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Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice

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*The Honorable Samuel L. Bufford***

I. INTRODUCTION

The European Court of Justice ("E.C.J.") issued a ruling on May 2, 2006 in the *Eurofood* case, finding that the commencement of an insolvency case for *Eurofood* in Ireland gave the Irish court priority under E.U. law over a similar insolvency case commenced shortly thereafter in Italy.[1] The E.C.J.'s ruling responded to the Supreme Court of Ireland's referral to the E.C.J. of five questions of E.U. law[2] based on the E.U. Regulation on Insolvency Proceedings ("E.U. Regulation").[3] The Irish Supreme Court had referred these questions to the E.C.J. preliminary to deciding a pending appeal of the Dublin High Court's decision to open a

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[1] Case 341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813, *available at* http://curia.europa.eu/en/content/juris/index.htm (Under "Cases lodged before the Court of Justice" follow "Since 1989" hyperlink; then follow "C-341/04" hyperlink). [hereinafter *Eurofood-E.C.J.*]. This Article deals with decisions from five courts, all relating to Eurofood IFSC Ltd. The decision by the Dublin High Court is *In re* Eurofood IFSC Ltd., [2004] No. 33 Dublin H. Ct. [hereinafter *Eurofood-Dublin*]. The decision on appeal of that decision to the Irish Supreme Court is *In re* Eurofood IFSC Ltd., [2004] IESC 45 (Ir.) [hereinafter *Eurofood-Ireland*]. The decision of the court in Parma, Italy is *In re* Eurofood IFSC Ltd., Parma Civil & Criminal Ct., Feb. 19, 2004 (unpublished opinion on file with author), *aff'd*, Trib. Amm. Reg. 10 June 2004, n.6998/2004 (on file with author) [hereinafter *Eurofood-Parma*]. The decision of the Italian court of appeal is *In re* Eurofood IFSC Ltd., Trib. Amm. Reg. 10 June 2004, n.6998/2004 (on file with author) [hereinafter *Eurofood-Italy*].

[2] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 24.

[3] Council Regulation 1346/2000, 29 May 2000, on insolvency proceedings, 2000 O.J. (L160) 1–18 (as amended) [hereinafter E.U. Regulation].

main insolvency proceeding[4] for Eurofood IFSC, Ltd. ("Eurofood") (a subsidiary of Parmalat SpA, one of the largest corporate groups in Italy, which went into insolvency proceedings in Italy on December 24, 2003) in competition with a parallel main insolvency case for the same entity in Parma, Italy.[5] The two parallel main proceedings arose because courts in each country, based on different criteria, had decided that Eurofood's center of main interests ("CoMI")[6] was located in its own country.

The E.C.J. decision is enormously important because it holds that the CoMI must be determined from the viewpoint of third party creditors and other parties in interest.[7] In contrast, the decision rejects the view that the CoMI decision for a corporate subsidiary may be based on the location of the command and control functions, which, for a subsidiary, may be in the country where the parent corporation is located.

The E.C.J. decision also addresses (briefly in some cases) three other extremely important issues under the E.U. Regulation (and in international insolvency law generally). First, it holds that the "public policy" exception to international recognition of insolvency decisions in the E.U. Community must be construed very narrowly.[8] Second, it discusses to a certain extent the importance of "fair legal process," a very important issue in other international insolvency cases.[9] Finally, it makes reference to the problem of the treatment of corporate groups under the E.U. Regulation (which is the same under the UNCITRAL Model Law on Cross-Border Insolvency[10] ("UNCITRAL Model Law") and its variations as adopted in numerous countries).

Perhaps the most surprising feature of the decision is the E.C.J.'s statement that the "equality of arms" principle is particularly important with respect to the right of creditors or their representatives to participate in insolvency proceedings.[11] The "equality of arms" principle was altogether unknown heretofore in insolvency law anywhere in the world. Indeed, it is essentially unknown in modern common law systems, and in civil law systems it is largely confined to criminal law and administrative law.

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[4] According to the language used in the English version of the E.U. Regulation, a "proceeding" corresponds to a "case" under U.S. bankruptcy law. *See, e.g.*, 11 U.S.C. §§ 301–03 (2005) (providing for the filing of a "case" under the bankruptcy statute).

[5] *See Eurofood-Italy*, *supra* note 1, slip. op. at 4–5.

[6] *See infra* notes 47–53.

[7] *See Eurofood-E.C.J.*, *supra* note 1, ¶¶ 32–33.

[8] *See infra* text accompanying notes 355–62.

[9] *See infra* text accompanying notes 305–36.

[10] UNCITRAL Model Law on Cross-Border Insolvency, *available at* http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf [hereinafter UNCITRAL Model Law]. For further discussion of UNCITRAL Model Law, see *infra* Part VI.A.2.

[11] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 66.

This Article examines the *Eurofood-E.C.J.* decision and evaluates its impact on the decisions of the Irish and the Italian courts to open main insolvency cases for Eurofood. This Article also addresses the broader international insolvency law issues that the E.C.J. decision left open.

Part II of this Article provides background information on the format and binding effect of a decision of the E.C.J. Part III explores the background of Parmalat and Eurofood and describes the Eurofood cases in the Irish and Italian courts prior to the E.C.J. decision. Part IV examines the E.C.J. decision, its rationale, and its application to the Irish and Italian cases.

Part V focuses on the E.C.J. decision's application to procedural problems in insolvency law of the "equality of arms" principle, which the E.C.J. had previously imported from the European Court on Human Rights and had applied principally in the contexts of criminal defense and administrative law. Part V also explains how the E.C.J. used this concept to impose E.U. procedural law on the determination of the location of a debtor's CoMI and the resulting proper national venue for its insolvency case. Part VI examines the substantive insolvency law issues that the *Eurofood-E.C.J.* decision addressed and the procedural issues apart from those involved in the "equality of arms" analysis. Part VII contains concluding remarks.

II. BACKGROUND

Before launching on an analysis of the *Eurofood-E.C.J.* decision, it is useful to provide some background on the E.U. Regulation and on the E.C.J. which issued the decision.

A. The E.U. Regulation on Insolvency Proceedings

The principal source of law for international cooperation in E.U. transnational insolvency proceedings is the E.U. Regulation,[12] which became effective on May 31, 2002[13] for all transnational insolvency proceedings opened on or after that date involving two or more E.U. countries[14] (other than Denmark, which exercised its right under its E.U.

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[12] *See generally* IAN F. FLETCHER, THE LAW OF INSOLVENCY (2002); GABRIEL MOSS ET AL., THE E.C. REGULATION ON INSOLVENCY PROCEEDINGS AND ANNOTATED GUIDE (2002); BOB WESSELS, EUROPEAN UNION REGULATION OF INSOLVENCY PROCEEDINGS: AN INTRODUCTORY ANALYSIS (2003) [hereinafter WESSELS, INTRODUCTORY ANALYSIS].

[13] The E.U. Regulation became effective on May 1, 2004 for the ten countries that joined the European Union on that date.

[14] The E.U. Regulation was originally prepared as a stand-alone treaty for the E.U. Member States. *See generally* FLETCHER, *supra* note 12, ¶¶ 31-015 to 31-017 (2002). 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

accession treaty to opt out of the E.U. Regulation). Two Annexes, A[15] and B,[16] specify the national laws of the member countries for "insolvency proceedings" and "winding up proceedings" that are subject to the E.U. Convention. Annex C[17] lists the titles of the liquidators under the laws of the various E.U. countries that qualify for the E.U. Regulation. The E.U. Regulation is based on the principle of mutual trust among the E.U. countries:[18] the E.U. countries trust their sister countries with respect to both their insolvency laws and their court procedures.[19]

The E.U. Regulation, for the most part, adopts a universalist[20] view: it intends that a main proceeding encompass all of the debtor's assets on a world-wide basis and to affect all creditors, wherever located.[21] Only one

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Kingdom in 1996 and, consequently, the continental E.U. countries imposed a ban on the importation of U.K. beef. Upset with this course of events, the United Kingdom refused to sign the E.U. Insolvency Convention. *See* WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, at 5–6.

[15] *See* E.U. Regulation, *supra* note 3, Annex A.

[16] *See id.* Annex B.

[17] *See id.* Annex C.

[18] *See id.* pmbl. 22; *In re* Eurofood IFSC Ltd., (2006) IESC 41 (Ir.).

[19] *See* Bob Wessels, *International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups of) Companies* 14–15 (2003) [hereinafter Wessels, *Insolvency Proceedings*], http://www.iiiglobal.org/country/european_union/InternJurisdictionCompanies.pdf (explaining concept of CoMI under the E.U. Regulation).

[20] *See* WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, 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.J. 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 A. Bebchuck & 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. REV. 2177, 2179 (2000); Robert K. Rassmussen, *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 International 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* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS ch. 8 (2005), *reprinted as Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 89 (2005); 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).

[21] *See* MOSS ET AL., *supra* note 12, ¶ 3.15; Miguel Virgós & Etienne Schmit, *Report on*

main proceeding may be opened for a particular debtor.[22] The universalist posture of the E.U. Regulation is tempered by the possibility of secondary proceedings, which must be territorial, in non-CoMI countries.

The E.U. 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 E.U. Regulation. The home country, for the purposes of a main insolvency proceeding, is the country where the CoMI of the entity is located,[23] which in turn is the proper location for the main proceeding.[24] A corporation can only have one CoMI for purposes of the E.U. Regulation. Proceedings in other countries are generally limited to secondary proceedings.[25] The E.U. Regulation does not attempt to reconcile the vastly different insolvency regimes in place in the various E.U. countries.[26]

1. Consequences of Opening a Main Proceeding

The opening of a main proceeding under the E.U. Regulation has several consequences.[27] First, the proceeding is governed by the laws of the country where it is opened.[28] Second, a judgment opening a main proceeding receives automatic recognition in all member states with no

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the Convention on Insolvency Proceedings, reprinted in MOSS ET AL., *supra* note 12, at 263. The Virgós & Schmit report was the principal report on the E.U. Convention on Insolvency Proceedings, which was converted into the E.U. Regulation by the substitution of Articles 44–47 (implementing the E.U. Regulation) for Articles 43–46 and 48–55 (providing formalities for treaty implementation) and an expansion of the preamble. Thus, the Virgós & Schmit report is authoritative as to the E.U. Regulation as well. *See, e.g.*, Case C-341/04, *In re* Eurofood IFSC Ltd., Opinion of Advocate General Jacobs, ¶ 2 (the Virgós & Schmit report "may provide useful guidance when interpreting the regulation.") [hereinafter E.C.J. A.G. Opinion].

[22] *See* Virgós & Schmit, *supra* note 21, ¶ 15; MOSS ET AL., *supra* note 12, ¶¶ 3.15, 8.33; WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, at 7.

[23] *See* E.U. Regulation, *supra* note 3, art. 3(1). *See generally* Wessels, *Insolvency Proceedings*, *supra* note 19, at 4–10, http://www.iiiglobal.org/country/European_union.html (explaining the concept of CoMI under the E.U. Regulation). The E.U. Regulation applies only if the CoMI is located in the European Union. *See* E.U. Regulation, *supra* note 3, pmbl. 14; MOSS ET AL. *supra* note 12, ¶ 3.09. Thus the E.U. Regulation does not apply to the E.U. aspects of a cross-border insolvency case if the CoMI is not located in the European Union. *See* MOSS ET AL. *supra* note 12, ¶ 3.09.

[24] *See* E.U. Regulation, *supra* note 3, art. 3(1).

[25] *See id.* art. 3(2)–(3).

[26] *See id.* pmbl. ¶ 12.

[27] *See generally* WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, at 1–2.

[28] *See* E.U. Regulation, *supra* note 3, art. 4; MOSS, *supra* note 12, ¶ 5.33; WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, 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 21, ¶ 153.

further formalities from the date that it becomes effective in the home state.[29] Third, the administrator in the main proceeding may exercise his or her powers in every E.U. country, including repatriating assets,[30] registering the judgment,[31] and publishing notice in E.U. countries.[32] These effects may only be challenged in the home court for the main proceeding.[33]

In addition, a judgment opening a main proceeding in any E.U. country imposes the forum country's domestic effects of that proceeding throughout the European Union,[34] except where the E.U. Regulation provides otherwise as to rights in rem,[35] setoff rights,[36] or sellers' rights based on reservation of title.[37] For example, an automatic stay or moratorium under the laws of the forum country for the main proceeding applies to all creditors in every E.U. country.[38]

Under the E.U. Regulation, a bankruptcy proceeding in a country where the debtor's CoMI is not located must be a secondary proceeding.[39] The E.U. Regulation permits the opening of a secondary proceeding in any country where the debtor has an establishment,[40] which means "any place of operations where the debtor carries on a non-transitory economic activity

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[29] *See* E.U. Regulation, *supra* note 3, art. 16; WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, at 33–35; Virgós & Schmit, *supra* note 21, ¶ 143; MOSS ET AL. *supra* note 12, ¶ 8.133.

[30] *See* E.U. Regulation, *supra* note 3, art. 18(1).

[31] *See id.* art. 22.

[32] *See id.* art. 21.

[33] *See id.* art. 17(2).

[34] *See id.* art. 4 (the law of the country that opens main proceedings applies unless otherwise provided in the E.U. Regulation); *In re* Maxwell Communication Corp., 92 F.3d 1036, 1045–50 (2d Cir. 1996) (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 21, ¶ 90.

[35] *See* E.U. Regulation, *supra* note 3, art. 5; Virgós & Schmit, *supra* note 21, ¶¶ 94–105.

[36] *See* E.U. Regulation, *supra* note 3, art. 6.

[37] *See id.* art. 7.

[38] The consequences may be different under the E.U. 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. For another example, in Hungary, a stay is issued only if it is approved in the meeting of creditors. *See* Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Members' Voluntary Dissolution § 9 (as amended). Because the exceptions in the E.U. 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.

[39] *See* E.U. Regulation, *supra* note 3, art. 3(2).

[40] *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 12, ¶ 8.26.

with human means and goods."[41] Because a secondary proceeding can only be opened in a country where the debtor has an establishment, the E.U. 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.[42]

There are two main purposes for secondary proceedings: to assist and support the main proceeding and to protect local creditors from the main proceeding. The adoption of the law of the forum country for the main proceeding, and its exportation throughout the European Union, are substantially modified if a secondary proceeding is opened in another E.U. country.[43] Under the E.U. Regulation, a secondary proceeding is governed by the local law of the country where it is opened.[44] While the E.U. Regulation requires that a secondary proceeding be a liquidation proceeding,[45] it also authorizes the administrator in the main proceeding to obtain a stay of the liquidation for three months at a time,[46] and to propose a reorganization as authorized by the insolvency laws of the country where the secondary proceeding is opened.[47]

2. Center of Main Interests

The jurisdictional challenge under the E.U. Regulation is to determine where the CoMI is located. The E.U. 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[48] to be the centre of main interests in the absence of proof to the contrary."[49] Recital 13 of the preamble to the E.U. Regulation amplifies this concept by stating, "The 'centre of main interests' should correspond to the place where the debtor conducts the administration

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[41] E.U. Regulation, *supra* note 3, 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 21, ¶ 70.

[42] *See* WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, at 11.

[43] *See* E.U. Regulation, *supra* note 3, arts. 27–38.

[44] *See id.* art. 28.

[45] *See id.*

[46] *See id.* art. 33.

[47] *See id.* art. 34(1).

[48] Unlike U.S. law, under the E.U. Regulation, 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, 3 J. DROIT INT'L (CLUNET) 739, 750 (2005).

[49] E.U. Regulation, *supra* note 3, art. 3(1).

of his interests on a regular basis and is therefore ascertainable by third parties."[50]

The E.U. 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.[51] Second, this is an objective test based on what is apparent to third parties, and especially to creditors.[52] Thus, a creditor's view of where the CoMI is located is an important factor. Virgós & Schmit explain the rationale for this rule, stating, "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."[53]

Under both the Model Law and the E.U. Regulation, each company has a single CoMI and can have only one main proceeding.[54]

Further, under the E.U. Regulation, the CoMI analysis must be made separately for each legal entity.[55] Except in a general way, the E.U. 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.

B. The European Court of Justice

The E.C.J. is an E.U. court established by the Treaty of Amsterdam, which is the current version of the constitutive treaty establishing the European Union.[56] The E.C.J. is the final authority in the European Union

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[50] *Id.* pmbl. 13. In E.U. law, the E.U. Regulation preambles have been treated as authoritative as the main text of the regulation. *See, e.g.*, *Eurofood-Ireland*, *supra* note 1, at 10.

[51] *See* Virgós & Schmit, *supra* note 21, ¶ 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 48, at 750 (discussing cases).

[52] *See* E.U. Regulation, *supra* note 3, pmbl. 13.

[53] *See* Virgós & Schmit, *supra* note 21, ¶ 75.

