France, and that the company was in a state of cessation of payments.<sup>370</sup> Philippe Kersebet, speaking on behalf of the employees, explained that the workforce was restless because of the opening of the proceeding in Leeds, and because relations with suppliers were deteriorating.<sup>371</sup> The Daisytek-France financial director also presented evidence on the tenuous state of the finances of the business.<sup>372</sup> Finally, the public prosecutor opined that the financial situation of the company was extremely tenuous and that it was close to liquidation.<sup>373</sup> The court did not hear from the administrators appointed in the Leeds proceeding until the next month, when they filed third-party proceedings to join the French proceeding. The court promptly dismissed their application.

In the German *Daisytek* proceedings filed in the Düsseldorf County Court (a small claims court) on May 19, 2003 (the Monday following the Leeds filings), the only evidence presented was a letter from the sole Düsseldorf business manager of the three German subsidiaries, to which was appended the December 31, 2002 financial statement.<sup>374</sup> The legal brief relied on the simple assertion that the bankruptcy proceedings were being filed because of "overindebtedness."<sup>375</sup>

Thus, except in Dublin, all of the evidence presented in the courts of first instance in the *Eurofood* and *Daisytek* proceedings consisted of unopposed declarations and statements presented in ex parte proceedings where possible opponents were given either no notice whatever (Leeds, Düsseldorf, and Pontoise) or insufficient notice to present an opposition (Parma). Because they failed to provide an opportunity for opposition, those courts certainly lacked a balanced presentation of the evidence on the location of the CoMIs at issue, and much important evidence was likely not presented.

The adoption of EU procedures to give timely notice and an opportunity to be heard will vastly improve the quality of evidence presented to an EU court making a decision on whether a proceeding should be a main proceeding based on the location of the debtor's CoMI.

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<sup>367</sup> *See id.*

<sup>368</sup> *See id.* at 15.

<sup>369</sup> *See id.* at 16.

<sup>370</sup> *See Daisytek-Pontoise, supra* note 212, slip op. at 2.

<sup>371</sup> *See id.*

<sup>372</sup> *See id.*

<sup>373</sup> *See id.*

<sup>374</sup> *See Düsseldorf*, 501 IN 126/03, slip op. at 1.

<sup>375</sup> *See id.* Overindebtedness is one of the grounds for opening an insolvency proceeding under German law. *See InsO, supra* note 279, § 19. Overindebtedness arises where a debtor's liabilities exceeds its assets. *See id.*

### c. Appeal of CoMI Decision

It is always possible that a court of first instance may make an incorrect decision on the CoMI, just as a court may make a wrong decision on any other issue. The remedy is to take an appeal.<sup>376</sup> Such an appeal was properly brought in the French and two of the German *Daisytek* proceedings. In both of these appeals, the appellate courts looked at the appropriate evidence and corrected the mistakes of the courts of first instance. The decision of the Parma court in *Eurofood* was affirmed on appeal in Italy. An appeal in the Irish *Eurofood* proceeding and a further appeal in the French *Daisytek-France* proceeding are pending. However, nobody took an appeal in the English *Daisytek-France* proceeding (decided by the Leeds court).<sup>377</sup>

A second remedy is also available if a court fails to apply the rules properly in deciding that a proceeding is a main proceeding for a particular debtor. The EU Regulation provides that a court may deny recognition of a foreign main bankruptcy proceeding on public policy grounds.<sup>378</sup> As the Irish courts have shown in *Eurofood*, it could possibly be proper to invoke a public policy provision where a court in another country has acted improperly in declaring a proceeding to be a main proceeding.<sup>379</sup> While a wrong decision on this issue alone is likely not a sufficient basis for invoking the public policy exception,<sup>380</sup> the Irish court found that due process violations by the Parma court<sup>381</sup> in deciding that its *Eurofood* proceeding was the main proceeding required the denial of recognition of the Italian decision on public policy grounds.

## 2. “Opening” of a Proceeding

There are both international and domestic procedural issues relating to the “opening” of an insolvency case for the purposes of the application of EU Regulation Article 16.1.

### a. International Issue

An international procedural problem arises with respect to opening a case within the meaning of EU Regulation Article 16.1, because the EU Regulation’s recognition provision takes effect upon the issuance of a “judgment opening insolvency

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<sup>376</sup> According to the *Eurofood* A.G. Report, *supra* note 28, the proper remedy for a party contending that a court has wrongly opened a main proceeding is to take an appeal in the courts of the country where the order was issued, with the possibility of a reference to the ECJ if appropriate. *See id.* ¶ 104.

