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Answering the Call of the European Court of Justice in Eurofoods

a Proposed Package of Due Process Rights with a View Toward the 2012 Revision of the European Insolvency Regulation

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ABSTRACT

This paper anticipates the 2012 revision of the European Insolvency Regulation, which is the sole Union legislation on the subject of cross border insolvency proceedings.

The paper first describes the historical background of the Regulation. The salient point of the historical discussion is that the Regulation is the product of forty years of negotiation and arises from a historical context that is no longer applicable to current economic realities, i.e. it provides for liquidation, not reorganization, it doesn't deal with cross border groups of companies, and it lacks an effective mechanism for transparency and creditor participation.

The paper then reviews the unique hybrid jurisdictional system of concurrent universal and territorial proceedings that the Regulation imposes. It looks at this scheme from a practical viewpoint, i.e. what issues arise with concurrent proceedings in two states, involving the same assets, the same creditors, and the same company.

The paper then focuses on a significant issue raised by the European Court of Justice in the Eurofoods case, i.e. the need to comply with fundamental due process principles that, while not articulated in the Regulation, lie at the core of Union law. Specifically, the paper considers the ramifications of the Court's holding that "a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard."

In response to the Court's direction, this paper proposes a package of due process rights, consisting principally of an accessible, efficient and useful insolvency database, the infrastructure of which already exists, but the content and use of which has not yet been developed. As part of a cohesive three part due process package, the paper also proposes the formation of cross border creditors' committees and the establishment of a European Insolvency Administrator.

Finally, on the institutional level, this paper proposes that the revision of the Regulation and the development of the insolvency database not only need to be coordinated, but need to be conceptualized, managed and undertaken, not as the separate efforts of diverse institutions, but as a single, unified endeavor.

ABOUT THE AUTHOR

Alan Stomel has been an attorney specializing in insolvency for twenty--five years. He began his career as an intern at the U.S. Department of Justice, Office of the United States Trustee and has worked at major international law firms before starting his own firm in 1999. He has participated in the reorganization of more than fifty companies under Chapter 11 of the U.S. Bankruptcy Code and has participated in the liquidation of hundreds more. He is quoted in the U.S. Congressional Record as an expert in the bankruptcy of firearms manufacturers and appears prominently in the book Lawyers, Guns and Money, an expose' of the cheap handgun industry in the United States. He received his J.D. degree from Loyola Law School in 1986 and his LL.M. (magna cum laude) in European and International Law from Vrije Universiteit Brusssel in 2011. Currently, he is a Legal Advisor at the European Commission, Justice Directorate

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Introduction

In the midst of the greatest financial crisis the world has seen since the Great Depression, at a time when bank bailouts, country bailouts, austerity measures, and stress tests are part of European daily news, the entire field of cross-border European business insolvency is regulated by a single twenty-two page document, conceived at a time before cross border subsidiaries and branches were the common method of conducting business, before anybody had heard of a debtor in possession, and when liquidation was the only type of insolvency proceeding, just as it had been since the first bench was broken in the plaza de San Marco almost five hundred years ago.

This is not to say that a single document cannot establish principles that inspire a coherent and functioning legal regime. The European Insolvency Regulation (hereinafter, the "Regulation") however, does not do that. It is a starting point, a first step, revolutionary in its scheme of modified universal jurisdiction, an experiment in supranational insolvency regulation that had never been attempted. Whether that was a result of political compromise or an intentional approach is a matter of debate as seen later in this paper. But the legislative history and the contemporaneous documents from the EU institutions demonstrate that it was always meant to be an experiment, not a permanent solution.[1]

The ten year period since the Regulation came into effect has provided the opportunity to see it in action, to allow professionals the opportunity to test it out, for companies to utilize it, for courts to rule, and for academics to study it in all of its aspects. But it is now time for the next step. The deadline to report the results of the experiment, coming at a time of great financial crises, is timely. The purpose of this paper is to move the process forward, to present concrete proposals, to move toward the implementation that the current financial milieu demands.