[54] *See, e.g.*, André J. Berends, *The Uncitral Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 355 (1998).

[55] *See generally* WESSELS, INTRODUCTORY ANALYSIS, *supra* note 12, at 18–20; Virgós & Schmit, *supra* note 21, ¶ 76.

[56] Treaty of Amsterdam Amending the Treaties on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, arts. 220–45 [hereinafter Treaty of Amsterdam].

for the determination of questions on the interpretation of E.U. law, including the E.U. Regulation.[57] In effect, the E.C.J. functions like a supreme court for E.U. law.

There are three features of the E.C.J. that require comment before I launch into an examination of the Eurofood cases leading up to the E.C.J. decision. First, I look at the format of an E.C.J. decision, which differs in important respects from a typical domestic court decision. Second, I examine the authority and binding force of an E.C.J. decision. Third, I look at the distinctive format of an E.C.J. decision resulting from a reference for preliminary decision by a court of an E.U. country.

1. E.C.J. Jurisdiction

The jurisdiction of the E.C.J. with respect to matters arising in courts of E.U. countries is governed by Article 234 of the Treaty of Amsterdam, which states in relevant part:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
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> . . .
>
> the validity and interpretation of acts of the institutions of the Community
>
> . . . .
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.[58]

Under this provision, referral of an issue of interpretation of an E.U. regulation by the highest court of a country is mandatory and by a lower court is discretionary.

The E.C.J. has jurisdiction to review issues under the E.U. Convention only upon reference of a national court,[59] and then only if the court considers that a decision of the E.C.J. is necessary for the national court to give judgment in a matter pending before it.[60] A decision of the E.C.J. is

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[57] *See* MOSS ET AL., *supra* note 12, ¶ 2.29.

[58] Treaty of Amsterdam, *supra* note 56, art. 234.

[59] *See id.* art. 68; MOSS ET AL., *supra* note 12, ¶ 2.32.

[60] In this circumstance, it is mandatory for the national court of last resort to make a reference to the E.C.J. *See* Treaty of Amsterdam, *supra* note 56, art. 68.

binding on the national court that has requested its opinion, and the national court is obligated to conform to an E.C.J. decision.[61] However, the E.C.J. does not have the power to overrule or set aside a national court decision.

An E.C.J. decision interpreting E.U. law goes back to the national court, for application to the facts of the particular case by that court. However, the national judge typically has little discretion and flexibility in making the final decision.[62] Nonetheless, the ultimate judgment comes from a national court, with the full force thereof, and not from an E.U. court. Thus, the E.C.J. is integrated with the national courts into a unitary judicial system.[63]

This feature of an E.C.J. decision, like that in *Eurofood*, arises from the nature of the reference to the E.C.J. Unlike a plenary appeal, the reference to the E.C.J. consists only of specific questions that arise under E.U. law. These questions generally are phrased in the abstract, as in the *Eurofood* case, and do not ask for the concrete application of an E.U. principle to the facts of a particular case.

There is a distinctive value in this procedure. The ultimate decision is issued by the national supreme court and not by an E.U. court. It thus has the value, prestige, and enforceable character of a national court decision, rather than the less certain status of an E.U. decision with less apparatus to enforce it.

2. Binding Force of an E.C.J. Decision

A decision of the E.C.J. is binding in the courts of the E.U. member countries. Article 244 of the Treaty of Amsterdam[64] provides that "[t]he judgments of the [E.C.J.] shall be enforceable under the conditions laid down in Article 256."[65] In turn, Article 256 provides in relevant part:

> Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision . . . .
>
> When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.[66]

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[61] *See id.*

[62] *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2421 (1991).

[63] *See id.* at 2420.

[64] Treaty of Amsterdam, *supra* note 56, art. 3.

[65] *Id.*

[66] *Id.* art. 256.

Thus, while the formalities are different, the E.C.J.'s *Eurofood* decision essentially has the same force as a decision of a supreme court or a court of last resort. The Italian courts will be required to change their Eurofood decisions to conform to the E.C.J. ruling.

3. Format of an E.C.J. Decision

An E.C.J. decision resulting from a referral from a court[67] of an E.U. country looks different from a decision of a national (or lower level) court in one substantial respect relevant to this Article. To a lawyer or judge accustomed to reading judicial decisions, whether from common law or civil law countries, such an E.C.J. decision is remarkably abstract. The analysis portion of the decision is mostly limited to a discussion of the applicable principles at issue. There is rather little discussion of how the principles apply in the particular case giving rise to the referral to the E.C.J.

This feature of such an E.C.J. decision arises from the procedural context of the case. The case belongs to the referring national court, and not to the E.C.J. The E.C.J. does not decide the particular case and does not declare a winner and a loser. The E.C.J.'s jurisdiction is limited to the questions referred to it, which are typically framed as legal questions.

As the court before which the case is pending, the referring court has the responsibility of applying the legal principles to the facts of that case. This procedure supports the policy grounds for the structure that the national court (which may be a lower court in the country) issues the decision, so that it carries the weight of a domestic court decision.

III. THE EUROFOOD INSOLVENCY CASES IN IRELAND AND ITALY

Parmalat is one of the largest business failures in European history.[68] Although it began 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.[69] Its principal subsidiary, Parmalat

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[67] The E.C.J., as a court of first instance, also considers cases that involve actions by private persons (including corporations and other business entities) against the European Union.

[68] *See* Jonathan Stempel, *Update 2—Citigroup Loses Bid to Dismiss Parmalat Suit in NJ*, REUTERS, July 14, 2006, https://secure.reuters.com/news/articlebusiness.aspx?type=bankingFinancial&storyID=nN14216273&WTmodLoc=BizArt-R1-IndustryNews-2&from=business (last visited Jan. 10, 2007). The only larger business failure in European history is Yukos Oil Co., which collapsed at the end of 2004. *See In re* Yukos Oil Co., 321 B.R. 396 (Bankr. S.D. Tex. 2005).

[69] *See Eurofood-Dublin*, *supra* note 1, slip op. at 3–4. For a more detailed description of Parmalat's history, corporate structure and business, see Annika Wolf, *Success and Failure*

Finanziaria SpA, was listed on the Italian stock exchange.

A. Parmalat's Collapse

The Parmalat corporate group collapsed in deep financial crisis in late 2003,[70] with charges of massive financial fraud and the arrest in Italy of several of its principal managers, including the two Italian directors of Eurofood.[71] Regulatory, legal, and criminal charges remain pending in various countries, including Italy and the United States.[72] The fallout of the Parmalat SpA[73] 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 created by these and other related filings.

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.[74] Parmalat's announcement of this default on December 8 led to an international financial crisis for Parmalat's corporate empire.[75]

The Italian government responded on December 23 by issuing decree-law No. 347,[76] amending its law providing for extraordinary administration of companies.[77] The new law permits a very rapid decision on the opening

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in Cross-Border Insolvency Proceedings—Parmalat—A European and American Perspective 28–33 (2006), http://www.iiiglobal.org/prize/2006/060707wolf.PDF.

[70] *See Eurofood-Italy, supra* note 1, slip op. at 4.

[71] *See Eurofood-Dublin, supra* note 1, slip op. at 3–4.

[72] *See id.* at 4.

[73] SpA is the Italian abbreviation for *societá per actione*, the typical corporate form for a large Italian corporation.

[74] *See Eurofood-Italy, supra* note 1, slip op. at 4.

[75] It first appeared that approximately €4 billion were unaccounted for in the Parmalat empire. Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 439 (2006), *available at* http://www.iiiglobal.org/country/european_union/060710Bufford.pdf. 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 to Trade Again*, WALL ST. J., Sept. 29, 2005, at C1.

[76] *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, *modified further by* Legge 28 gennaio 2005, n. 6, Gazz. Uff. Jan. 28, 2005 [hereinafter Law 347/2003].

[77] *See* Legislative Decree No. 270, July 8, 1999. 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

of an insolvency proceeding for a very large debtor. As originally adopted, the revised procedure was available only to a debtor with at least a thousand employees and debts of at least €1 billion.[78] Only Parmalat and four or five other Italian companies (notably, including Fiat) met the size requirements for extraordinary administration. More recently, to accommodate the case for Volare Airlines SpA,[79] the requirements to qualify have been lowered to 500 employees and a total debt of €300 million.[80] Under the new procedure, adopted just before Christmas 2004, a company seeking extraordinary administration must apply first to the Minister of Productive Activities for admission into extraordinary administration.[81] Afterwards, a court must issue an order opening the insolvency proceeding upon a finding that the company is insolvent.[82]

Pursuant to the new law enacted on the previous day, on Christmas Eve 2003, Parmalat SpA filed its request for extraordinary administration with the Minister of Productive Activities.[83] The minister immediately granted the request, and appointed Dr. Enrico Bondi as extraordinary administrator.[84] On December 27, the Parma court confirmed that Parmalat SpA was insolvent and opened an extraordinary administration case for it.[85] 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.[86]

Because the Parmalat corporate group was doing business in some thirty countries, its collapse spawned insolvency proceedings in a number of those countries. In this Article, I deal principally with the Irish and Italian insolvency proceedings for a single subsidiary, Eurofood IFSC Ltd.

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goal is reached, the business must be liquidated. *See* Luciano Panzani, *Conflict of Jurisdiction in European Cross Border Insolvency Law: The Eurofood Case* (2006) (on file with author). Justice Panzani is a member of the Italian Supreme Court, and is the Judicial Member of the Italian commission that is drafting revisions to the Italian insolvency law.

[78] *See* Law 347/2003, *supra* note 76, art. 1.

[79] *See* Lucio Ghia, *The Reform of the Italian Bankruptcy Law and the Uncitral Insolvency Guide Law* 8 (2005), http://www.iiiglobal.org/country/italy/060531ghia.pdf.

[80] *See* Legge 28 gennaio 2005, n. 6, *modifying* Law 347/2003, *supra* note 76, art. 1.

[81] *See* Law 347/2003, *supra* note 76, art. 2.

[82] *See id.* art. 4.

[83] *See Eurofood-Dublin*, *supra* note 1, slip op. at 4.

[84] *See id.*

[85] *See Eurofood-Italy*, *supra* note 1, 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.

[86] *See* Parmalat Concordato Creditori, *Avviso ai Creditori del Gruppo Parmalat*, http://cp22.etdotcom.it/it (last visited Jan. 10, 2007).

B. The Eurofood Subsidiary

Eurofood was registered in Ireland on November 5, 1997 as a company "limited by shares," with its registered office in Dublin, Ireland.[87] It is a wholly owned subsidiary of Parmalat SpA. Eurofood's principal purpose was to obtain financing for Parmalat's Venezuelan and Brazilian subsidiaries under the favorable tax treatment for businesses located in the Dublin port.

Eurofood's headquarters were located in the International Finance Services Centre (hence the "IFSC" in Eurofood's name), an urban renewal center located at the Custom House Dock in Dublin. The center is dedicated to businesses providing internationally traded financial services to non-residents of Ireland.[88] 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.[89] Eurofood's certificate required it to operate at that location and limited its operating authority to providing financing facilities to the Parmalat Group.[90] 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).[91] 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 governed by Irish law.[92] In addition, the agreement contained an Irish jurisdiction clause.[93] Eurofood was subject to Irish accounting requirements, and its books and records were maintained in Dublin.[94]

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 $80 million to provide collateral for a loan by Bank of America to finance Parmalat operations in Venezuela.[95] On the same date, Eurofood borrowed an additional $100 million from a lending consortium headed by Metropolitan Life Insurance Co. to finance Parmalat business

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[87] For a summary of the Eurofood background, *see* Craig Martin, *Eurofood Fight: Forum Shopping Under The E.U. Regs*, AM. BANKR. INST. J., Mar. 2005, at 36.

[88] *See Eurofood-Ireland*, *supra* note 1, at 2.

[89] *See id.*

[90] *See id.*

[91] *See Eurofood-Dublin*, *supra* note 1, slip op. at 2.

[92] *See Eurofood-Ireland*, *supra* note 1, at 2.

[93] *See id.*

[94] *See id.* at 3.

[95] *See id.*

operations in Brazil.[96] Finally, in 2001, Eurofood engaged in a swap transaction with Bank of America for $2 million to finance its operations in Ireland.[97] Eurofood's only substantial assets were the obligations owed to it on the two large loans, and a guarantee of its debts given by the Parmalat parent corporation, whose ability to deliver on these guarantees was in deep question in early 2004.[98]

Until November 12, 2003, Eurofood had four directors, two Irish and two Italian. All but one of its fifteen board of directors meetings were conducted in Dublin; the remaining meeting was conducted by a conference call.[99] On November 12, 2003 one of the Italian directors resigned, and the other resigned on January 20, 2004. Both were in Italian custody when the Eurofood winding up petition was filed in Dublin on January 27, 2004.[100]

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[101] on January 27, 2004, and requested the appointment of a temporary administrator.[102] On the date of filing, Eurofood was hopelessly insolvent[103] because of the serious doubt that Parmalat could honor its guaranty of the Eurofood debt. Bank of America filed the case in part because Eurofood had informed it that Parmalat might attempt to move its CoMI out of Ireland.[104]

On the same day, the Dublin High Court appointed Pearse Farrell as provisional liquidator for Eurofood.[105] 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"

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[96] *See id.*

[97] *See id.*

[98] *See Eurofood-Dublin*, *supra* note 1, slip op. at 3.

[99] *See id.* at 2–3.

[100] *See id.* Eventually both directors (along with nine other Parmalat officials) arranged plea bargains in Italian court and received suspended prison sentences. *See* Eric Sylvers, *Eleven Convicts in Parmalat Fraud*, INT'L HERALD TRIB., June 29, 2005, *available at* http://www.iht.com/articles/2005/06/28/business/parma.php.

[101] Under the E.U. Regulation, a winding up under Irish law is one of the kinds of insolvency proceedings that invokes the provisions of the Regulation. *See* E.U. Regulation, *supra* note 3, art. 2(a), app. A.

[102] *See Eurofood-Dublin*, *supra* note 1, slip op. at 5.

[103] *See id.* at 3.

[104] *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 E.C.J. *See* Case C-1/04, *In re* Susanne Staubitz-Schreiber, 2004 O.J. (C 71) 10.

[105] *See Eurofood-Dublin*, *supra* note 1, slip. op. at 4–5.

within the meaning of the E.U. 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.[106]

D. The Eurofood Proceeding in Parma

Under Law 347/2003, the Administrator of a company in extraordinary administration may request the opening of a similar extraordinary administration in case in the same court for any other company in the corporate group. Thus, pursuant to the then-new revisions to the Italian insolvency laws, the commencement of insolvency proceedings in Italy for Eurofood was a two-step procedure involving an application to the Minister of Productive Activities, followed by a filing with a local Italian court.

1. Procedure

On January 29, 2004, two days after the Dublin filing for Eurofood, Mr. Farrell gave notice of the insolvency filing and of his appointment to Dr. Bondi,[107] 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 for his appointment as administrator.[108] Although informed of the pending Irish proceeding for Eurofood, the Minister granted the application on February 9.

On the next day, February 10, Dr. Bondi filed a proceeding in Parma for Eurofood[109] as a companion to the nineteen other proceedings for Parmalat-related entities then pending. The court in Parma immediately set a hearing for Tuesday, February 17 on the opening of the Eurofood proceeding and, in particular, to determine whether Eurofood was insolvent.[110] The court further ordered Dr. Bondi to give notice of the

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[106] Irish statute grants power to the court to make this determination. *See* Companies Act, 1963 (Act No. 33/1963) (Ir.) § 216, *available at* http://www.irishstatutebook.ie/1963_33.html (providing for a hearing).

[107] *See Eurofood-Italy*, *supra* note 1, slip op. at 5.

[108] *See Eurofood-Dublin*, *supra* note 1, slip op. at 8. Eurofood did not satisfy the jurisdictional requirements for extraordinary administration under Italian law of 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 76, art. 3 (as amended); *Eurofood-Italy*, *supra* note 1, slip op. at 15.

[109] *See Eurofood-Dublin*, *supra* note 1, slip op. at 8.

[110] Under the law for extraordinary administration, the court was given only five days in which to make a decision on the opening of an extraordinary administration proceeding. *See* Law 347/2003 (as amended), *supra* note 76, § 4; Panzani, *supra* note 77, at 4. The law subsequently was amended to give the court fifteen days in which to make this decision. *See*

hearing to "interested parties."[111] On February 12, Dr. Bondi filed a report with the Parma court on Eurofood,[112] but he did not provide a copy to Mr. Farrell.[113]

Also on February 10, Dr. Bondi removed one of Eurofood's two Irish directors (a lawyer in Dublin), and appointed three new Italian directors.[114] 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, Mr. 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.[115]

2. Decision of the Parma Court

On February 20, 2004, the Parma court issued its ruling opening an extraordinary administration proceeding for Eurofood on the grounds that it was clearly insolvent.[116]

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.[117] The court found that the activity of Eurofood management and the "propelling center of the enterprise" was located in Parma.[118] The court based this decision on a

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Legge 5 iuglio 2004, n. 166, Gazz. Uff. July 6, 2004, n. 156, *modifying* Law 347/2003, *supra* note 76.