<sup>377</sup> Arguably, the failure to take these appeals rendered the venue issues moot. Perhaps the only issue remaining to discuss in these proceedings is whether there is anything wrong with a venue choice when the affected creditors have failed to exercise their appellate rights.

<sup>378</sup> *See* EU Regulation, *supra* note 9, art. 26; Model Law on Cross-Border Insolvency, *supra* note 18, art. 6.

<sup>379</sup> *See Eurofood-Ireland*, *supra* note 80, slip op. at 17–19; *Eurofood-Dublin*, *supra* note 64, slip op. at 30–32.

<sup>380</sup> The Versailles court did not invoke the EU Regulation public policy exception to refuse recognition of the Leeds High Court decision that the *Daisytek-France* main proceeding was located in England.

<sup>381</sup> Apparently, when it issued its decision on July 27, 2004, the Irish Supreme Court was unaware of the Italian Court of Appeals decision filed on July 16, 2004 that affirmed the decision of the Parma court.

proceedings . . . .”<sup>382</sup> The problem arises because some countries, notably the English-speaking common law countries, do not have procedures providing specifically for a “judgment opening insolvency proceedings.”

Civil law countries invariably provide that an insolvency proceeding does not formally begin until a court issues a judgment opening the proceeding. In their view, the consequences both to debtors and creditors are far too important and drastic to permit them to arise simply upon the filing of a proceeding. In Germany, for example, an insolvency proceeding begins with a request by the debtor or creditors to open a proceeding.<sup>383</sup> If the request is made by the debtor, the court order opening the proceeding may be issued almost immediately. However, there is often a delay of several days or more.<sup>384</sup> In France, the delay may be more significant: For a debtor’s voluntary application, it ordinarily takes a minimum of ten to fourteen days for a court to issue an opening order, and may take much longer.<sup>385</sup>

In contrast, there is typically no order “opening” an insolvency proceeding subject to the EU Regulation in Ireland (or in the United Kingdom).<sup>386</sup> In Ireland, however, a compulsory liquidation procedure “is commenced” by order of the court.<sup>387</sup> This requirement applies both to involuntary cases and to the rare voluntary case filed under Irish law.<sup>388</sup> Such an order is arguably the functional equivalent of a “judgment opening insolvency proceedings.” In the *Eurofood* case, the Dublin court issued this commencement order on March 23, 2004. If this analysis is correct, the Parma court correctly decided that no such decision had yet been made in Ireland when it issued its February 20, 2004 order opening an extraordinary reorganization case in Italy.

While the Dublin trial court found, in the involuntary *Eurofood* proceeding, that its January 27, 2004 first day order qualified as a “judgment” under the EU Regulation definition, the Parma court properly found that the January 27 Dublin decision did not qualify as a “judgment opening insolvency proceedings” that invoked automatic recognition under the EU Regulation.<sup>389</sup> An Irish court does not issue a winding up order on an involuntary petition until a hearing on notice to

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<sup>382</sup> See EU Regulation, *supra* note 9, art. 16.1.

<sup>383</sup> See InsO, *supra* note 279, § 13.

<sup>384</sup> See, e.g., *Eurofood-Parma*, *supra* note 108 (delay of seventy-four days before opening the proceeding).

<sup>385</sup> Conversation with Judge Jean-Luc Vallens, Bankruptcy Counsel, Ministry of Justice (Fr.), in Washington, D.C. (Nov. 15, 2004).

<sup>386</sup> As to the England and Wales procedures on the commencement of administration proceedings, see *Daisytek-Leeds*, 2003 WL 21353254; see also MOSS ET AL., *supra* note 21, ¶ 8.52 (only the issuance of an administration or winding-up order under English law will qualify as an “opening” under the EU Regulation).

<sup>387</sup> See BRAUDE ET AL., *supra* note 204, ¶ 27.04 [1].

<sup>388</sup> In part, the Irish *Eurofood* case suffered from the Irish practice that a voluntary winding up by a debtor almost always takes advantage of a non-judicial procedure that is not recognized under the EU Regulation. An Irish corporate debtor rarely presents its own voluntary winding up petition to a court. Such debtors usually prefer the cheaper and more flexible procedures of a voluntary winding up. See *id.* ¶¶ 27.04[2]; 27.05. For the insolvency procedures recognized under Article 16, see *id.* Annex A. The Irish compulsory winding up by the court is included in this list, but not a voluntary winding up.