This paper is not a critical analysis of the Regulation. The Regulation has already been the subject of extensive and comprehensive critical analysis, the overwhelming focus of which is the "center of main interest" standard, corporate groups, and harmonization. These matters have been discussed extensively in literally thousands of articles, including books and articles by leading world experts on international insolvency. Nor is this a comparative law or conflict of laws study or a statistical analysis of insolvency proceedings, all of which has been done repeatedly. Although these matters will be touched on as background and context, this paper is much narrower in scope and from a different vantage point. This is a view from the inside, based on extensive meetings and communications with almost everyone at the European Union institutions involved in the insolvency area. It is also a product of a

[1] Article 46 of the Regulation provides: "No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation."

specific time and place, the period immediately prior to the revision of the Regulation in Brussels.

The first half of this paper will establish a foundation and will attempt to present in an orderly fashion the history, the essential provisions of the Regulation and how they function, the major issues and pending debates. Although these areas are well known to those who operate in the insolvency area, their presentation is essential, because the solutions tend to suggest themselves. The paper will discuss the revolutionary hybrid jurisdictional approach of the Regulation and how this approach was premised on certain procedural prerequisites which were merely mentioned in passing in the Regulation, but never made explicit. Ultimately, however, and as evidenced in practice, there is a disconnect in the Regulation between law and procedure. The problematic result becomes evident in the discussion and in the case law.

In the second half, the goal of this paper is to refocus the discourse, to redirect it to where it should be, on fundamental rights, on the right to fair trial and the right to notice and opportunity to be heard, to further identify the lack of those rights in the application of the Regulation, and then to suggest a minimal procedural solution consistent with the goals and values which are fundamental to EU law. This thesis will propose nothing revolutionary or inconsistent with what is in the Regulation or the rulings of the European Court of Justice regarding the Regulation. Instead, it will simply offer a more explicit statement of the procedural mechanisms that the experience of the last ten years has shown need to be explicit. In other words, it will show that without immediate and complete notice and access to information on a cross border basis, through a transparent and user friendly insolvency database, and through a system to administer and monitor and ensure the flow of information to all parties, the Regulation cannot function.

1 History of the Regulation

1.1 Why the history of the regulation is crucial to its evaluation today

The Regulation came into effect on May 31, 2002, but it was born out of a long and conflicted process during the last forty years of the 20th century. The Regulation was conceived in a world different than today and reflects those times, before cross border enterprises were the norm, before the incredible increase in the complexity of corporate or enterprise groups, before mega bankruptcies, debtors in possession, at a time when the only insolvency proceeding was a simple liquidation. It was a different world, commercially, technologically, legally, globally.

That history is not mentioned here merely for academic interest, since that is not the focus of this paper and the history has been dealt with extensively in many articles and books. It is mentioned here because it is crucial for the understanding of the Regulation's features and its weaknesses. A historical background is necessary to provide a context, a substratum. From that context, the issues and problems become evident, and the necessary solutions become obvious and entirely logical. But they don't appear without a foundation which follows.

1.2 The Chronology

The salient facts relevant to the history of the Regulation are summarized in the Report on the Convention of Insolvency Proceedings, by Miguel Virgos and Etienne Schmit, (hereinafter, the "Virgos Schmit report").[2] According to the Virgos Schmit Report, the process began in 1963 with a committee of experts under the auspices of the Commission of the European Communities. Between 1963 and 1980 they drafted two Conventions, neither of which was approved. The second convention "was studied by an EC Council Working Party from 1982 until 1985, when work was suspended for lack of sufficient consensus."

In 1981, the Council of Europe drafted a proposed convention entitled "European Convention on Certain International Aspects of Bankruptcy", which was signed in Istanbul in 1990 (the "Istanbul Convention"). While never ratified, Paul J. Omar, in his in-depth analysis of the Convention, points out how this parallel process was the impetus for the resumption of work by the European Community,[3] which led to the 1995 EU Convention on Insolvency Proceedings. That Convention also failed to be ratified because of bad timing, occurring at the same time as two major political crises involving the UK, fallout from mad cow disease and a flare-up between UK and Spain over Gibraltar.[4] `

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[2] 6500/96 Brussels, 3 May 1996. See pages 7-8.