[111] *See Eurofood-Dublin*, *supra* note 1, slip op. at 9 (quoting from Mar. 1, 2004 affidavit filed by Francesco Gianni (on behalf of Dr. Bondi)).

[112] *See Eurofood-Italy*, *supra* note 1, slip op. at 5; Martin, *supra* note 87, at 36.

[113] *See Eurofood-Ireland*, *supra* note 1, at 15 (opinion by Justice Fennelly); E.C.J. A.G. Opinion, *supra* note 21, ¶ 39.

[114] 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.

[115] *See Eurofood-Dublin*, *supra* note 1, slip op. at 10.

[116] *See Eurofood-Parma*, *supra* note 1, slip op. at 10–11. 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 of three sentences that take up nearly two full pages.

[117] *See id.* at 2.

[118] *Id.*

distinction between "executive administrators," who were the two Italian directors, and "non-executive administrators," who were the Irish directors.[119] 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.[120] In addition, the court found that the economic purpose of Eurofood was entirely tied to the Parmalat corporate group based in Parma.[121] 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"; its only asset was the corporate guarantee of its Italian parent Parmalat SpA,[122] whose "mother proceeding" was located in Italy.[123]

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.[124] In contrast, the court found that Eurofood was:

> [S]imply 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.[125]

The court found that the controlling authority for the enterprise was located in Italy.[126] Thus, the Parma court effectively found that Eurofood's CoMI was located in Italy and that 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 E.U. Regulation would prevent the opening of a main proceeding for Eurofood in Italy. In the court's view, the

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[119] *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.

[120] *See id.* at 4.

[121] *See id.* at 5. A consideration of the relations between Eurofood and the other Parmalat entities is not legitimate under the E.U. Regulation. *See infra* text accompanying notes 209–10; *see also* Virgós & Schmit, *supra* note 21, ¶ 76. *See also infra* text accompanying notes 357–67 (recommending that the E.U. Regulation be amended to accommodate the joint needs of corporate groups in the insolvency context).

[122] *See Eurofood-Parma*, *supra* note 1, slip op. at 5–6.

[123] *See id.* at 10.

[124] *See id.* at 7.

[125] *See id.* at 8.

[126] *See id.* at 7–8.

mere filing of the Irish proceeding and the appointment of a provisional liquidator did not constitute an "opening" of the proceeding, as defined in E.U. Regulation Article 3(3),[127] that required recognition under E.U. Regulation Article 16.[128]

E. Subsequent Irish Proceedings

Notwithstanding the decisions of the court in Parma respecting Eurofood, the Irish courts continued with their Eurofood insolvency proceedings.

1. The Dublin High Court Decision

After the Parma decision on February 20, 2004, 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 seethed 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, and second, the insolvency proceedings must actually be opened in Ireland.[129]

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[127] E.U. Regulation, *supra* note 3, art. 3 provides in relevant part:

> 1. The courts 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 office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
>
> 2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of the other Member State.
>
> The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
>
> 3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings.

[128] *See id.* at 9.

[129] *See Eurofood-Parma*, *supra* note 1, slip op. at 21.

a. Time of Opening of Proceeding in Dublin

Taking the second point first, the court found that an insolvency proceeding, as defined in the E.U. Regulation, was opened in Ireland on January 27, 2004. The court based its 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 E.U. Regulation's provision[130] on opening a main proceeding.[131]

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.[132] Article 16.1 of the E.U. Regulation requires the courts of any other E.U. 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."[133] By virtue of the relation-back rule in the Irish Companies Act,[134] even the March 23 decision took effect as of January 27, according to the Dublin court.[135] Thus, in the court's view, its January 27 decision predated the February 20 decision of the court in Parma.[136]

As to the location of Eurofood's CoMI, Dr. Bondi 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.[137] The court found that this determination was implicit in its determination to appoint a provisional liquidator on that date.[138]

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[130] *See* E.U. Regulation, *supra* note 3, art. 2(e).

[131] *Eurofood-Dublin*, *supra* note 1, slip op. at 21–22; *accord* Virgós & Schmit, *supra* note 21, at art. 2(f), ¶ 147 ("It is sufficient for [a judgment] to have effect in the State of opening and for its effects not to have been stayed.").

[132] *See* E.U. Regulation, *supra* note 3, art. 16(1).

[133] *Id.*

[134] *See* Companies Act, 1963 § 220.2 (Act No. 33/1963) (Ir.), *available at* http://www.irishstatutebook.ie/1963_33.html.

[135] This relation-back rule, the court noted, mirrored a similar provision in the law of England and Wales. *See Eurofood-Dublin*, *supra* note 1, slip op. at 22.

[136] The A.G. opinion filed in the *Eurofood-E.C.J.* case articulates a third ground for finding that the Dublin case was opened on January 27, 2004. The opinion points out that Section 220 of the Irish Companies Act of 1963 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* E.C.J. A.G. Opinion, *supra* note 21, ¶¶ 22, 93.

[137] *See Eurofood-Dublin*, *supra* note 1, slip op. at 23.

[138] This reasoning is quite questionable. Under the E.U. Regulation, a secondary proceeding may be opened before a main proceeding. *See* E.U. Regulation, *supra* note 3, 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.

b. Location of CoMI in Ireland

The Dublin court began its discussion of 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.[139] The CoMI normally corresponds to the location of the debtor's head office.[140]

In looking beyond this presumption, the Dublin court held that the CoMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis; therefore, third parties, especially potential creditors, can ascertain the location of the CoMI.[141] All of the evidence before the Dublin court indicated that the actual creditors considered Eurofood to have its CoMI in Ireland. The existing creditors of Eurofood, according to their evidence, clearly believed they were dealing with investments issued by a company located in Ireland that was subject to Irish fiscal and regulatory provisions.[142] Thus, the Dublin court suggested, the Parma court had ignored the creditors' perceptions.[143]

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.[144]

c. Public Policy

The Dublin court also found that the public policy exception in Article 26 applied in its Eurofood proceeding. In particular, the European Convention on Human Rights ("ECHR") includes the right to a fair hearing,[145] 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.[146]

F. The Irish Supreme Court Decision

Dr. Bondi appealed the *Eurofood-Dublin* decision to the Irish Supreme Court. The Court issued a two-part opinion on July 27, 2004.[147] The Court

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[139] *See Eurofood-Dublin*, *supra* note 1, slip. op. at 23.

[140] *See id.* at 25 (citing Virgós & Schmit, *supra* note 21).

[141] *See id.* at 23–24.

[142] *See id.* at 27.

[143] *See id.*

[144] *See id.* at 29.

[145] *See* European Convention on Human Rights, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (1955), *available at* http://www.echr/Basic Texts/english/pdf [hereinafter ECHR].

[146] *See Eurofood-Dublin*, *supra* note 1, at 30–32.

[147] *See id.* at 2.

considered three main issues: first, whether insolvency proceedings had been opened first in Ireland or in Italy; second, whether Eurofood's CoMI was located 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.[148]

The Court found general agreement that it would be required to refer certain questions relating to these issues to the E.C.J.[149] To assist the E.C.J. in deciding these issues, the Irish Supreme Court made rulings on relevant facts and issues of Irish law.[150]

1. 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 held in Dublin. While Dr. Bondi disputed whether many of the meetings were held in Dublin, the Court found that "the evidence [is] overwhelming that the[se] meetings were properly and regularly held in Dublin," and that Dr. Bondi had provided no other evidence to support his contention.[151]

In addition, Dr. Bondi contended that the two Italian directors were "executive" directors, while the two Irish directors were "non-executive" directors.[152] The Court found no basis for this distinction, either in law or in the corporation's Articles of Association.[153]

2. 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 E.U. Regulation. In the Irish Supreme Court's view, there are two ways that the Irish winding up petition can take 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.[154] Alternatively, the Dublin court's later decision to order a winding up may relate back to the date of presentation of the petition.[155] In either case, the

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[148] *See id.* at 5.

[149] *See id.* at 6.

[150] *See id.* at 7.

[151] *See id.* at 7–8.

[152] 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 1, slip op. at 3–4; *see also supra* notes 113–21 and accompanying text.

[153] *See Eurofood-Ireland*, *supra* note 1, at 8.

[154] *See id.* at 9–10.

[155] *See id.*

Irish Supreme Court found that the applicable date was January 27, 2004, which was before an insolvency case for Eurofood was presented to the Parma court. Thus, the Italian court would be required to recognize the prior Irish court decision to open a main proceeding for Eurofood.

The Irish Supreme Court found that, under Irish law, the legal effects of a winding up proceeding (which is a proceeding subject to the E.U. Regulation)[156] are "deemed to commence at the time of the presentation of the petition for the winding up."[157] 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.[158]

The Irish Supreme Court found the E.U. Regulation less than clear on the issue of when an insolvency proceeding is opened, entitling the proceeding to community-wide recognition.[159] Article 16 of the E.U. Regulation provides for the recognition of a "judgment opening insolvency proceedings."[160] The Irish Supreme Court found some ambiguity in the meaning of this phrase, because it does not exactly match the definitions in Article 2.[161] Article 2(e) provides that a "judgment" with respect 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."[162] 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."[163] Therefore, the question in the Court's view was whether an order appointing a provisional liquidator constituted a judgment opening the proceeding that was subject to recognition under Article 16.[164] The court found that it required a preliminary ruling from the E.C.J. on this issue.[165]

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[156] *See* E.U. Regulation, *supra* note 3, Annex A.

[157] *See Eurofood-Ireland*, *supra* note 1, at 11 (quoting the Companies Act 1963 § 220(2)).

[158] *See id.* at 10.

[159] *See id.*

[160] E.U. Regulation, *supra* note 3, art. 16.1.

[161] *See Eurofood-Ireland*, *supra* note 1, at 19–20.

[162] E.U. Regulation, *supra* note 3, art. 2(e).

[163] *Id.*

[164] *See Eurofood-Ireland*, *supra* note 1, at 9–10.

[165] *See id.* at 10.

3. 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.[166] While this issue is governed by E.U. law, the Court found that it is predominantly an issue of fact (on which the trial court's decision is entitled to greater deference) and that the facts before the Dublin court were clear.[167]

The Court pointed to the applicable E.U. Regulation provision, Article 3.1, which states:

> The courts 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.[168]

Further, the Court noted that Recital 13 states, "[t]he 'centre of main interests' should correspond to the place where the debtor conducts the administration of his or her interests on a regular basis and is therefore ascertainable by third parties."[169]

The Court found two elements relevant in Recital 13. First, 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.[170] Indeed, Dr. Bondi did not contest that Eurofood conducted the administration of its interests in Ireland, except with respect to some of the meetings of its board of directors, and the Court found this evidence to be insubstantial.[171]

The E.C.J. found that the second relevant element in Recital 13 is that the CoMI should be ascertainable by third parties, especially creditors.[172] The creditors in this proceeding presented detailed evidence of the lengths to which they went to satisfy themselves that Eurofood's CoMI was in Ireland.[173]

The Irish Supreme Court was very troubled by Dr. Bondi's response to these issues. Bondi relied on five arguments:[174] (1) Eurofood was a wholly

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[166] *See id.* at 10–11.
[167] *See id.*
[168] E.U. Regulation, *supra* note 3, art 3.1.
[169] *Id.* Recital 13.
[170] *See Eurofood-Ireland*, *supra* note 1, at 21.
[171] *See id.* at 22.
[172] *See id.*
[173] *See id.* at 11.
[174] *See id.*

owned subsidiary of Parmalat;[175] (2) its sole purpose was to provide financing for companies in the Parmalat Group;[176] (3) company policy was decided at Parmalat headquarters in Italy by Parmalat executives, and Eurofood exercised no independent decision-making;[177] (4) Eurofood had no employees in Ireland;[178] and (5) Eurofood's liability to its creditors was guaranteed by Parmalat.[179]

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."[180] Essentially, Dr. Bondi's argument was that Eurofood was operated as an agency of Parmalat and did not have a functionally 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 . . . ."[181]

4. 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.[182] The relevant principle of Irish law, the Court found, is the principle requiring fair procedures in all judicial and administrative proceedings, which has both common law and constitutional foundations.[183] 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.[184] 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.[185]

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

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[175] *See id.*
[176] *See Eurofood-Ireland*, *supra* note 1, at 11.
[177] *See id.*
[178] *See id.* In fact, Eurofood had no employees at all.
[179] *See id.*
[180] *See id.* at 23.
[181] *See id.*
[182] *See Eurofood-Ireland*, *supra* note 1, at 13–20.
[183] *See id.* at 35.
[184] *See id.* at 36.
[185] *See id.*

Court on the due process violations in the Parma court proceeding.[186] 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.[187] "It is not possible," the Court responded, "to refrain from criticising the behaviour of the Appellant in the strongest terms."[188]

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 Irish law.[189]

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 Treaty of Amsterdam mandates that a court of final appeal refer any issue of E.C. law interpretation to the E.C.J. for preliminary decision. Thus, the Court decided, it must defer to the E.C.J. for a ruling on the application of the E.U. Regulation to this issue.[190]

G. 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[191] five questions to the E.C.J.[192]

The first question was whether the January 27, 2004 proceedings in the Dublin court constituted a judgment opening an insolvency proceeding

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[186] *See id.* at 37.

[187] *See id.* (Dr. Bondi's counsel stated in oral argument that "he had no instructions on the matter.").

[188] *Eurofood-Ireland*, *supra* note 1, at 38.

[189] *See id.* at 18; *accord* Panzani, *supra* note 77, at 4.

[190] *See Eurofood-Ireland*, *supra* note 1, at 19–20.

[191] "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty . . . ." Treaty of Amsterdam, *supra* note 56, art. 234. 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. *Id.* Such a reference in the E.C.J. is mandatory in a case pending before a national court of last resort. *See id.*

[192] *See Eurofood-Ireland*, *supra* note 1, at 11–13; *see also Eurofood-E.C.J.*, *supra* note 1 (acknowledging the filing of the questions referred by the Irish Supreme Court).

within the meaning of the E.U. Regulation.[193] Second, 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.[194] 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.[195] Fourth, the Court asked what factors determine the location of a subsidiary's CoMI where it and its parent have their respective registered offices in two different E.U. countries.[196]

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[193] The Irish Supreme 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 (E.C.) No 1346 of 2000?

Eurofood-Ireland, *supra* note 1, at 24–25.

[194] The Irish Supreme 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. at 25.

[195] The Irish Supreme 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.

[196] The Irish Supreme 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 interests on a regular basis in a manner ascertainable by third parties and in

Finally, the Court asked the E.C.J. to determine whether the Irish courts could invoke the public policy exception in the E.U. 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.[197]

The Irish Supreme court declared that, "it is a matter of great urgency to have rulings on these questions," and requested that the E.C.J. give special priority to them.[198] However, the E.C.J. denied the request for urgent review.[199]

The case was argued before the E.C.J. on June 12, 2005. Eight countries (including Ireland and Italy), as well as the E.U. Commission, took a sufficient interest in the case to file written observations with the E.C.J., and all but three of the countries were represented at oral argument.[200] The Advocate General of the E.C.J. issued an opinion on September 27, 2005, in which he analyzed the arguments of the parties and of the countries that appeared as *amici curiae*. The Advocate General recommended that the E.C.J. issue a preliminary opinion that the Irish courts were not required to recognize the opening of the Eurofood

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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 12–25.

[197] The Irish Supreme 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 to 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 26.

[198] *See id.* at 24.

[199] *See Eurofood-E.C.J.*, *supra* note 1.

[200] *See* E.C.J. A.G. Opinion, *supra* note 21, ¶ 45.

insolvency case in Italy.[201]

H. 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 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, 2004.[202]

The court noted that, if the appeal were successful, the Parma proceedings would become secondary proceedings; if not, the Irish proceedings were secondary proceedings.[203] 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.[204]

The appellate court found that the opening of an Italian extraordinary administration proceeding is a two-step process. First, a minister issues a decree admitting a company into extraordinary administration. Second, the court finds that the debtor is insolvent and establishes procedures for the proceeding.[205] For Eurofood, the first step took place on February 9, 2004 and the second on February 20, 2004.