<sup>389</sup> Indeed, this was precisely the point on which the court in Parma based its decision that a main proceeding under the EU Regulation had not yet been opened in Dublin.

creditors, where the debtor (and the non-petitioning creditors) has an opportunity to contest the winding up.<sup>390</sup>

The analysis of the Italian courts could use elaboration. On February 20, 2004, the only proceeding pending for Eurofood in Dublin was an involuntary winding up proceeding, in which the court had not yet decided whether the case should be commenced. It is not unusual for an involuntary case to be dismissed without opening (in the continental European sense) or commencement (in the Irish sense). It was impossible for the Parma court to divine, on that date, how the Dublin court would proceed. In addition, the Dublin proceeding was a liquidation, whereas the *Parmalat* cases in Parma were all extraordinary reorganization cases.<sup>391</sup>

Given that the situation of Eurofood in the Dublin court was at best unclear, there was a second reason on which the Parma court could base a decision to open its own Eurofood main case. Eurofood was a part of a far larger business that was in reorganization, not liquidation. The Parma court could properly conclude that Eurofood should be reorganized, also. Italian public policy, recognized in the EU Regulation as a valid consideration,<sup>392</sup> favors reorganization over liquidation, particularly when it involves one of the handful of largest business empires in Italy that qualifies for extraordinary administration. In case of doubt, the Italian court should act to permit the incorporation of Eurofood in the ongoing reorganization of the Parmalat business empire, which had an enormous financial impact in Italy.

A complication under Irish law arises because the commencement order relates back in time to the date of the filing of the original petition.<sup>393</sup> In the *Eurofood* case, the commencement order related back to January 27, 2004, and took effect as of this earlier date. This raises the issue of the impact of the relation back on an inconsistent intervening judgment opening an insolvency case in another country, like the February 20, 2004 decision on the *Eurofood* case in Parma.

Relation back should not be permitted to defeat a decision like the one the Parma court made on February 20, 2004. On that date, the Parma court correctly determined that there was no existing Dublin “judgment opening insolvency proceedings” that was entitled to automatic recognition. A county should not be permitted to circumvent this requirement by giving retroactive effect to a decision made on a later date.

This interpretation of Article 16.1 of the EU Regulation does not require revision of the Regulation. It would be entirely appropriate for the ECJ to issue a ruling in the pending *Eurofood* case supporting this outcome.<sup>394</sup>

#### b. Domestic Issues

If the Daisytek-France proceeding had been filed in France before the filing of the sixteen related entities in Leeds, this proceeding would illustrate a national

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<sup>390</sup> See BRAUDE ET AL., *supra* note 204, ¶¶ 27.03[3]–[4]. In part, the *Eurofood* case arose from a disparity between the procedures for opening a case for extraordinary administration under the (just revised) Italian law and the procedures for initiating a winding up by the court under Irish law.

<sup>391</sup> See Panzani, *supra* note 71, at 1, 3–4.

<sup>392</sup> See EU Regulation, *supra* note 9, art. 26.

<sup>393</sup> See *supra* text accompanying notes 121–24.

<sup>394</sup> This issue is before the ECJ pursuant to the first two issues that the Irish Supreme Court has referred to it. See *supra* notes 165–79 and accompanying text.

advantage that the English courts enjoy over the continental European courts, which impacts the application of the EU Regulation. In a “race to the courthouse,” the English procedure is faster than the procedure in countries such as France.

The EU Regulation provides that, once a court opens an insolvency proceeding, this order must be recognized in the courts of every other EU country (except Denmark, where the EU Regulation is not in force) as soon as the order becomes effective. In consequence, as soon as a court issues an order opening a main proceeding, a court in any other country may only open a secondary proceeding.<sup>395</sup>

Under the English procedure, an order for administration, which is the English equivalent of an order opening a proceeding, can be obtained almost immediately upon the filing of the proceeding. In France, in contrast, an order opening a proceeding typically takes a minimum of ten days to two weeks (for a voluntary proceeding) and, on occasion, can take much longer. Thus, if two insolvency proceedings are filed at approximately the same time, one in England and one in France, it is almost a certainty that the English proceeding will be opened as a main proceeding (if it qualifies, in the opinion of the English judge) long before the French court can take action.