[3] European Insolvency Law, Paul J. Omar, 2004, Ashgate Publishing Lmited, England at p. 72. See also Omar, Paul J. (2003) "The European Insolvency Regulation 2000: A Paradigm of International Insolvency Cooperation," Bond Law Review: Vol. 15: Issue 1, Article 10. Available at: http://epublications.bond.edu.au/blr/vol15/iss1/10

[4] European Union Regulation On Insolvency Proceedings, An Introductory Analysis (October 2006), Prof. Bob Wessels, at page 6. See www.bobwessels.nl
Available at http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session 5/European Union Regulation on Insolvency

Even though the 1995 Convention was a victim of the political fallout, it did eventually become the Regulation, when the gauntlet was picked up by Germany and Finland with the publication of the August 1999 initiative which was later adopted in substantially the same form as the Regulation.[5]

1.3 Universalism as the foundational model for the Regulation

The initial rejection of the territorial approach

From the very beginning of the forty year process, a dispute arose regarding what is now the fundamental feature of the Regulation. The Virgos Schmit Report [p. 7] indicates that the draft Convention provided for single proceedings with universal effect and rejected the idea of secondary territorial proceedings. That dispute persisted through the various drafts. The contemporaneous Report on the Convention on Insolvency Proceedings of 23 November 1995 [6] provides that: "whereas a committee of experts in the Commission of the European Communities drew up a first draft Convention from 1963 to 1980 and - after the enlargement of the Community beginning in 1973 - a second draft Convention, which provided for a single procedure to be recognised in the other Contracting States and precluded the simultaneous opening of domestic proceedings in these other States."

The fact that the opening of secondary territorial proceedings was specifically rejected at various stages and only seems to have reappeared with the 1999 German/Finnish initiative (although that is less than clear from the available documentary evidence) is highly relevant and merits further scrutiny. What were the specific events or analysis that resulted in the decision to include secondary territorial proceedings? Was this a deliberate decision to adopt a modified universal/territorial approach or was this a happenstance occurrence due to last minute political manoeuvring? The answer is highly relevant to the analysis of the future viability of the modified territoriality/universality approach of the Regulation discussed below.

Universalism versus Territoriality: What does it mean in the insolvency context?

Prior to reviewing how the dialectic developed over time and how it continues today, it is helpful to see how universality and territoriality actually operate in the context of insolvency proceedings.

The history leading to the adoption of the regulation and its predecessors are discussed in great detail in European Cross-Border Insolvency Regulation, by Jona Israel, Intersentia, 2005, Antwerpen-Oxford at p. 215 and onward.

[5] Per Israel, p. 243, "the Regulation is nearly identical in substance to the 1995 Convention," referring to the Convention on Insolvency Proceedings 1995. The 1999 Initiative is document number 1999/C 221/06, "Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999"
available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1999:221:0008:0023:EN:PDF]

[6] Report on the Convention on Insolvency Proceedings of 23 November 1995, Committee on Legal Affairs and Citizens' Rights, Rapporteur: Kurt Malangré, 23 April 1999, A4-0234/99; available at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A4-1999-0234&format=XML&language=EN

Universal insolvency jurisdiction means that all the assets of an entity are administered in a single insolvency proceeding, by one court, using one set of rules, with all members of a class of creditors treated equally according to the applicable priority scheme. Its advantages are uniformity, predictability, and equality of treatment. It allows for the pooling of all assets, for all assets to be administered together, for a sale as a going concern, and for the realization of a higher asset value than would be obtained in a piecemeal sale. It minimizes expenses, minimizes conflicts of law, and promotes economic efficiency.

Universal proceedings need a single law in order to work because generally, and with certain key exceptions, one court cannot apply different laws to similarly situated parties at the same time in the same case. Universal proceedings therefore require procedural harmonization and at least a minimal level of substantive harmonization. In the continuum of insolvency regimes, the universalist and harmonized system is exemplified by the United States, where federal bankruptcy law is identical in all states and one court has jurisdiction over a bankruptcy estate which comprises all assets, wherever located. This is at one extreme of the spectrum.

At the other end of the spectrum is the territorial model, in which a local or domestic court with jurisdiction only over domestic assets administers an insolvency proceeding involving an entity or establishment in its jurisdiction. When applied to cross border enterprises, the territorial model precludes the possibility of a joint reorganization and favours a piecemeal liquidation.

Because universalism and harmonization go hand in hand, it is no surprise that the vocal arch foe of insolvency universalism, Professor LoPucki, would assert that: "Harmonization is a euphemism for forcing commercially less important countries to adopt the remedies and priorities of the commercially more important countries." [7] The quote, however, reflects an American centered viewpoint which does not take into account the much more complex harmonization debate in the European Union, where the tension between harmonization and state sovereignty not only has a long and dynamic history, but is part of everyday discourse. In the European Union context, where Member States are able to assert sovereignty rights through the European Council, the "commercially important countries" have not forced harmonization of insolvency laws. In fact, the opposite has proven to be the case, because Member States, strong or weak, are inclined to maintain their sovereignty and keep their own system of insolvency law.