The Italian court further found that, for the purposes of mandatory recognition under the E.U. Regulation,[206] 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 Italian 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.[207] 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.[208] 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).[209]

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[201] *See id.* ¶ 152.
[202] *See Eurofood-Italy*, *supra* note 1, slip op. at 26.
[203] *See id.* at 9–10.
[204] *See id.* at 10.
[205] *See id.* at 12–14.
[206] *See* E.U. Regulation, *supra* note 3, art. 16(1).
[207] *See Eurofood-Italy*, *supra* note 1, slip op. at 10–11.
[208] *See id.* at 12.
[209] *See id.*

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."[210] The legislation 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 in order to promote the uniform reorganization of companies in the group, all of which are caught up in the parent corporation's financial difficulties.[211]

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.[212] The court further held that, in any event, the initiation of a bankruptcy proceeding is not subject to objection by creditors.[213] Creditors would be allowed to seek an appropriate remedy after the proceeding is initiated.[214]

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.[215] The court found that, given the public interest in maintaining a large business, the fifth or sixth largest in Italy, subject to extraordinary administration, "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."[216]

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 the decisions that the Irish Supreme Court issued on July 27.

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[210] *See id.* at 15.

[211] *See id.*

[212] *See id.* at 24.

[213] *See Eurofood-Italy*, *supra* note 1, slip op. at 24. United States 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.

[214] *See Eurofood-Italy*, *supra* note 1, slip op. at 24. The procedure is the same in the United States.

[215] *See id.* at 25.

[216] *Id.*

IV. THE EUROPEAN COURT OF JUSTICE'S *EUROFOOD* DECISION

The E.C.J. answered four of the five questions posed by the Irish Supreme Court. The E.C.J. found that its answers made the second question moot.[217]

A. Factors in Determining the Location of a CoMI

The E.C.J. first addressed the factors that a court must consider, under the E.U. Regulation, in determining the location of the CoMI. The E.C.J. noted that the E.U. Regulation adopts a presumption that the CoMI is located in the country of the corporation's registered office (which roughly means the nation of its incorporation). [218]

According to the E.C.J., in determining the proper location of the CoMI of a subsidiary, it is necessary to examine two sets of factors.[219] The first set of factors is the location where the subsidiary has regularly administered its own interests, as ascertainable by third parties, and the country in which it is incorporated. The second set of factors arises from the location of the parent company which, by virtue of its ownership and power to appoint directors, is able to control the policy decisions of the subsidiary. Where, as in the Eurofood proceedings, these factors point to different countries for the location of the CoMI, the court must determine the relative weight to give to each factor.[220]

In the E.C.J.'s view, the European Union needs a uniform rule for interpreting and applying the jurisdictional test of the debtor's CoMI.[221] There is no room for divergent national views on this issue. In part, the E.C.J. based this determination on the fact that this concept is distinctive to the E.U. Regulation and is otherwise unknown in the law of the E.U. member countries.[222]

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[217] For the exact language of the second Irish Supreme Court question, which the E.C.J. found moot, see *supra* note 196.

[218] Most E.U. countries follow the "real seat" rule, which requires that a company's registered office be in the same country as its headquarters. *See, e.g.*, Christian Kersting, *Corporate Choice of Law—A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1, 36–38 (2002); Nicole Rothe, Comment, *Freedom of Establishment of Legal Persons within the European Union: An Analysis of the European Court of Justice Decision in the Überseering Case*, 53 AM. U. L. REV. 1103, 1110 (2004). There are a few E.U. countries, such as the United Kingdom, that permit a "letterbox company," which does not carry out any business in the country where its registered office is located. *See id.* at n.48. In *Eurofood-E.C.J.*, the E.C.J. stated that a showing that a company is a "letterbox company" could refute the presumption that its CoMI is located in the country of its registered office. *See* text accompanying *infra* notes 240–42.

[219] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 27.

[220] *See id.*

[221] *See id.* ¶ 31.

[222] *See id.* In fact, this assertion by the E.C.J. slightly overstates the facts. Two E.U.

In determining the CoMI, the E.C.J. ruled that where a parent and a subsidiary have registered offices in different E.U. countries, the presumption that the CoMI of the subsidiary is located in the country where its registered office is situated can be rebutted only "if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect."[223] The E.C.J. stated that such rebuttal could be made if the subsidiary is not carrying out any business in the territory of the country where its registered office is located.[224] In contrast, where a subsidiary carries on its business in the country where its registered office is situated, "the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation."[225]

The E.C.J. stated that the determination of the location of a debtor's CoMI must be based on criteria that are both objective and ascertainable by third parties.[226] If E.U. countries do not follow a uniform interpretation, the CoMI concept cannot serve its function of determining in which country a main insolvency case belongs and which country's law will govern the insolvency proceeding.[227] Inconsistent interpretations of the CoMI concept can lead to dueling jurisdiction between countries for the main proceeding of a debtor, as in fact happened in the Eurofood case.

The E.C.J. turned to the thirteenth recital of the E.U. Regulation to define the scope of the concept of CoMI.[228] This recital states, "the centre of main interests should correspond to the place where the debtor conducts the administration of [its] interests on a regular basis and is therefore ascertainable by third parties."[229] The E.C.J. treated this recital as a definition that "shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties."[230]

The E.C.J. found that both objectivity and ascertainability third parties

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countries have adopted the UNCITRAL Model Law, *supra* note 10, which uses the CoMI concept in the same way as in the E.U. Regulation. The United Kingdom (excepting Northern Ireland) adopted the law effective April 4, 2006, less than a month before the E.C.J. issued its *Eurofood* decision. In contrast, Poland adopted its version of the Model Law effective October 1, 2003, and it was already in place when Poland became an E.U. member effective May 1, 2004.

[223] *Eurofood-E.C.J.*, *supra* note 1, ¶ 37.

[224] *Id.*

[225] *Id.*

[226] *See id.* ¶ 33.

[227] *See id.*

[228] *See id.* ¶ 32.

[229] E.U. Regulation, *supra* note 3, comt. 13 (internal quotations omitted).

[230] *Eurofood-E.C.J.*, *supra* note 1, ¶ 33.

were necessary to achieve an important goal of the E.U. Regulation: "to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings."[231] The E.C.J. further found that objectivity and forseeability are particularly important, given that the determination of the court with jurisdiction to open a main proceeding also determines which country's law will govern the proceeding.[232]

The relevant third parties are typically the debtor's major creditors and its employees. As in the Eurofood proceeding, third parties may have undertaken considerable effort in exercising due diligence to assure themselves as to the location of the debtor's CoMI. These third parties would have an interest in reasonably predicting in advance where a main insolvency proceeding would properly be filed, what country's substantive law and procedural rules would govern the proceeding, and whether the subsidiary's insolvency proceeding might become entangled in a far larger proceeding of the corporate group of which the subsidiary is a part.

The weight that the E.C.J. gave to Recital 13, as an integral substantive provision of the Regulation, is remarkable. Normally, as a matter of construction, a recital would be treated as explanatory commentary, and not the source of a substantive rule of law, let alone a rule of such importance as the definition of CoMI. The recitals that now appear at the beginning of the E.U. Regulation were not included in the draft treaty that was converted into the E.U. Regulation.[233] The recitals were added at the time of conversion of the text to a regulation, presumably by the E.U. staff and perhaps with help from the countries sponsoring the conversion.[234]

1. Presumption that CoMI is Located in Country of Registered Office

After examining the interests of third parties, principally consisting in the creditors of a debtor filing an insolvency proceeding, the E.C.J. turned to a consideration of the possible rebuttal of the presumption that the CoMI is located in the country where the registered office is located.[235] Because Eurofood's registered office was located in Dublin, the Article 3(1)

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[231] *Id.*

[232] *See id.*

[233] *See* European Union Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223, *reprinted in* 23 BROOK. J. INT'L L. 75, 75 (1997). The draft treaty had only four brief introductory paragraphs, which were replaced with four different introductory paragraphs in the Regulation that precede the present thirty-three recitals at the beginning of the Regulation.

[234] According to the introductory paragraphs, it was principally Germany and Finland whose efforts led to the conversion of the draft treaty into a regulation after it failed to obtain the necessary signatures for adoption as a treaty.

[235] *See Eurofood-E.C.J.*, *supra* note 1, ¶¶ 34–37.

presumption unquestionably placed its CoMI in Ireland.[236]

2. Rebuttal of Presumption

Under U.S. law, there are a variety of ways of treating a presumption and its possible rebuttal. First, a presumption may be treated as a "bursting bubble" that disappears as soon as evidence is introduced that is sufficient to support a contrary inference.[237] Second, a presumption may shift the burden of going forward in presenting evidence at trial, but not shift the ultimate burden of proof.[238] Third, while not shifting the burden of proof, a presumption may be taken into account in weighing the evidence.[239] Fourth, a presumption may shift the burden of proof to the party against whom the presumption operates.[240] Fifth, a presumption may be rebuttable only by clear and convincing evidence.[241] Sixth, rebuttal may not be permitted at all.[242] The existing authority in domestic E.U. courts on the effect of the E.U. Regulation's presumption on the location of a debtor's CoMI is unclear and not altogether consistent.[243]

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[236] For the text of E.U. Regulation Article 3(1), see *supra* note 127.

[237] This is known as the Thayer-Wigmore theory of a presumption. *See, e.g.*, 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122.1, at 428 (2005) (citing JOHN HENRY WIGMORE, EVIDENCE § 2491 (3d ed. 1940) and JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE 336 (1898)); CAL. EVID. CODE § 604 (West 2006) ("The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.").

[238] This is the position taken by the U.S. Federal Rules of Evidence. *See* FED. R. EVID. 301 ("A presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.").

[239] *See, e.g.*, WRIGHT & GRAHAM, *supra* note 237, § 5722.1, at 435–38 (designating this effect of a presumption as the "California Heresy").

[240] *See, e.g.*, CAL. EVID. CODE § 606 (West 2006) ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.").

[241] *See, e.g.*, 11 U.S.C. § 362(c)(3)(C) (2005) (requiring clear and convincing evidence to rebut the presumption that a bankruptcy case filed by an individual is not in good faith, if the individual had a prior case that was dismissed within a year before the filing).

[242] *See, e.g.*, Elan Transdermal Ltd. v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1389 (N.D. Cal. 1992) (under California law, a substantial relationship between work that an attorney has performed for a former client and his or her work for a current client in opposition to the former client creates an irrebuttable presumption that the attorney has received confidential information from the former client. That creates a conflict of interest disqualifying the lawyer from the work for the current client).

[243] *See* Bob Wessels, *The Place of the Registered Office of a Company: A Cornerstone in the Application of the E.C. Insolvency Regulation*, 3 EUR. COMPANY L. (KLUWER) 183, 184–

3. E.C.J. Decision on Rebuttal Requirements

The question in the *Eurofood-E.C.J.* case is whether the presumption can be rebutted by evidence of the location of the parent company and its control over the policy decisions of the subsidiary.[244]

In its decision, the E.C.J. gave a clear answer on the proper kind of evidence to consider in an attempted rebuttal of the presumption that a debtor's CoMI coincides with its registered office. The E.C.J. found that rebuttal must be based on factors that are both objective and discernible by third parties.[245] For example, the E.C.J. stated, such rebuttal could be successful for a "letterbox" company that is not carrying on any business in the country where its registered office is located.[246] In contrast, the E.C.J. stated, if a company carries out its business in an E.U. country where its registered office is located, the location of its CoMI cannot be rebutted by evidence that its economic choices are or can be controlled by a parent company in another E.U. country.[247]

While the E.C.J. opinion does not draw out the consequences of its decision on the Eurofood controversy,[248] the implications are clear. The presumption that Eurofood's CoMI was located in Ireland, because its registered office was located there, was supported by the evidence of the expectations of its major creditors. Given this evidence, the location of its parent corporation Parmalat SpA in Italy was insufficient to rebut the presumption.

Thus, the E.C.J. supported the Dublin High Court's decision, that Eurofood's CoMI was located in Ireland. In contrast, in deciding that Eurofood's CoMI was in Italy, the Italian courts improperly based their decisions on the fact that Eurofood's important economic decisions were made by the Parmalat corporate decision makers in Italy.

The E.C.J. did not answer the question of the quantity of evidence required to rebut the presumption that a debtor's CoMI is located in the country of its registered office or the consequence of presenting some

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86 (2006) [hereinafter Wessels, *Registered Office*] (discussing cases); Raimon, *supra* note 48, at 750.

[244] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 27. While the evidence presented on this subject in the Dublin High Court and in the Parma court is not available, apparently it varied enormously.

[245] *Id.* ¶ 34.

[246] *See id.* ¶ 35.

[247] *See id.* ¶¶ 36–37.

[248] One function of the distinctive nature of the reference of preliminary questions to the E.C.J. is that its jurisdiction is limited to answering the questions presented. The national (or lower) court referring the question then applies the answer to the case in front of it, and the decision carries the weight of the domestic court rather than the E.C.J. *See generally* Weiler, *supra* note 62, at 2421.

evidence of the proper sort. The E.C.J. did not decide whether the presumption should have any weight once contrary evidence is presented, or whether it shifts the burden of proof or the burden of producing evidence.[249]

B. Jurisdiction to Open Main Proceedings in a Non-CoMI E.U. Country

The E.C.J. next took up the issue of whether a court in an E.U. country has jurisdiction to review the decision of a court of another E.U. country that has opened a main insolvency proceeding where (a) the company's registered office is not located in the country of the first court, and (b) from the viewpoint of third parties, the location where the debtor's conduct of the administration of its interests on a regular basis is also not in the country of the first court.[250] The point of this question was to inquire whether Articles 3[251] and 16[252] of the E.U. Regulation mandate the recognition of the decision of the first court to open a main proceeding, where that court lacks jurisdiction, pursuant to the Regulation, to open such a proceeding.[253]

The E.C.J. stated the general principle as follows:

> [O]n a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.[254]

Mutual trust, the E.C.J. said, is the principle governing the recognition of the opening of a main proceeding in another E.U. country and the priority granted by Article 16 to the first court decision opening a case.[255] By corollary to the principle of mutual trust, the E.C.J. stated, the E.U.

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[249] Professor Wessels argues that the function of the presumption is to allocate the burden of proof. *See* Wessels, *Registered Office*, *supra* note 243, at 185. Furthermore, he contends that the presumption assists in the resolution of doubts where the evidence is unclear. *See id.* It remains to be seen whether this view of the presumption will prevail in light of the *Eurofood-E.C.J.* decision.

[250] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 38.

[251] For the text of E.U. Regulation art. 3, see *supra* note 127.

[252] Automatic recognition of a proceeding opened under Article 3 is required by E.U. Regulation, *supra* note 3, art. 16(1), which provides: "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all other Member States from the time that it becomes effective in the State of the opening of proceedings."

[253] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 38. The same issue could arise in another E.U. country which has no claim to hosting the debtor's CoMI, but where a party in interest may wish judicial assistance in connection with the debtor's insolvency proceeding.

[254] *Id.* ¶ 44.

[255] *See id.* ¶ 39.

countries have waived "the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings. . . ."[256] Thus, once a decision[257] opening a main proceeding is made in one E.U. country,[258] the principle of mutual trust requires courts in other E.U. countries to recognize that decision and prevents them from reviewing the assessment that the first court made as to its jurisdiction.[259]

The E.C.J. stated that the proper avenue to challenge such a determination is to invoke the remedies available under the law of the country where the opening decision was made (i.e., make an application for reconsideration in the court that made the decision to open a main proceeding, or to take an appeal to a higher court in that country).[260]

However, the E.C.J. recognized two procedural qualifications to the recognition requirement based on the principle of trust. First, a court opening a main insolvency proceeding must examine whether the debtor's CoMI is located in that country.[261] Second, "such an examination must . . . comply with the essential procedural guarantees required for a fair legal process . . . ."[262] If a decision opening a main insolvency proceeding does not meet these procedural requirements, the principle of mutual trust does not apply, and recognition is not required. The E.C.J. expanded on these issues later in its opinion.[263]

C. Consequence of Appointing a Provisional Liquidator

The E.C.J. next turned to the first question posed by the Irish Supreme Court, whether the Dublin court's appointment of a provisional liquidator constituted "a decision opening insolvency proceedings" for Eurofood, within the meaning of Article 16(1).[264] The E.C.J. recognized that priority, for recognition purposes under Article 16(1), is based on which decision to

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[256] *See id.* ¶ 40.

[257] In this context, "decision opening" a main proceeding has the same meaning as "judgment opening" a main proceeding. E.U. Regulation art. 16 refers to a "judgment opening insolvency proceedings." *See* E.U. Regulation, *supra* note 3, art. 16. Preamble 22 gives the same meaning both to "judgments concerning the opening . . . of insolvency proceedings" and to "decision[s] . . . to open proceedings . . ." *Id.* pmbl. 22. In *Eurofood-E.C.J.*, the court uses these terms interchangeably.

[258] If the country first opening a main insolvency proceeding for a debtor is not an E.U. country, the mandate for recognition of such a decision does not apply.

[259] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 42.

[260] *See id.* ¶ 43.