This problem is illustrated in the *Eurofood* proceeding, where the Parma court was racing to make a decision to open a main proceeding before the Dublin High Court could do so.<sup>396</sup> In taking time to assure that procedural rights were properly respected, the Dublin court lost out in the race to judgment to the Parma court, which quite apparently violated the procedural rights of important parties in interest. There is perversity in a rule that awards the race to the swift, where respecting the procedural rights of the parties in interest can easily result in losing the race.

There is a very important procedural difference between the Dublin and the Parma *Eurofood* cases: The Parma case was a voluntary case, while the Dublin case was an involuntary case filed by a Eurofood creditor. In the ordinary course of events, the opening of a voluntary case should be essentially instantaneous, while the opening of an involuntary case should take several weeks. If both begin an insolvency case at about the same time, there should be no contest and the voluntary case should open far before the involuntary case. In the *Eurofood* cases, however, the involuntary case in Dublin got a substantial head start, and it was hard for Dr. Bondi and the Parma court to catch up without substantial violation of procedural standards.

While the Dublin High Court tried to address this issue by stating that its decision related back to the date of the original filing, and thus predated the Parma court decision, this rationale is problematic. The rule should provide, at least in some circumstances, that the court to receive the first filed proceeding has a prior right to make the first determination of whether to open a main proceeding, provided that it makes this decision within a specified period of time, such as thirty days.

In deciding that the Leeds court applied the proper legal standard in determining that Daisytek-France’s CoMI was located in England, the Versailles court conducted

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<sup>395</sup> See EU Regulation, *supra* note 9, art. 16.2; *Daisytek-Versailles*, 2003 WL 22936778, ¶ 5–6.

<sup>396</sup> See *Eurofood-Dublin*, *supra* note 64, slip op. at 16 (opinion by Justice Fennelly) (reporting a statement made by one of the Parma judges at the February 17, 2004 hearing that the court was not prepared to defer a decision to a date that would permit the Dublin court to decide the matter first).

a thorough analysis of the reasoning of the Leeds court.<sup>397</sup> While the Versailles court did not review the Leeds court's weighing of the facts,<sup>398</sup> it took a careful look at what law the Leeds court applied to the facts. In effect, the Versailles court conducted the same analysis of the Leeds trial court's decision as a common law appellate court would have conducted.<sup>399</sup>

### 3. "Due Process" Procedural Problems

The EU Regulation provisions on the jurisdiction of a local court with respect to a main proceeding create a dramatic tension between the need for a court to act quickly and the need to provide due process rights to the parties in interest. On the one hand, the court that first opens a main proceeding is entitled to apply its domestic law to the substance of the insolvency proceeding (with some qualifications which are only partly addressed in the EU Regulation), and to have its professionals do the major part of the work (and earn the major portion of the fees) in the proceeding. In addition, local creditors in that country will likely benefit at the expense of foreign creditors, even though, in principle, they are supposed to be treated equally.

On the other hand, issues of due process require that a court take an appropriate amount of time to give the parties in interest an opportunity to prepare and present their proceedings on the issue of the location of the debtor's CoMI, as well as a number of other important issues that typically arise at the outset of a major international insolvency, before a court makes a decision to open a main proceeding.<sup>400</sup>

*Eurofood* illustrates this tension in vivid colors. While the proceeding of the Parmalat parent company and of certain other affiliates commenced approximately a month earlier in Italy, the first *Eurofood* proceeding began in Ireland on January 27, 2004. Because the proceeding began with an involuntary filing by Bank of America, Irish procedure required a hearing and an opportunity to contest the propriety of commencing the winding up proceeding with appropriate evidence before making a decision to proceed with the proceeding.<sup>401</sup> The Dublin High Court proceeded with deliberate speed, and set its hearing for four weeks later (on Monday, February 23, 2004) to determine whether the proceeding was a main proceeding.

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<sup>397</sup> See *Daisytek-Versailles*, 2003 WL 22936778, ¶ 5.

<sup>398</sup> See *id.*

<sup>399</sup> While the appellate review that the Versailles court gave to the decision of the Leeds court was a full appellate review under common law standards, it fell short of the level of review that it might have given to a decision on appeal from a French court. For a French appeal, the court of appeal could have made a *de novo* determination of the facts, as well as analyze the trial court's determination of the applicable law.