[261] *See id.* ¶ 41.

[262] *Id.*

[263] *See* discussion in text *infra* notes 280–312.

[264] *Eurofood-E.C.J.*, *supra* note 1, ¶ 45.

open a main proceeding is handed down first.[265] However, the Regulation does not define with sufficient precision what constitutes a "decision to open insolvency proceedings."[266]

This problem arose in the Eurofood cases because Irish law lacks a step in the commencement of an insolvency proceeding that is designated as a "decision to open" such a proceeding.[267] Furthermore, under Irish law, the precise point where an insolvency proceeding is opened, for the purposes of the E.U. Regulation, apparently varies from case to case.

The E.C.J. decided to bypass this formal gap and to focus on the substance of what constitutes a decision to open an insolvency proceeding. The E.C.J. ruled on this issue as follows:

> [O]n a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.[268]

Thus, for the application of the E.U. Regulation, Article 1(1)[269] requires that a national insolvency proceeding have four characteristics: (1) it must be a collective proceeding, (2) it must be based on the debtor's insolvency, (3) it must result in at least a partial divestment of the debtor, and (4) it must involve the appointment of a liquidator.[270] Whether a statute qualifies under this provision is not left to speculation: Annex A to the Regulation specifies the statutes for each E.U. country (except Denmark, where the E.U. Regulation is not applicable) that meet this qualification, and Annex C lists the titles of the liquidators in each country who meet the definition in Article 2(b).[271]

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[265] *See id.* ¶ 49.

[266] *See id.* ¶ 50.

[267] The negotiator from Ireland should have had this issue resolved in the negotiation of the text of the draft insolvency convention that was converted into the E.U. Regulation with no relevant changes. One could say that this resulted from a failure of diplomacy.

[268] *Eurofood-E.C.J.*, *supra* note 1, ¶ 58.

[269] *See* E.U. Regulation, *supra* note 3, art. (1)(1), which provides: "This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator."

[270] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 46.

[271] E.U. Regulation, *supra* note 3, art. 2(b) defines a liquidator as, "any person or body whose function is to administer or liquidate assets of which the debtor has been divested or

The E.C.J. held that a decision to open an insolvency proceeding under the law of an E.U. country includes any decision under a statutory scheme referred to in Annex A that meets the formal criteria of Article 1(1) and appoints a liquidator of the kind specified in Annex C.[272] It does not matter, the E.C.J. held, that the liquidator is initially appointed on an interim basis.[273]

The E.C.J. noted that the conditions and formalities for opening an insolvency proceeding are determined by domestic national law, and not the E.U. Regulation, and they vary considerably from one E.U. country to another.[274] In some E.U. countries, insolvency proceedings are opened very soon after the submission of an application, especially if the application is submitted by the debtor and is unopposed. In other countries, by contrast, it may take a substantial period of time before a decision to open a case is issued, even in an unopposed case filed by the debtor.[275] The E.C.J. also noted that a "provisional" opening may be in place for several months.[276]

The E.C.J. declared that, in order to assure the effectiveness of the recognition provisions of the E.U. Regulation, it is necessary that the obligation of recognition apply as soon as possible in the course of the proceedings.[277] The E.C.J. noted that the principle that only one main proceeding is permitted would suffer serious disruption if competing courts could claim concurrent jurisdiction for a main proceeding over an extended period.[278] Thus, the phrase "decision to open insolvency proceedings" must be interpreted in light of the objective of assuring the effectiveness of the Regulation.[279]

For example, the urgency of recognition is highlighted in the context of the application of the moratorium or automatic stay resulting from the filing of an insolvency case in an E.U. country. Article 16(1) exports the home country moratorium (i.e., that of the country where the case is filed) in a main proceeding to all other E.U. countries.[280] A court in another

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to supervise the administration of his affairs. Those persons and bodies are listed in Annex C." This list must be updated by the European Union to reflect recent changes in national insolvency laws in E.U. countries.

[272] *See Eurofood-E.C.J.*, *supra* note 1, ¶¶ 54, 58.

[273] *See id.* ¶ 55.

[274] *See id.* ¶ 51.

[275] *See id.* France, for example, typically requires approximately three weeks for a court to open an insolvency proceeding.

[276] *See id.*

[277] *See id.* ¶ 52.

[278] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 52.

[279] *See id.* ¶ 53.

[280] *See* E.U. Regulation, *supra* note 3, art. 16(1), which provides: "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it

country needs to know immediately if a proceeding either pending when the first main insolvency case is filed or commenced thereafter is subject to the home country moratorium. Similarly, such a court needs to know whether assets that may be involved in its own case are *in custodia legis* in the home country court.

The Italian administrator and the Italian government had acknowledged that the temporary liquidator appointed for Eurofood by the Dublin High Court on January 27, 2004 was an administrator of the kind specified in Annex C. Nonetheless, they argued that Article 38 of the E.U. Regulation granted powers to such an administrator to apply for preservative measures "for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings."[281] Thus, they argued, the appointment of such an administrator could not open the insolvency proceeding.[282]

The E.C.J. rejected this construction. It found instead that this provision applies to a temporary administrator in an insolvency case that is not yet open because the home court has not yet ordered that the debtor be divested of its property or the temporary administrator is not an Annex C administrator.[283] The purpose of Article 38, the E.C.J. found, was to permit this type of administrator, though not authorized to request the opening of a secondary proceeding in another country,[284] to apply for preservative measures in that country pending receipt of full authority.[285] Thus, this provision did not assist the Italian assertion of jurisdiction over a main case for Eurofood.[286]

In light of this conclusion, the E.C.J. found it unnecessary to address the Irish Supreme Court's second question, premised on a contrary finding

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becomes effective in the State of the opening of proceedings."

[281] E.U. Regulation, *supra* note 3, art. 38 provides:

> Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

[282] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 56.

[283] *See id.* ¶ 57.

[284] *See* E.U. Regulation, *supra* note 3, art. 29.

[285] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 57.

[286] The E.C.J. did not in fact make this final finding. It confined its decision to the abstract issues presented by the Irish Supreme Court, and left it to the national courts to draw the appropriate conclusions about the *Eurofood* case.

on the first question, of whether the relation-back, under Irish law, of the Dublin court's March 23, 2004 decision opening a main insolvency proceeding for Eurofood prevented an intervening Italian court decision opening a main insolvency proceeding for the same debtor from taking priority.[287]

However, the E.C.J.'s failure to address this question left a gap in this analysis. The Irish Supreme Court presumably wanted to be able to rule that the Dublin decision on January 27, 2004 prevented the Italian court in Parma from opening a main proceeding for Eurofood in February 2004. The E.C.J. did not make such a ruling, and such a result cannot be inferred from what the E.C.J. did decide. Instead the Irish Supreme Court will have to rely on the E.C.J.'s "equality of arms" analysis to reach this conclusion.[288]

D. Impact of Procedural Irregularities on Recognition Obligation

In its fifth question, the Irish Supreme Court asked the E.C.J. to determine whether it was required to recognize an insolvency proceeding opened in another E.U. country where the procedure leading to the decision disregarded procedural rules guaranteed by the public policy of the country where the court is located. In responding to this question, the E.C.J. addressed both considerations of fair legal process and the public policy exception to the requirements of the E.U. Regulation.[289] Because of the complexity of these issues, I address them separately *infra*.[290]

E. Subsequent Irish Supreme Court Decision

After the E.C.J. issued its *Eurofood* decision, the Irish Supreme Court dismissed the *Eurofood* appeal on the grounds that the E.C.J. decision had fully resolved the issues before it.[291]

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[287] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 59.

[288] *See infra* text at notes 323–30.

[289] E.U. Regulation, *supra* note 3, art. 26 provides:

> Any Member State may refuse to recognize insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

[290] *See infra* text at notes 299–312 (fair legal process) and 350–59 (public policy).

[291] *See In re* Eurofood IFSC Ltd., [2006] IESC 41 (Ir.).

V. "EQUALITY OF ARMS," FAIR PROCEDURES, AND DUE PROCESS

Perhaps the most surprising part of the E.C.J.'s discussion of fair procedures in the CoMI decision making process is its reference to the principle of "equality of arms," a subcategory of fair procedure requirements under E.U. law. The principle of "equality of arms" gave the E.C.J. the legal tools to address some of the procedural issues raised by the Irish Supreme Court in its submission to the E.C.J.[292]

I have previously written, while the E.C.J. *Eurofood* decision was pending, that the E.U. Regulation needs both substantive and procedural improvements to provide adequately for a fair and reasonable decision-making process in the determination of the CoMI of a business entity.[293] In Part VI, I consider the impact of the E.C.J. *Eurofood* decision on my arguments that the E.U. Regulation needs substantive revisions to accommodate corporate groups[294] and to better define the factors to consider in the CoMI analysis.[295]

I have also argued that the E.U. Regulation needs a set of procedural improvements, including procedures for making the CoMI determination, a better definition of what constitutes a "judgment opening insolvency proceedings," which is entitled to automatic recognition,[296] and a package of "due process" rights.[297] More generally, I argued that the E.U. Regulation needs procedural rules for its application. I have further argued that these rules should be adopted on an E.U.-wide basis,[298] so that they would not be subject to domestic rule-making that may adopt inconsistent and inadequate rules.[299]

Given the existing Irish and E.U. law, the Irish Supreme Court thought that it could only find an answer to these procedural problems in the "public policy" exception to the mandatory recognition and enforcement of judgment provisions in the E.U. Regulation.[300] The E.C.J. found a better solution to the problem. By invoking the "equality of arms" principle based

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[292] In my article on the *Eurofood* case that I published before the E.C.J. decision, I did not foresee the use of this principle to address procedural issues raised by the Irish Supreme Court in its submission. *See* Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429, 464–84 (2006).

[293] *See id.*

[294] *See infra* text at notes 360–70.

[295] *See infra* text at notes 378–413; *see also* Bufford, *supra* note 292, at 464–71.

[296] *See* E.U. Regulation, *supra* note 3, art. 16(1).

[297] *See* Bufford, *supra* note 292, at 482–84.

[298] *See id.* at 471.

[299] *See id.*

[300] *See Eurofood-E.C.J.*, *supra* note 1, ¶¶ 61–64, discussed *infra* at notes 360–70.

on E.U. law, the E.C.J. found a solution to the procedural problem based on E.U. law, not Irish law. It is E.U. law (the "equality of arms" principle embodied in the Treaty of Amsterdam), the E.C.J. ruled, that permits the Irish Supreme Court to deny recognition to the order of the Parma court opening a main proceeding for Eurofood.[301]

I also did not appreciate that the E.C.J. had an arrow in its quiver to address at least some of the due process concerns that the Irish Supreme Court and I had raised. This arrow is embodied in the concept of "equality of arms," which the E.C.J. relied on in its *Eurofood* decision to deal with some of the due process kinds of problems.

The concept of "equality of arms" is unknown in U.S. law.[302] However, the E.C.J. has used this concept on a number of occasions in commercial law cases.[303] Most of the E.C.J. commercial law cases either involve competition law or administrative law disputes with the European Union.[304]

As applied to the Eurofood case, the principle has important consequences in a number of European countries with respect to their procedures in making decisions on the location of the CoMI in an international insolvency case.

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[301] *Id.* ¶¶ 60–65.

[302] *But see* Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007 (arguing for the adoption of a new constitutional right of equality of arms to balance criminal trials more evenly between prosecutor and defendant).

[303] A database search of E.C.J. cases on the website of the British and Irish Legal Information Institute using the "equality of arms" phrase yielded fifty-five cases (including the *Eurofood-E.C.J.* case). *See* BAILII Court of Justice of the European Communities (including Court of First Instance Decisions), http://www.bailii.org/eu/cases/EUECJ.

[304] *See id.* All but two of the E.C.J. "equality of arms" decisions involved E.U. regulatory action (twenty-nine involved E.U. competition law). For a description of the operation of the "equality of arms" concept in E.U. regulatory law, *see In re* Microsoft Corp., 428 F. Supp. 2d 188, 195 (S.D.N.Y. 2006). The remaining case, apart from *Eurofood-E.C.J.*, is Case C-237/02, Freiburger Kommunalbauten GmbH Baugessellschaft & Co. KG v. Hofstetter, 2004 O.J. C106/12, 2004 E.C.J. Celex Lexis 393 (Apr. 1, 2004), where the E.C.J. found that a national court (in Germany) must decide whether a consumer contract for a parking space in a multi-story garage was unfair, and thus violated the "equality of arms" principle, insofar as it required payment in full upon receipt of a bank performance guarantee (with default interest if not paid timely) before the structure was built. In one other case, Case C-276/01, Steffensen, 2003 O.J. C135/6, 2004 E.C.J. Celex Lexis 146 (Apr. 10, 2003), which arose from the application of an E.U. regulation in a German court against a sausage manufacturer whose sausages were improperly labeled, the production supervisor challenged the evidence seized in retail outlets on the grounds of "equality of arms" because the remaining portions of the production run had been sold and could not be tested. The E.C.J. ruled that the domestic court must determine, based on the facts of the particular case, whether the "equality of arms" principle was satisfied.

A. E.C.J. Procedural Rulings

"Fair legal process" is an important issue in the Eurofood cases. The Dublin High Court took sufficient time to give Dr. Bondi, the Italian administrator appointed in the Italian Eurofood case (and also in all the other Parmalat cases filed in Italy), a full and fair opportunity to be heard before deciding that the Dublin case was the main case for Eurofood. In contrast, Dr. Bondi gave notice to Mr. Farrell, the Irish provisional liquidator, at 5:15 p.m. on a Friday afternoon, of the Parma hearing on the opening of a main proceeding that was scheduled (and took place) the following Tuesday at noon. Furthermore, Dr. Bondi refused to provide to Mr. Farrell copies of the voluminous papers that he had filed in the Parma court.

The E.C.J. found that the general principle that everyone is entitled to a fair legal process is well established in E.C.J. jurisprudence.[305] This principle, according to the E.C.J., "is inspired by the fundamental rights which form an integral part of the general principles of Community law which the [E.C.J.] enforces . . . ."[306] The principle is also inspired, the E.C.J. stated,[307] by the constitutional traditions common to the Member States and by the guidelines supplied by the ECHR.[308] More particularly, the right to be heard, including the right to receive documents filed with a court, "occup[ies] an eminent position in the organisation and conduct of a fair legal process."[309] In the context of insolvency proceedings, the E.C.J. found that these rights are provided by the principle of "equality of arms," to which we now turn.

B. The E.C.J. Language on "Equality of Arms" in *Eurofood*

In *Eurofood*, the E.C.J. was quite terse in its reference to the "equality of arms" principle. The Court stated:

> In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings

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[305] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 65 (citing Case C-185/95, Baustahlgewebe v. Comm'n, 1998 E.C.R. I-8417, ¶¶ 20–21; Joined Cases C-174/98 & C-189/98, Netherlands v. Comm'n, 2000 E.C.R. I-1, ¶ 17; Case C-7/98, Krombach, 2000 E.C.R. I-1935, ¶ 26).

[306] *Id.*

[307] *Id.*

[308] *See* ECHR, *supra* note 145.

[309] *Eurofood-E.C.J.*, *supra* note 1, ¶ 66.

> actually have the opportunity to challenge the measures adopted in urgency.[310]

We turn now to unpacking the "equality of arms" concept, insofar as it applies in insolvency cases.

C. Origins of "Equality of Arms": European Convention on Human Rights

"Equality of arms" is a legal concept of ancient origin,[311] and has its modern home in European and international criminal procedure.[312] The concept finds its modern European origins in Article 6 of the ECHR, which was adopted by the Council of Europe[313] in 1952.[314]

1. Convention Language

Article 6 of the ECHR provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

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[310] *See id.*

[311] The "equality of arms" principle arose in the context of the trial by wager of battle, which, according to Blackstone, traces back to "the earliest times," including the laws of Gundebald in AD 501. *See* WILLIAM BLACKSTONE, 3 COMMENTARIES *337. Such a trial could be used in military, criminal, or civil cases. *See id.* Blackstone describes the armament permitted: the representatives of each side "are dressed in a suit of armour, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows." *Id.* at *339. The only weapons allowed were three-foot batons or staves, and a four-cornered leather "target." *Id.* The battle, which took place before judges sitting in court on a specially designated field, was fought from sunrise "till the stars appear in the evening." *Id.* at *340. It rarely resulted in the death of one of the combatants. *Id.* at *339. Blackstone declares that such a trial was still "law at this day [1769]," although the last such trial had occurred in 1638. *Id.* at *338.