<sup>400</sup> A custom has developed in the United States to limit the notice to creditors on most matters in a Chapter 11 case. An application to approve such limited notice is typically included in the motions that are presented for court approval at the first hearing in the proceeding, which typically occurs within a day or two of the proceeding filing. The typical notice order provides that notice of most hearings (but not plan confirmation hearings or motions to approve the sale of substantial estate assets) is given only to the committee of creditors, the major secured creditors, the U.S. Trustee, and any other creditors who request that they be included on a "special notice list." The notice of a motion to designate a proceeding as a main proceeding should not go only to the limited special notice list. It should go to all creditors, employees and other parties in interest because of its importance.

<sup>401</sup> See BRAUDE ET AL., *supra* note 204, ¶¶ 27.03[3]-[4].



During the intervening four weeks, Dr. Bondi, the Italian administrator of the insolvency proceeding for Eurofood's parent Parmalat, obtained an order from the Ministry of Productive Activities for the commencement of an Italian insolvency proceeding for Eurofood, and the court in Parma rushed to issue a judgment on February 20, 2004 (the Friday before the Dublin hearing), finding that the Italian proceeding was the main proceeding for Eurofood. In the process, the Parma court clearly violated a number of procedural norms under the notion of due process (and perhaps violated international civil rights as well).<sup>402</sup>

Notions of due process require that all parties with an interest in the proceedings (the parties in interest) have a full and fair opportunity to appear at the hearing, to have their views heard, and to present relevant evidence.<sup>403</sup> A full and fair opportunity includes a right to sufficient advance notice of the hearing and the delivery of copies of the relevant documents on which such a determination is sought. We now take a more detailed look at these issues.

a. Advance Notice

Notice of a hearing on the issue of whether a proceeding should be opened as a main proceeding should include all of the parties in interest.<sup>404</sup> This should include all of the creditors, the employees, any administrator appointed in a proceeding for the same debtor in another country, the principal shareholders (especially including a parent corporation), and any officials entitled to notice. Very broad notice should be the rule, not the exception. The decision on whether a proceeding is a main proceeding may be the most important decision in the proceeding, and all who have an interest in the outcome should be informed of the hearing because their rights may be substantially affected by this decision.

The advance notice given of the *Eurofood* hearing in Parma was very deficient. Dr. Bondi, the Italian administrator, gave notice of the hearing to Mr. Farrell, the Irish liquidator, in Dublin after hours on Friday (of a holiday weekend) that the court in Parma would hold a hearing the following Tuesday at noon. It is not clear that the notice to Farrell included the information that the Parma court's hearing included the issue of whether it should designate its proceeding as a main proceeding. While Farrell was able to hire counsel to attend the hearing, he was not able to collect and present his evidence for the court in Parma. Dr. Bondi gave no notice at all to Eurofood creditors (including those who filed the involuntary case in Dublin). They learned of the hearing only on Monday, the day before the hearing, and were altogether unable to hire counsel or to attend the hearing in Parma.

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<sup>402</sup> In addition, it appears that the Parma court and the Ministry of Productive Activities also overlooked their own procedural requirements. In substance, the Italian *Eurofood* proceeding was an involuntary bankruptcy proceeding brought by the administrator of its corporate parent. The only insolvency proceeding duly authorized by Eurofood's own directors was that filed in Dublin. The Italian courts gave no consideration to this problem.

<sup>403</sup> While a number of countries do not have a legal concept of "due process" as such, the concept of procedural fairness or regularity is well known throughout the world and is incorporated into the law of most countries.

<sup>404</sup> Under Italian law, only Eurofood and the Parmalat administrator were recognized as parties with respect to the opening of the case. See Panzani, *supra* note 71, at 4. Creditors could demand to be heard, but had no right to receive a copy of the petition. *Id.*

The hearing in Leeds, where the English court decided that England was the CoMI for Daisytek, was also procedurally suspect. There is nothing in the reported *Daisytek* decisions to indicate that any of the French or German employees, managers, customers, or suppliers were given any notice or opportunity to be heard at the hearing where the Leeds court issued the administration orders for these four foreign companies. Apparently, this decision was made entirely *ex parte*, with no opportunity for input from anyone except counsel for the Daisytek empire and its top managers.

One of the most important procedural rights in a court is the right to present evidence on one's own behalf. The right to be heard is hollow if a party in interest does not have the right to present the evidence that supports that party's position on how an issue should be resolved.