[312] *See, e.g.*, MAŁGORZATA WASEK-WIADEREK, THE PRINCIPLE OF "EQUALITY OF ARMS" IN CRIMINAL PROCEDURE UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS FUNCTIONS IN CRIMINAL JUSTICE OF SELECTED EUROPEAN COUNTRIES (Leuven Univ. Press) (2000); François Falletti, *Equality of Arms in French Criminal Procedure*, http://www.iap.nl.com/speeches/ 2000_h.html (last visited July 5, 2006). For a description of the more liberal interpretation given to the right of "equality of arms" in international criminal tribunals, see James Meernik, *Equality of Arms? The Individual vs. The International Community in War Crimes Tribunals*, 86 JUDICATURE 312, 315 (2003); *see also* Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective*, 28 FORDHAM INT'L L.J. 1566 (2006); Stefania Negri, *The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure*, 5 INT'L. CRIM. L. REV. 513 (2005).

[313] The Council of Europe is both the oldest and the largest of the European international organizations. It has forty-six members, including all of the E.U. member countries. The European Court of Human Rights is a Council of Europe institution.

[314] *See* ECHR, *supra* note 145. Each of the forty-six members of the Council of Europe, including all of the E.U. members, has ratified the European Convention on Human Rights.

> hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[315]

As is evident in the foregoing text, "equality of arms" is not a right overtly enumerated in Article 6. However, it is generally recognized as an uncodified element of the right to a fair trial provided in Article 6.[316] Thus, Article 6 makes "equality of arms" a core element of the adversary criminal process[317] in the forty-six member countries of the Council of Europe (which includes all of the E.U. member countries).

In the criminal context, the "equality of arms" principle gives three rights to a defendant in a criminal trial: (1) the right to a full and fair opportunity to present the facts of his or her case to the court; (2) the right

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[315] *Id.* art. 6.

[316] *Id.*

[317] *See, e.g.*, J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS, 137 (Oxford Univ. Press) (1969); *see also* Kingsley E. Belle, *Equality of Arms—a Significant Aspect of Fairness in International Criminal Justice,* http://http://64.118.85.12/~slcmp/opinion_article.html (last visited Jan. 11, 2007) ("The principle of equality of arms is classified as a sub-principle of fairness, whereby the accuser and the accused must be treated equally before the law.").

to present the defendant's legal arguments to the court; and (3) the right to respond to the evidence and the legal arguments presented by the prosecution.[318]

2. The Belziuk Case

A leading European case for the application of the principle of "equality of arms" is the 1998 decision of the European Court on Human Rights[319] in *Belziuk v. Poland*,[320] the first Polish criminal case to come before that court.

The defendant in that case was convicted of attempting to steal an automobile, and was sentenced to three years in prison. Having taken an appeal and not being represented by counsel, he requested that he be brought to the appellate court hearing. The court of appeal denied this request on the grounds that he had argued his position in writing and he had already explained in detail his version of the facts in the trial court.[321]

The Court found three principles deriving from Article 6(1) and (3)(c) that applied to the *Belziuk* case. First, criminal proceedings form a single entity from beginning to end, and the protection provided by Article 6 does not end at the trial court.[322] Second, while as a general rule the right to a fair hearing requires that the accused be present at trial, it does not necessarily entail rights to a public hearing of an appeal and a right to be present in person.[323] Instead, at the appellate level the court must consider "the special features of the proceedings involved and the manner in which the [defense's] interests are presented and protected before the appellate court, particularly in the light of the issues to be decided by it and their importance for the appellant."[324]

Third, in the opinion of the Court, the principle of "equality of arms," as a feature of the requirement for a fair trial, requires that both the prosecution and the defense be given "the opportunity to have knowledge of

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[318] *See, e.g.*, WASEK-WIADEREK, *supra* note 312, at 23.

[319] There is no right under the ECHR for an individual to bring a claim against that person's own country. *See* ECHR, *supra* note 145, art. 33 (specifying that a case may be brought before the European Court on Human Rights only by High Contracting Parties (i.e., countries that have ratified the Convention) or the European Commission on Human Rights (the Commission)). However, the Commission may receive a petition from such an individual, if the country at issue has declared that it recognizes the competence of the Commission to receive such petitions. *See id.* art. 34. The Commission, in turn, may forward the petition to the European Court on Human Rights. *See, e.g.*, Belziuk v. Poland, 1998-II Eur. Ct. H.R. 1.

[320] *Belziuk*, 1998-II Eur. Ct. H.R. 1, at 11.

[321] *Id.* at 3.

[322] *Id.* at 10.

[323] *Id.* at 11.

[324] *Id.*

and comment on the observations filed and the evidence adduced by the other party."[325] Conceivably, the Court stated, national law may provide for this principle in various ways.[326] However, in this case, if the defendant had been present at the hearing, he could have challenged the submissions of the prosecutor and presented evidence in support of his appeal.[327] Because the defendant was denied this opportunity, the Court found that the principle of "equality of arms," as implicitly embedded in Article 6, was violated.[328]

D. "Equality of Arms" in the Insolvency Context

In its *Eurofood* decision, the E.C.J. does not explain how the concept of "equality of arms" applies in the insolvency context. However, from its use in the criminal procedure context, we can distill the following. The "equality of arms" principle requires that each party in interest in an insolvency case be given a full and fair opportunity to present both the facts and the law on its side, and, equally, that it be given a full and fair opportunity to comment on the evidence and legal arguments of an opponent.

One of the important issues that the Irish Supreme Court submitted to the E.C.J. was its perception that the Parma court had violated Mr. Farrell's rights. Dr. Bondi had refused to provide copies of the papers that he had filed in the Parma case in connection with the Parma court's hearing and determination that it had jurisdiction to open a main insolvency proceeding for Eurofood.[329]

Providing a full and fair opportunity to present the facts and law and to comment on the other side's submissions can be difficult with respect to urgently needed judicial decisions at the outset of an insolvency case. As the *Eurofood-Dublin* case illustrates, it is often necessary in a business reorganization case to obtain orders from the court on a variety of subjects as soon as the case begins.[330] In the United States, these orders are commonly known as "first day orders."[331]

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[325] *Id.*

[326] *Belziuk*, 1998-II Eur. Ct. H.R. 1, at 11.

[327] *Id.* at 12.

[328] *Id.*

[329] *See Eurofood-E.C.J.*, *supra* note 1, at 5 (submission 5).

[330] *See Eurofood-Dublin*, *supra* note 1, slip. op. at 4–8 (court appointed temporary liquidator on the day that the case was filed); *In re* Daisytek-ISA Ltd., [2003] B.C.C. 562 (Ch.), 2003 WL 21353254 Ch. (May 16, 2003) (U.K.), at *2–*4 (determining that England was the location of the CoMI for fourteen European subsidiaries of Daisytek, Inc.) [hereinafter *Daisytek-Leeds*].

[331] *See generally* JAMES F. QUEENAN, JR. ET AL., CHAPTER 11 THEORY AND PRACTICE: A GUIDE TO REORGANIZATION 7:206 (1997) (referring to typical "first day" pleadings and

The E.C.J. decision in *Eurofood* recognizes that urgent orders may be required in an insolvency case. For this reason, the E.C.J. acknowledges that "the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given . . . ."[332] However, the E.C.J. states that any restriction based on the urgency of making a decision must be "surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency."[333]

In the "first day order" context, the "equality of arms" principle presumably imposes several requirements. First, before the court issues first day orders, either the parties or the court must provide maximum reasonable notice consistent with the urgencies of the case to the major unsecured creditors, any affected secured creditors, and any supervisory governmental authorities. Second, any such order issued by the court must be temporary, insofar as possible, and limited to what the debtor needs to continue in business (or the administrator needs to preserve the estate) for the first few weeks (perhaps a month) of the case. The court should then schedule further proceedings to consider additional relief for the debtor and the affected creditors, at which time all parties in interest can enjoy the full measure of their "equality of arms" rights.

Balancing considerations of fair procedure and public policy, the E.C.J. stated that the referring court (i.e., the Irish Supreme Court) may refuse to recognize insolvency proceedings opened in another E.U. country where "the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard."[334] In making its "flagrant breach" determination, the E.C.J. cautioned the Irish Supreme Court not to insist that a fair legal process requires an oral hearing,[335] and stated that the court "must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator . . . was given sufficient opportunity to be heard" in the Parma court.[336]

On the issue of fair procedure, the impact in the Eurofood cases of the E.C.J. decision is not clear. The Irish Supreme Court and the Dublin High Court were both very seriously concerned with the procedures followed by

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orders).

[332] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 66.

[333] *Id.*

[334] *Id.* ¶ 67.

[335] It is uncertain why the E.C.J. included this particular caution in its decision. The decision of the Irish Supreme court is in two parts, one part referring five questions for preliminary ruling to the E.C.J. and a second relating to the recognition of the Parma court. There is nothing in either of these decisions giving undue importance to the hearing and oral argument in Parma, as opposed to the entire procedure leading to its decision to open a main proceeding for Eurofood. *See Eurofood-Ireland*, *supra* note 1.

[336] *See Eurofood*-E.C.J., *supra* note 1, ¶ 68.

the court in Parma. It is difficult to predict whether, "having regard to the whole of the circumstances," the Irish Supreme Court will decide that the procedures in the Parma court were in flagrant breach of Mr. Farrell's right to be heard, and to deny recognition of the Italian decision to open a main case for Eurofood.

The "equality of arms" principle is particularly relevant to the procedures applied in the Eurofood cases in Italy and in Ireland. The E.C.J. does not spell out the details of the application of the "equality of arms" principle in the Eurofood cases. However, many of the consequences of the application of this principle are quite clear.

1. The Parma Hearing

In the Parma court, Mr. Farrell was denied his rights under the "equality of arms" rule in two respects. First, he was not given adequate time to file papers (presumably in Italian) in the Parma court to present what he considered the relevant facts and law for the court to consider in deciding where Eurofood's CoMI was located. Mr. Farrell received notice in Dublin at 5:15 p.m. on Friday afternoon, February 13, 2004, of the hearing scheduled for noon the following Tuesday, February 17 in Parma (following a holiday Monday). During this time, Mr. Farrell was first required to obtain authorization from the Dublin High Court to hire Italian counsel, and then he had to engage such counsel. Counsel then had to be instructed in the facts of the case and research the law. In addition, counsel had to try to find out what Dr. Bondi had filed in support of his application in the Parma court. Finally, counsel had to file appropriate papers on Mr. Farrell's behalf. This was far more than could be reasonably accomplished on a holiday weekend. The fact that the Parma court gave Mr. Farrell nearly two days to file additional papers after the hearing did not ameliorate this problem to any substantial extent.

In addition, Mr. Farrell was not given a full and fair opportunity to comment on Dr. Bondi's submissions to the court. The right to comment implies a corollary right to receive copies of an opponent's submissions. However, Mr. Farrell was not provided copies of Dr. Bondi's submissions at all, even though he requested them. In consequence, he was severely handicapped in determining what arguments to make and what evidence to present on behalf of the Eurofood bankruptcy estate in Ireland. This was a clear violation of the "equality of arms" principle.

2. The Dublin Hearing

In stark contrast to the procedure in the Parma court, the Dublin High Court provided Dr. Bondi nearly a month to hire and instruct counsel in Ireland and to file appropriate factual evidence and legal arguments. Dr. Bondi thus had a full and fair opportunity in the Dublin court to present the

facts in support of his contention that Eurofood's CoMI was located in Italy, to present his legal arguments in support thereof, and to comment on the submissions made on behalf of Mr. Farrell.

E. Broader Implications of the Application of "Equality of Arms"

The application of the "equality of arms" principle by the E.C.J. has broader implications. This discussion has thus far focused on the application of the principle of "equality of arms." The E.C.J.'s *Eurofood* decision implies that the entire panoply of fair legal process rights applies to proceedings under the E.U. Regulation in the domestic courts of each E.U. country.[337] This includes all of the other procedural rights under Article 6 of the ECHR.[338] These rights presumably include the right to a fair and public hearing, held within a reasonable time and before a fair and impartial tribunal, and the public pronouncement of judgment.[339] If any of these rights is not respected in a judgment under the E.U. Regulation opening a main insolvency proceeding, that judgment does not command automatic recognition in the courts of the other E.U. countries.

F. "Equality of Arms" in Other E.U. Countries

Italy is far from the most problematic E.U. country whose insolvency procedures raise "equality of arms" issues. For example, the procedures followed by the English courts fall shorter of the requirement of "equality of arms" than those applied in the Parma court.

For example, in the English Daisytek cases,[340] on the day that cases were filed for sixteen European subsidiaries, the High Court in Leeds held that fourteen had their CoMIs in England.[341] Most important for this discussion, there is no evidence that any creditor received any notice of the hearing or was given any opportunity to be heard, to present its own evidence, or to rebut the Daisytek management evidence.[342] It is quite

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[337] *See id.* ¶¶ 65–68.

[338] This is not a new development of E.C.J. jurisprudence. The E.C.J. itself cites four cases supporting this proposition: *see* Case C-185/95, Baustahlgewebe v. Comm'n, 1998 E.C.R. II-8417, ¶¶ 20–21; Joined Cases C-174/98 and C-189/98, Netherlands v. Comm'n, 2000 E.C.R. II-1, ¶ 17; Case C-7/98, Krombach, 2000 E.C.R. II-1935, ¶¶ 19–21.

[339] *See* ECHR, *supra* note 145, art. 6(1).

[340] *Daisytek-Leeds*, *supra* note 330.

[341] At the request of counsel for the debtors, the court deferred a decision on the location of the CoMI for the subsidiaries incorporated in Scotland and in Northern Ireland. *See Daisytek-Leeds*, *supra* note 330, at *1.

[342] The French Cour de Cassation apparently waited to make its ruling on the appeal of the French Daisytek case until the E.C.J. made its ruling in *Eurofood-E.C.J.* *See* Cass.com., June 27, 2006, Bull. civ. IV, No. 923, *available at* http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCass.jsp (enter "03-19863" for "Numéro d'affaire" and click "Rechercher" button; then follow "Cour de Cassation . . ." hyperlink). While the Cour de Cassation

appropriate, in my view, that the court may not require notice before opening the insolvency cases: indeed, under U.S. law, the opening of a voluntary insolvency case is automatic upon the filing of a petition by an authorized representative of the debtor.[343] However, the CoMI decision is enormously important, and should not be made in haste without satisfying the procedural requirements of the "equality of arms" principle.

How quickly does the CoMI decision need to be made? It certainly is a decision of substantial importance in an insolvency case, because it determines which country will provide both the substantive law and the procedures that will govern the case, as well as the forum where the issues arising in the case will be decided. Thus, the CoMI decision should not be delayed longer than is necessary to give notice to the principal creditors and parties in interest.

In my view, the Dublin court got the timing right. It scheduled the hearing on the CoMI decision on March 2, 2004, approximately a month after the initial insolvency filing on January 27.[344] This provided sufficient time for the parties in interest to exercise their "equality of arms" rights: a full briefing of the issues, presentation of their own views of the relevant facts and the applicable law, and comments on the presentations of opponents.

G. The Future of "Equality of Arms" in U.S. Law

I should not leave a discussion of the "equality of arms" principle without addressing whether it might be adopted in U.S. law, especially in the insolvency law arena.

It is quite unlikely that the concept will be adopted in U.S. law. Existing U.S. case law construes the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution to provide the same procedural rights. Thus, the United States has no need for a new concept for rights that are already fully protected.

The protection of the "equality of arms" elements in U.S. law is most

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applied the E.C.J. ruling on the public policy exception of Article 26 of the E.U. Regulation, it made no mention of the "equality of arms" ruling. Conceivably, the Cour de Cassation could have held that the *Daisytek-Leeds* decision did not meet the "equality of arms" requirements, and thus did not require recognition by the French courts. However, this issue was probably not before that court, and likely was not argued by the parties in their briefs filed before the *Eurofood-E.C.J.* decision was issued.

[343] *See* 11 U.S.C. § 301 (2005).

[344] It is also noteworthy that Mr. Farrell, the provisional administrator that the Dublin court appointed in *Eurofood-Dublin* on January 27, 2004, gave immediate notice to Dr. Bondi, the administrator of the Italian Parmalat cases, of the March 4, 2004 hearing. *See Eurofood-Ireland*, *supra* note 1, at *4. In contrast, Dr. Bondi failed to give notice of the hearing in Parma (despite instructions by the court there) until all of the working days in the intervening interval had passed. *Id.*

clear in the criminal context. The first element, the right to present one's own evidence to a trier of fact, is well established in U.S. Supreme Court jurisprudence.[345] The right to the assistance of counsel, protected by the Sixth Amendment to the U.S. Constitution, includes the second element of "equality of arms," the right to have counsel make a proper argument on the evidence and the applicable law in a defendant's favor.[346]

The third element of "equality of arms" is covered in two lines of U.S. cases. The right to comment on an opponent's arguments is implied in the right to the assistance of counsel. In addition, due process includes the right to examine witnesses presented in opposition.[347] These rights apply in civil contexts as well as criminal, including in the bankruptcy context as well.[348]

VI. ANALYSIS

I previously wrote, while the E.C.J. *Eurofood* decision was pending, that the E.U. Regulation needs both substantive and procedural improvements to provide adequately for a fair and reasonable decision making process in the determination of the CoMI of a business entity.[349] I argued that the E.U. Regulation needs substantive revisions to define better the factors to consider in the CoMI analysis, and to accommodate insolvency cases for corporate groups such as the Parmalat group.[350] I also argued that the E.U. Regulation needs a set of procedural improvements, including procedures for making the CoMI determination, a better definition of what constitutes a "judgment opening insolvency proceedings," which is entitled to automatic recognition[351] and a package of "due process" rights.[352] More generally, I argued that the E.U. Regulation

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[345] *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 408 (1988) (attempted murder conviction); Washington v. Texas, 388 U.S. 14, 19 (1967) (murder conviction).