In the *Eurofood* proceeding, it is apparent that the Irish administrator was given little opportunity to present his own evidence in the proceeding. The virtual impossibility of presenting such evidence rested on two circumstances. First, the Irish trustee did not know what evidence was presented by the Italian parties, and thus was deprived of the opportunity to present contrary evidence. Second, the time between the giving of notice (after business hours on Friday) and the hearing (the next Tuesday) was much too short to make any effective effort to collect and present the evidence the Irish trustee would have liked the Parma court to consider. Furthermore, Eurofood's Irish creditors were prevented altogether from presenting evidence to counter the evidence presented by the Italian parties because they received even less informal notice and no formal notice whatsoever of the hearing.

#### b. Copies of Relevant Papers

A right to notice is not effective if the party receiving notice does not have the right to receive copies of the papers that the court is asked to consider in making its decision. The Parma court recognized the need to deliver such papers in the *Eurofood* proceeding, and ordered that Dr. Bondi, the Italian administrator, deliver the papers to the Irish administrator.<sup>405</sup> However, the court failed to enforce this order when the Irish administrator appeared at the hearing and asserted that the order was not complied with (despite repeated requests), and he had not been able to examine any of the moving papers *at all* before the hearing.

The Irish administrator correctly argued that he had a fundamental right to review the papers and to have an opportunity to respond to them before the Parma court should proceed with its determination of the issue. At that point, the Parma court should have adjourned the hearing to insist that the Italian administrator comply with the order and give the Irish administrator sufficient time to review the papers and to respond to them.

It appears that the procedure in the Leeds court in the *Daisytek* proceeding was even more problematic. Because the parties apparently did not give notice at all to the French parties in interest (including the French directors and employees), they were also deprived of the opportunity to review the papers on which the Leeds court made its decision.

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<sup>405</sup> See *Eurofood-Ireland*, *supra* note 80, slip op. at 13.

## VI. CONCLUSION

The European Union Insolvency Regulation is a giant step forward in promoting international cooperation on cross-border insolvency proceedings. It adopts a modified universalist solution to cross-border proceedings insofar as they are located within the European Union. However, experience has shown that it needs some improvements to work effectively.<sup>406</sup> A battle now rages between courts of several European countries on which courts will administer particular cross-border proceedings, and how the center of main interest is to be determined for this purpose.

This Article has shown that two very important substantive modifications would vastly improve the EU Regulation. First, the EU Regulation needs to provide for the filing in the same country (thereby permitting the filing in the same court) of members of a corporate group that are economically integrated. It is very difficult (if it is possible at all) to reorganize a corporate empire when its insolvency proceedings are distributed among a number of countries.

Second, the EU Regulation needs to clarify the definition of CoMI and to specify what a court should consider in making the CoMI determination. I argue that a court should weigh the following factors: (1) the location of operations and management decisions of the corporation; (2) the location of the “nerve center” or place of principal decision-making for the corporation; and (3) the expectations of creditors, such as suppliers and financiers, as to the CoMI decision in the event that the company goes into an insolvency proceeding.

This Article has also shown that three kinds of procedural improvements are needed. First, the EU Regulation needs to decouple the decision on whether a proceeding is a main proceeding from the decision opening the proceeding itself, and to give an opportunity to the parties in interest, broadly construed, to be heard on the subject of whether a proceeding is a main proceeding. This is a decision of great importance in a cross-border proceeding, and should not be made precipitously or without considering the views of creditors, foreign liquidators, and other parties in interest who want to be heard. Second, the EU Regulation needs a definition of what constitutes a “judgment opening insolvency proceedings,” to specify what steps qualify under this term in those countries where an opening order or judgment is not a typical part of the insolvency process. Third, procedures need to be adopted to recognize the due process rights of foreign estate administrators, foreign creditors, and other parties in interest throughout a cross-border insolvency proceeding.

These changes will make the EU Regulation work much more effectively in coordinating and facilitating cross-border insolvency proceedings within the EU.

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<sup>406</sup> The European Commission is required to report on the operation of the EU Regulation by June 1, 2012. This review is apparently already underway. See Freshfields, *supra* note 364, at 23; Gabriel Moss & Christoph G. Paulson, *The European Insolvency Regulation—The Case for Urgent Reform* (Aug. 31, 2005) (unpublished article on file with author).