[346] *See, e.g.*, Herring v. New York, 422 U.S. 853, 859–60 (1975) (attempted robbery conviction).

[347] *See, e.g.*, *In re* Oliver, 333 U.S. 257, 273 (1948) (reversing a conviction by a single judge sitting as a grand jury, who issued a summary conviction for contempt of court immediately after receiving testimony from the defendant).

[348] *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989) ("[C]ivil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("[Due process] requires notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); Am. Sur. Co. v. Baldwin, 287 U.S. 156, 168 (1932) ("Due process requires that there be an opportunity to present every available defense"); Am. Broad. Co. v. F.C.C., 179 F.2d 437, 442 (D.C. Cir. 1949) ("[T]he guarantee of a hearing implied in the due process clause of the Fifth Amendment applies as well to a hearing on issues of fact as to hearings on issues of law.").

[349] *See* Bufford, *supra* note 292, at 464–84.

[350] *See id.* at 464–71.

[351] *See* E.U. Regulation, *supra* note 3, art. 16(1).

[352] *See* Bufford, *supra* note 292, at 471–84.

needs procedural rules for its application.[353]

Part V has discussed the E.C.J.'s resolution of some of the procedural issues under the concept of "equality of arms." I now consider the extent to which the E.C.J. *Eurofood* decision has resolved the remaining issues.

A. Substantive Issues

In *Eurofood-E.C.J.*, the E.C.J. addressed both of the substantive issues that I raised, the application of the CoMI analysis and the treatment of corporate groups. In addition, the E.C.J. made a firm ruling on the applicability of the public policy provision and the circumstances where it may be appropriate to apply this provision in the context of determining the location of a debtor's CoMI. In Part IV, *supra,* I examined the E.C.J.'s clarification of the proper focus of the CoMI analysis.[354]

I turn now to the other substantive issues raised in the E.C.J.'s *Eurofood* decision. These issues include the scope of the public policy provision in the E.U. Regulation, and whether it may be invoked in a case like the *Eurofood* cases, and the treatment of corporate groups. I also discuss the application of the E.U. Regulation to a debtor in possession, authorized by the laws of an E.U. country, in an insolvency proceeding opened in such a country.

1. Public Policy Provision

The E.U. Regulation provides that a court may deny recognition of a foreign main bankruptcy proceeding on public policy grounds.[355] As the Irish Supreme Court has shown in *Eurofood-Ireland*, it could possibly be proper to invoke the public policy provision where a court in another country has followed unfair procedures in declaring a proceeding to be a main proceeding.[356] The Irish Supreme Court found that major due process violations by the Parma court in deciding that its Eurofood proceeding was the main proceeding required the denial of recognition of the Italian decision on public policy grounds.[357]

The E.C.J. held in *Eurofood-E.C.J.* that recourse to the public policy exception in Article 26 is reserved for exceptional cases.[358] In making this ruling, the E.C.J. brought the E.U. Regulation under the umbrella of its

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[353] *See id.*

[354] *See supra* text accompanying notes 212–29.

[355] *See* E.U. Reg art. 26; UNCITRAL Model Law, *supra* note 10, art. 6.

[356] *See Eurofood-Ireland*, *supra* note 1, at 17–19; *Eurofood-Dublin*, *supra* note 1, slip op. at 30–32.

[357] *See supra*, text at notes 175–82.

[358] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 62 (citing Case C-7/98, Krombach, [2000] E.C.R. I-1935, ¶¶ 19, 21).

jurisprudence (case law) on the enforcement of judgments under the Brussels Convention on the Enforcement of Judgments, in which it had held that this exception may be invoked:

> [O]nly where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as fundamental within that legal order.[359]

The E.C.J. held that case law equally applies to the interpretation of Article 26 of the E.U. Regulation.[360]

The E.C.J. clearly set a high bar to invoking the public policy exception: the infringement must be "at variance to any unacceptable degree" with the legal order, and must constitute a "manifest breach" of a fundamental rule of law.[361] Thus, as a general principle, the public policy exception to the mandatory recognition of the opening of an insolvency proceeding in another E.U. country or the enforcement of any judgment in such a proceeding may be invoked only in extraordinary situations where the infringement "constitute[s] a manifest breach of a rule of law considered fundamental within that legal order."[362] While the E.C.J. did not decide whether the Irish Supreme Court could properly invoke the public policy provision to deny recognition of the opening of the Italian main insolvency proceeding for Eurofood (because this conclusion was beyond the scope of the questions submitted), the clear implication is that the E.C.J. would not consider this a proper case to invoke public policy.

This narrow construction of the public policy provision in Article 26 is consistent with the view that a judicial decision should not rest solely on public policy grounds when it can be based on other grounds. Because the E.C.J. found that the procedural issues could be resolved based on the "equality of arms" principle, it found that it was not necessary to invoke the public policy provision in the *Eurofood* case.

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[359] *Id.* ¶ 63 (citing *Krombach*, ¶¶ 23, 37).

[360] *Id.* ¶ 64.

[361] *Id.* ¶ 63.

[362] The French Cour de Cassation applied this reasoning in its decision on the appeal of the *Daisytek* case from the Versailles Court of Appeal. Cass. com., June. 27, 2006, Bull. civ. IV, No. 923, 5 (2006), *available at* http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCass.jsp (holding that the failure to hear representatives of the workers does not constitute such a manifest violation of fundamental rights that a French court may deny recognition of an order from a court of another E.U. member country on the grounds of public policy under Article 26 of the E.U. Insolvency Regulation).

This approach to the public policy provision makes good sense.[363] Public policy is an amorphous and rather undefined basis for a judicial decision, and the results of invoking public policy are especially unpredictable. In contrast, the "equality of arms" principle invokes specific legal standards that can be applied with reasonably predictable results.

2. Corporate Groups

Perhaps the most unsatisfying feature of the E.C.J.'s *Eurofood* decision is its failure to deal in any fashion with the international venue problem of the reorganization of corporate groups such as the Parmalat group. The E.C.J. stated that "each debtor constituting a distinct legal entity is subject to its own court jurisdiction."[364] In consequence, the CoMI of each legal entity must be determined separately from the CoMI of any related entity in the corporate group. This separate determination determines the proper national venue for the main proceeding for that particular entity under the E.U. Regulation.

Virtually all multinational corporate empires are corporate groups, not single corporations. Indeed, there are often hundreds of legally separate entities,[365] and they may be doing business in scores of countries.[366] Some of them operate independent businesses. Others are integral parts of a larger business operation. Still others fall in between.[367]

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[363] United States law is similar on the subject of avoiding constitutional adjudication if a case can be resolved on other grounds. *See, e.g.*, I.N.S. v. St. Cyr, 533 U.S. 289, 299–300 (2001), where the U.S. Supreme Court stated: "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." *Id.* at 299–300. (quotations and citation omitted).

[364] *Eurofood-E.C.J.*, *supra* note 1, ¶ 30.

[365] The Mercedes Benz-Chrysler corporate empire, for example, includes nearly a thousand separate legal entities. *See* DAIMLERCHRYSLER AG, STATEMENTS OF INVESTMENTS IN AFFILIATED, ASSOCIATED AND RELATED COMPANIES (2001), http://www.daimlerchrysler.com/Projects/c2c/channel/documents/829786_313e_kurz.pdf. When BCCI Holdings collapsed in 1991, it was doing business in sixty-nine countries. See Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 939 (11th Cir. 1997) (dismissing claims by foreign government against foreign entities on forum non conveniens grounds).

[366] Parmalat involved some 260 affiliated entities doing business in thirty countries. *See* Claudio Celani, *The Story Behind Parmalat's Bankruptcy*, 31 Executive Intelligence Rev., Jan. 16, 2004, *available at* http://www.larouchepub.com/other/2004/3102parmalat_invest.html (last visited Jan. 27, 2007) (Parmalat had a networking 260 offshore entities); *Eurofood-Ireland, supra* note 1, at 3 (Parmalat operated in more than thirty countries worldwide).

[367] For a similar proposal, although somewhat different in its details, see Robert van Galen, *The European Insolvency Regulation and Groups of Companies* (2004), INSOL EUR. ANN. CONGRESS, (2003), http://www.iiiglobal.org/country/european_union/articles.htm.#

A corporate group can normally deal with the financial difficulties of a particular member of the group (unless it is the principal operating entity) in the ordinary course of business. Thus, it is unusual for a single member of a corporate group to file an insolvency proceeding. However, if the entire group encounters financial difficulty, as happened with the Parmalat group, a group-wide solution to the financial problems is often required. In consequence, many of the group members will typically have to file insolvency proceedings.

The E.U. Regulation does not address the problem of corporate groups. It assumes that each legal entity should be evaluated separately to determine the location of its CoMI, which is the proper venue for its main insolvency proceeding.[368] More specifically, the E.U. 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.[369] The E.U. Regulation makes no provision for any degree of cooperation between proceedings for related entities,[370] and it makes no provision for substantive consolidation.[371]

This approach is unsatisfactory because a corporate group that is an integrated economic unit can only be reorganized or liquidated efficiently if the reorganization is done collectively for the entire group.[372] If the legal regime for the insolvency cases of corporate groups were to permit the filing of insolvency proceedings in the same venue for all of the group

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articles.

[368] *See, e.g., id.* (proposing revisions to the E.U. Regulation to provide for joint bankruptcy proceedings for corporate groups); E.C.J. A.G. Opinion, *supra* note 21; *Eurofood-E.C.J.*, *supra* note 1, ¶ 117 ("[E]ach subsidiary in a group must be considered individually."); Wessels, *Insolvency Proceedings*, *supra* note 19, at 18–20 (stating that the E.U. Regulation "offers no rule for groups of affiliated companies"); *see also* Virgós & Schmit, *supra* note 21, ¶ 76.

[369] 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* E.U. Regulation, *supra* note 3, art. 29, pmbl. 19.

[370] *See, e.g.*, MOSS ET AL., *supra* note 12, ¶ 8.56.

[371] *See id.*

[372] 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.*, Press Release, Senator Schumer, Parmalat Decision to Not Sell U.S. Assets Both Preserves Competition for Farmers and Helps Prevent Milk Price Hikes, http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2004/PR02637.Parm051804.html (announcing restructuring of Parmalat United States operations); Press Release, Felsberg e Associados, Parmalat Files the First Request for Judicial Restructuring, http://www.felsberg.com.br/pdf/Alert_Reestructuring_9_24-06-05.pdf (last visited Jan. 11, 2007) (describing separate reorganization of Parmalat's Brazilian subsidiary in Sao Paulo, Brazil).

members, it would be much easier to work out a common solution to the financial problems of the group. If the proceedings are all filed in one court, there will be one judge to administer the cases and one set of lawyers and other professionals. In addition, the insolvency proceedings would all be governed by one legal regime (except where conflict of laws rules lead to the application of another country's law) and one set of legal procedures.

In contrast, if proceedings are dispersed in a number of countries, as happened in Parmalat, a group-wide solution to the financial problems is much more difficult to negotiate. In addition, there are a variety of judges and a variety of groups of lawyers and other professionals. Most important, there are also different applicable legal regimes and different sets of legal procedures.

Uniformly among the nations, corporate law generally does not recognize corporate groups as an independent source of corporate rights and responsibilities. This view finds its roots in the very nature of a corporation itself. The idea of a corporation is that the risks of the corporate stakeholders, including the management, the creditors, and the shareholders, are limited to the activities of the corporation itself. A parent corporation is simply another shareholder that exercises shareholder rights under the applicable corporate law. For the parent, the block of shares that it owns in a subsidiary is simply another corporate asset that it may buy or sell, and that confer shareholder rights (such as voting on directors and receiving dividends) on the parent corporation. Business losses of a subsidiary are isolated there, and are not shared with the corporate shareholder.

Business successes of the parent are not shared with the subsidiary, and are not available to cover losses suffered by the subsidiary and its creditors. Equally, business successes of the subsidiary are not available to creditors of the parent, except to the extent that the subsidiary pays a dividend to its shareholders. The failure to observe these norms may result in the loss of the corporate shield provided under national company law. This is solid ground, perhaps even solid rock, for business corporation law.

This solid rock of business corporation law is reflected in both the E.U. Regulation and in the UNCITRAL Model Law. Both require that each corporate entity be treated separately for all insolvency purposes, including venue for insolvency proceedings.[373]

The decisions of the Irish and the Italian courts on the location of Eurofood's CoMI clearly derived from their disagreement as to the role and importance of the corporate group in the CoMI decision. The Italian courts found the location of decision making power in the corporate group to be decisive. In their view, the location of the command and control structure

[373] UNCITRAL Model Law, *supra* note 10, art. 29.

for the Eurofood subsidiary was the dominant consideration on the CoMI determination. In the view of the Irish courts, in contrast, the views and expectations of the creditors of the particular corporate entity are more important than the location of the effective decision makers for the corporate group.

While this outcome in the E.C.J. *Eurofood* decision is unsatisfying, the E.C.J. cannot be faulted for making this decision. The UNCITRAL Model Law on Cross-Border Insolvency similarly treats each corporate entity separately for the determination of the CoMI. The problem lies in the drafting of the E.U. Regulation. A similar problem inheres in the UNCITRAL Model Law on Cross-Border Insolvency. A legislative solution is required for the problem: we should not expect the courts, even the E.C.J., to fix the legislative problem.

For the European Union, an amendment to the E.U. Regulation would be required. UNCITRAL has formed a working group to address this issue for the Model Law, and a proposal is expected in due course.[374] Given the UNCITRAL initiative, the European Union may well await the results of the UNCITRAL deliberations, and then adopt a similar (if not identical) solution to this problem. Like the CoMI concept itself, the corporate group solution to the problem of varying CoMIs should be uniform in both the Model Law and the E.U. Regulation.

3. Debtor in Possession

The E.U. draft convention on cross-border insolvency, which was converted into the E.U. Regulation, was written before the debtor in possession trend had developed in Europe. Thus, the E.U. Regulation provides that the opening of a case does not qualify for recognition under the E.U. Regulation unless the applicable law provides for "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator."[375] To avoid any question as to which national laws qualify under this definition, the E.U. Regulation lists the qualifying national laws in its Annex A.

The rejection of the model of reorganization with a debtor in possession was reinforced in the E.C.J. *Eurofood* decision. In determining that the Dublin decision appointing Mr. Farrell as a provisional liquidator on January 27, 2004 was entitled to recognition under Article 16, the E.C.J. specifically found that this constituted a displacement of management, and thus qualified under the Article 1(1) definition of "collective insolvency

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[374] *See* Press Release, UNCITRAL, U.N. Commission on International Trade Law Concludes 39th Session in New York, U.N. Doc. UNIS/L/102 (Jul. 7, 2006), *available at* http://www.unis.unvienna.org/unis/pressrels/2006/unisl102.html.

[375] *See* E.U. Regulation, *supra* note 3, art. 1(1).

proceedings." [376]

The reorganization of a firm under the aegis of insolvency law was pioneered by the United States.[377] According to that policy, the reorganization of a business often is best carried out by the old management, if it is not incompetent or corrupt.[378] In contrast, in the U.S. experience, an administrator who comes from outside rarely knows enough about the firm to lead a successful reorganization. This policy was born in the Great Depression, when businesses failed principally because of the general economic conditions, and not because of any fault in the management of the particular firm. This policy was extended to all reorganization provisions under the bankruptcy law in 1979.[379]

In recent years, a trend has developed for other countries to adopt the debtor in possession model for business reorganizations. For example, Canada's Bankruptcy and Insolvency Act, which went into force in 1994, provides for the debtor to remain in possession in a reorganization case.[380] More recently, Japan has adopted the debtor in possession system for the reorganization of small firms under its Civil Rehabilitation Act. [381]

Before 2006, there was no E.U. insolvency law that provided for the reorganization of a business with a debtor in possession. This has now changed. The new French insolvency law now provides a procedure for the reorganization of a business where the old management remains in place.[382]

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[376] *See id.*

[377] *See* Act of June 7, 1934, Pub. L. No. 296, § 77B, 48 Stat. 911, 912 (1934) (amending Bankruptcy Act of 1898 to provide for corporate reorganizations).

[378] *See id.*

[379] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C.A. §§101-1531 (2006) and in scattered other titles of the U.S. Code.).

[380] *See* Bankruptcy and Insolvency Act, R.S.C., ch. B-3 (1985), R.S.C., ch. 27, sec. 2 (1992). In addition, Canada's Companies' Creditors Arrangement Act, R.S.C., ch. C 36 (1985), a statute dating from the 1930s and is more popular for the reorganization of large businesses, has authorized debtor management to remain in control of the business during reorganization.

[381] *See* Civil Rehabilitation Act [CRA], Law No. 255 of 1999, ch. XIII, sec. 1, (amended by Laws 2004), *translated in* 2 EHS LAW BULL. SER. No. 80, 129 (2001), Laws No. 45, 98, and 100 of 2002, and Law No. 76 of 2004 [CRA].2335, LS 89 (2004) (Japan). For the overview of the CRA, *see* Masafumi Kodama, *The New Japanese Reorganization Procedures*, AM. BANKR. INST. J., Oct. 2001, at 18; Kent Anderson, *Small Business Reorganizations: An Examination of Japan's Civil Rehabilitation Act Considering U.S. Policy Implications and Foreign Creditors' Practical Interests*, 75 AM. BANKR. L.J. 355 (2001). For a comparison of the Civil Rehabilitation Act Law (and U.S. law) with the Corporate Reorganization Act, Corporate Reorganization Act, Law No. 154 of 2002, amending Law No. 172 of 1952, amended by Law No. 76 of 2004 (RA) (Japan), see Hon. Samuel L. Bufford & Kazuhiro Yanagida, *Japan's Revised Laws on Business Reorganization: An Analysis*, 39 CORNELL INT'L L.J. 1 (2006).

[382] *See* C. COM. art. L 621-4, *available at* http://195.83.177.9/code/liste.phtml?

B. Procedural Issues

Many of the venue problems that have arisen in the administration of international insolvency proceedings in recent years have resulted from inadequate procedural rules. In Part V, *supra*, I examined in detail the E.C.J.'s use of the principle of "equality of arms" to deal with the due process type of procedural issues referred to it by the Irish Supreme Court.[383] This principle permitted the E.C.J. to address these procedural issues without invoking the public policy provision of Article 26 of the E.U. Regulation.[384] We turn now to those procedural issues that fall outside the scope of "equality of arms."

Procedural issues are crucial to the determination of a debtor's CoMI, and in consequence the proper national venue for the main proceeding for an international company. 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;[385] for most issues in the main proceeding, the governing law is the law of the country where the main proceeding is opened.[386] The choice of forum governs such rights as the scope of the automatic stay or moratorium and the opportunities for relief therefrom, the availability of interim relief pending the opening of an insolvency proceeding, the rights of workers in the proceeding, the priority of claims, and the right to reorganize and the procedures attendant thereto, including 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 E.U. Regulation is notably lacking in procedural rules. The strategy of the E.U. Regulation is to rely on domestic procedural rules to govern E.U. Regulation procedures. Because each of the E.U. member countries has a domestic bankruptcy law, this strategy is largely well founded. However, the E.U. Regulation contains distinctive substantive and procedural provisions that are not reflected in domestic bankruptcy procedures, and which need supplementary procedural rules.

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lang=uk&c=32&r=3155 (providing that no administrator need be appointed in a case where the number of employees is below a threshold set by regulation. That threshold is twenty employees and annual revenues of €3 million. *See* Decree No. 2005-1677 of Dec. 28, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 29, 2005, p. 20324, art. 53, *available at* http://www.legifrance.gouv.fr/WAspad/Visu?cid=749460&indice=1&table=JORF&ligneDeb=1).

[383] *See supra* text accompanying notes 286–343.

[384] *See supra* text accompanying notes 330–37.

[385] *See supra* text accompanying notes 24–37.

[386] *See* E.U. Regulation, *supra* note 3, art. 4 (stating that the law of the forum state governs an international insolvency proceeding governed by the E.U. Regulation, except to the extent that the E.U. Regulation provides otherwise).

Because the procedural rules would specifically apply to rights under the E.U. Regulation, the procedural rules should be adopted at the E.U. level. Presumably, the European Union has the power to issue a supplementary procedural regulation to establish procedures for the application of the E.U. Regulation in the national courts of the member countries. The E.C.J. has filled in this gap to a certain extent with the application of the "equality of arms" principle in its *Eurofood-E.C.J.* decision. However, the other procedural issues raised in this Article remain to be addressed.

The application of the E.U. Regulation to date shows that it needs three important additional 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 delinked from the decision to open an insolvency proceeding and other "first day" orders. The procedures need to provide a fair venue hearing, on notice to all creditors and other interested parties, and an opportunity to be heard, as required by the "equality of arms" principle applied by the E.C.J. in its *Eurofood* decision.

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 or judgment opening an insolvency proceeding.

The third set of procedural reforms needed fall generally under the category of "due process." Procedural rights needed to implement the "equality of arms" principle include: (a) advance notice of important hearings in a proceeding (including the decision on the CoMI), (b) requiring the provision of 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 E.C.J., 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.

In contrast, under Chapter 15, the U.S. domestication of the UNCITRAL Model Law,[387] 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 Rules of Bankruptcy Procedure do not presently include rules for the

[387] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2006).

application of the provisions in Chapter 15, these rules are in the drafting process.[388] In addition, many federal judicial districts have adopted substantial local procedural rules for their bankruptcy courts that supplement the federal rules.[389] The procedural insufficiencies of the E.U. 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

The inadequacy of E.U. procedural rules for applying the E.U. Regulation is particularly important in the decisions on the location of the CoMI in the Eurofood 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. The timing of the decisions in Italy and Ireland to determine where Eurofood's CoMI was located is examined in connection with the above discussion on the principle of "equality of arms."[390]

a. Procedures in Other Countries for Deciding CoMI

The impact of the E.C.J.'s remarks on "fair procedures" is likely to be enormous. The procedures followed by the Italian courts in the Italian Eurofood case fall seriously short of the E.C.J. requirements. However, procedures in other countries, such as the United Kingdom (England) and France in past decisions determining the CoMI for debtors, are much more unsatisfactory than those followed by the Italian courts in the Eurofood case.

For example, it is apparently the practice of the English courts to decide whether to open a main insolvency case as a first day order, which is issued with no notice to creditors whatsoever.[391] 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.[392] For the French and German affiliates, apparently no notice was provided to their

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[388] It takes approximately three years for the promulgation of revisions to the Federal Rules of Bankruptcy Procedure. Thus, it will be several years before the new rules governing Chapter 15 practice to come into force.

[389] *See, e.g.*, Local Bankruptcy Rules, Central District of California, Bankr. C.D. Cal. R. 1001-1 to 9075-1 (2005). The Central District of California is in the process of adopting a local rule governing proceedings under Chapter 15 of the U.S. bankruptcy code, 11 U.S.C. §§ 101-1531 (2006).

[390] *See supra* text accompanying notes 306–12.

[391] *See, e.g.*, *Daisytek-Leeds*, *supra* note 330.

[392] *See supra* text accompanying notes 335–47.

French or German creditors or employees. French law required that notice be given to Daisytek-France's 145 French employees,[393] who had substantial rights under French law, including the right to be heard before the opening of an insolvency proceeding[394] and the right to a representative in the insolvency process.[395] 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 as to the location of the CoMIs of the relevant subsidiaries 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.[396] However, both the workers and the public prosecutor were given notice and appeared.[397] There appears to be no reason why the English administrators could not have been given notice: if they had known of the hearing, they likely would have appeared. The English administrators appeared afterwards on a motion to intervene,[398] which the Pontoise court denied.[399]

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.[400] The notice should also go to those administrators and committees of creditors (if there are any) that have already been appointed

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[393] *See* C. COM. art. L 621-4, *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=32&r=3155.

[394] *See id.*

[395] *See id.* art. L 621-8.

[396] *See Klempka v. SAS ISA-Daisytek*, Judgment of May 26, 2003, 8th Ch., Trib. de comm. Pointoise (*Daisytek-Pontoise*), *rev'd on other grounds*, Klempka v. ISA Daisytek SAS, 2003 WL 22936778, [2004] I.L. Pr. 6 (C d'A 2003) (Fr.) (*Daisytek-Versailles*), *aff'd*, Cass. com., June. 27, 2006, Bull. civ. IV, No. 03-19863, *available at* http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCass.jsp.

[397] *See id.*

[398] A decision on opening an insolvency case is best made at the earliest possible time, which may limit the notice given and the opportunity to appear. In its *Eurofood-E.C.J.* decision, the E.C.J. recognizes the need for making some decisions in insolvency cases on little or no notice. *See Eurofood-E.C.J.*, *supra* note 1, ¶ 66. In such circumstances, the E.C.J. stated, procedural guarantees are required to assure that "persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency." *Id.*

[399] *See Daisytek-Versailles*, *supra* note 396, at *3.

[400] *But see* MOSS ET AL., *supra* note 12, ¶ 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.

in proceedings in other countries (whether inside or outside the European Union) 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.

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,[401] evidence of the location of its registered office should be sufficient unless a party in interest contests the application of the presumption. 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 problem lies in giving the parties enough time to collect and present the relevant evidence before making a decision on the CoMI.[402]

Italian courts are far from the worst offenders in limiting the opportunity of the parties in interest to be heard effectively before a court makes a decision on the location of a debtor's CoMI for the purposes of opening a main insolvency proceeding. It is true that Mr. Farrell did not have much opportunity to hire counsel to appear at the hearing, had little opportunity to see the documents that Dr. Bondi filed in the Parma court, and had limited opportunity to present his own evidence on the subject. Nonetheless, in all of these respects, his procedural rights exceeded those routinely provided in English courts when they make decisions on the location of a debtor's CoMI.

The nature and quality of the evidence supporting a decision to open a main proceeding is very important. It appears that, in the Eurofood 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,[403] 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 Mr. Farrell as provisional liquidator on a lengthy affidavit

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[401] *See supra* notes 215–29 and accompanying text.
[402] *See supra* notes 306–12 and accompanying text.
[403] *Eurofood-Dublin*, *supra* note 1, slip. op. at 6.

presented by Wayne Porritt, the managing director of Bank of America NA.[404] 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.[405] 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 does not disclose the evidence submitted 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.[406] 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.[407]

The evidence submitted by Dr. Bondi to the Parma court, on which the court based its decision to open a main proceeding for Eurofood, was apparently extensive: the papers included nineteen exhibits. The procedural transgression of Dr. Bondi was that he never provided copies of the papers to the Irish liquidator (either before or after the hearing in Parma).[408] After the hearing, the court gave the English administrators only thirty hours, which was clearly insufficient, to file any supplemental evidence or arguments.[409]

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

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[404] *See id.* at 6.

[405] *See id.* at 7.

[406] *See Daisytek-Leeds*, *supra* note 330, at *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 10 (2005), http://www.freshfields.com/publications/pdfs/2005/13114.pdf.

[407] Indeed, in the court's eighteen paragraph decision on the fourteen applications, only paragraph 17 addresses the facts concerning Daisytek-France's CoMI. *See Daisytek-Leeds*, supra note 330, at *4.

[408] *See Eurofood-Ireland*, *supra* note 1, at 15–16.

[409] *See id.* at 16.

for Daisytek-France, and that the company was in a state of cessation of payments.[410] 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.[411] The Daisytek-France financial director also presented evidence on the tenuous state of the finances of the business.[412] Finally, the public prosecutor opined that the financial situation of the company was extremely tenuous and that it was close to liquidation.[413]

However, apparently no notice of the hearing was given to the administrators appointed by the Leeds court, and they did not appear. The Leeds administrators first appeared in the Pontoise case the next month, when they filed third-party proceedings to join the French proceeding. The Pontoise 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.[414] The legal brief relied on the simple assertion that the bankruptcy proceedings were being filed because of "overindebtedness."[415]

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 whatsoever (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 standard adopted by the E.C.J. would require that the Pontoise court defer a decision, if possible, on whether its case is a main proceeding or a secondary proceeding until notice and an opportunity to be heard is given. Under the "equality of arms" principle, every party in interest has the right to present that party's own evidence and legal arguments, and to

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[410] *See Daisytek-Pontoise*, *supra* note 396, slip op. at 2.

[411] *See id.*

[412] *See id.*

[413] *See id.*

[414] *See* Mar. 3, 2004, AG Düsseldorf, 501 IN 126/03, slip op. at 1 (F.R.G.).

[415] *See id.* Overindebtedness, which arises when a debtor's liabilities exceed its assets, is one of the grounds for opening an insolvency proceeding under German law. *See* § 19 InsO [Insolvency Code], Oct. 5, 1994, BGBl.I at 2866, *available at* http://bundesrecht.juris.de/inso/index.html.

comment on the evidence and legal arguments submitted by the other parties in interest.[416]

If the decision on whether a new case is a main proceeding cannot be delayed, the court opening the case (or receiving the filing, if opening is automatic without a court order under local procedure) should be required to make findings that justify the need to proceed without providing the "equality of arms" rights to all parties in interest. In such a case, the parties in interest must be given the opportunity in due course to challenge such a decision adopted in urgency.[417]

In contrast, it appears that the failure to give notice to the English administrators in the Düsseldorf County Court resulted from the failure of the Düsseldorf business manager to inform the court of the Leeds proceeding. Procedural regulations are unlikely to prevent a party in interest from misleading the court, where that party fails to provide needed information in the party's possession.

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

I have discussed the procedures in the English and French courts because of the prominent cases where the procedural problems have become known. It is likely that, to comply with the "equality of arms" rulings in the *Eurofood-E.C.J.* decision and with the recommendations here, many E.U. countries will be required to revise their procedures for the opening of insolvency cases, and especially for determining whether the case is a main proceeding for the debtor.

VII. CONCLUSION

This Article has examined the decision of the E.C.J., issued on May 2, 2006, in the case involving Eurofood IFSC Ltd., an Irish subsidiary of Parmalat SpA which, together with a number of its affiliates, is in an extraordinary administration proceeding in Italy. Both Irish and Italian courts had ruled that Eurofood's CoMI was located in their own country. The E.C.J. decision responded to five Irish Supreme Court questions and referred to the E.C.J. as to the proper country to conduct the main insolvency proceeding for Eurofood, after Irish and Italian courts had each ruled that Eurofood's CoMI was located in their own country.

The E.C.J. decision resolves three major issues under the E.U. Regulation on Insolvency Proceedings. First, it sided with the Irish courts

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[416] *See supra* text accompanying notes 306–12.

[417] *See Eurofood-E.C.J.*, *supra* note 1, ¶ 66.

instead of the Italian courts in deciding that the CoMI must be decided from the viewpoint of third parties (chiefly creditors), and not on the basis of the country where the effective executive decisions are made. The presumption of the E.U. Regulation that a corporation's CoMI is located in the country of its registered office can be rebutted, the E.C.J. ruled, "only if factors which are both objective and ascertainable by third parties" show that the CoMI is located elsewhere, as in the case of a "letterbox" company.[418]

The E.C.J. decision also resolved two important procedural issues. In a major doctrinal change, the E.C.J. imported into insolvency procedure the E.U. (and Council of Europe) principle of "equality of arms," a subset of procedural fairness law requiring that each party in interest be given a full and fair opportunity to present the evidence and legal arguments in support of that party's position and to comment on an opponent's evidence and arguments. The Irish Supreme Court is certain to find, if it reaches this issue, that these requirements were not met in the Parma court's ruling, which decided that Eurofood's CoMI was located in Italy.

The Irish Supreme Court may not reach this issue, however, because of the E.C.J.'s second important procedural decision. The E.C.J. held that the Dublin court's appointment of a provisional liquidator on the date of the Irish insolvency filing, which predated the Italian proceedings by nearly two weeks, constituted a "judgment opening insolvency proceedings" that was entitled to automatic recognition under the E.U. Regulation. The unanswered question remains whether the Dublin court's later decision that the previously opened proceedings qualified as main proceedings, and thus preempted the Parma court from opening a main proceeding for Eurofood in the interim.

Several other questions remain unanswered after the E.C.J. decision. The most important remaining substantive issue is the treatment of related entities in a corporate group with systemic insolvency problems (which occurred in the Parmalat case). UNCITRAL is commencing a further study on this issue. Procedural issues remain that arguably fall outside the scope of "equality of arms," including procedures governing the timing for making a CoMI determination, the nature and format of evidence to be presented on this issue, and the fleshing out of procedural rights of the parties in interest in connection with such a decision.

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[418] *Id.* ¶¶ 34–35.