Therein lays the basis and inspiration of the hybrid system embodied in the Regulation. The Virgos Schmit Report, p. 13 provides:

"The idea of a single exclusive universal form of insolvency proceedings for the whole of the Community is difficult to implement without modifying, by the application of the law of the State of the opening of proceedings, pre-existing rights created before insolvency under the different national laws of other Contracting States. The reason for this lies in the absence of a uniform system of security rights in Europe, and in the great diversity of national insolvency laws as regards criteria

[7] Lynn M. Lopucki, Global And Out Of Control 2005, University of California, Los Angeles School of Law, Public Law & Legal Theory Research Paper Series
Research Paper No. 05-8 at p. 19. Available at http://ssrn.com/abstract=693601

for the priority to be given to the different classes of creditors. In this legal context, the Convention seeks to reconcile the advantages of the principle of universality and the necessary protection of local interests. This explains why a combined model has been adopted which permits local proceedings to coexist with the main universal proceedings."

This quote is critical to understanding the fundamental basis of the hybrid system, the belief that two factors, a Member State's unique security rights and its unique prioritization among creditors, can only be protected in territorial proceedings, and cannot be given up in favor of a harmonized system. This rationale is explicitly repeated in Recital 11 of the Regulation.

The Territoriality Rationale

Since this is the *casus rationale* of the hybrid system, the statement merits some scrutiny. "Security rights" refer to rights of a lienholder. Priority rights in the context of the Regulation usually refers to the rights of employees in insolvency related situations.

Upon scrutiny, however, the conclusion that an insolvency proceeding with universal jurisdiction is incompatible with the exercise of security rights different from those of the state in which the proceeding is held, is erroneous. For example, under United States bankruptcy law, state law is applied to determine, for example, the secured status of a creditor, the validity of a security interest, the method of perfection, the law controlling a deed of trust or security agreement, or the validity of a judgment lien. Security rights are determined not by a harmonized federal law, but by the law of the state in which the property is located. Thus, although the property is subject to the jurisdiction of the bankruptcy court in which the proceeding was commenced, the secured status of the creditor is determined under state law. And yet, this is not a problem for a U.S. bankruptcy court, since that court is perfectly capable of applying relevant state law to a particular asset, while the harmonized federal law applies to the proceedings as a whole. Although there is no "uniform system of security rights," that does not preclude a single universal proceeding.

The second rationale given for the hybrid approach of the Regulation is to preserve the priority given to certain classes of creditors under national insolvency laws. This has generally come to refer to the rights of employees in insolvency cases, for example, by providing priority status over other classes of creditors. Appropriately, this has already been the subject of legislation on a supranational level.[8] This does indeed have to be harmonized for the orderly administration of a universal insolvency proceeding because similarly situated unsecured creditors cannot be treated differently in a case, both for administrative reasons and for issues of fairness. Indeed, the bankruptcy system in the United States provides that creditor priority is subject to a harmonized federal bankruptcy law, so that regardless of where the case is filed, unpaid wages, consumer deposits, taxes, general unsecured claims, are all subject to the same priority scheme. With regard to the "preservation of priority" rationale, therefore, that has been proven not to be valid as

[8] See, for example, Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer

demonstrated both in Europe and the U.S., since a territoriality carveout is obviously not required to protect employees. Based on the foregoing, the two rationale for moving away from universality and adopting territorial proceedings need to be revisited in the context of the review of the Regulation.

Territoriality - incompatible with the values and goals of the EU

By its very nature, territoriality discriminates between domestic creditors and those from another state. It flies in the face of mutual trust, is inconsistent with EU fundamental goals and policy, prevents the effective reorganization of companies with cross border subsidiaries or branches, and creates a logistical nightmare in the administration of cases. In the cross border context, a territorial proceeding, with assets first being available for local creditors without equal sharing with foreign creditors is inherently unfair and abhorrent to the concept of the internal market, equal treatment and non- discrimination.

Territoriality also violates the fundamental rationale of the insolvency/bankruptcy process, which is to avoid the race to the courthouse in order to prevent one creditor from taking action to get paid before other creditors, or to prevent a single creditor from grabbing an asset or freezing an account vital to ongoing operations. Preventing unilateral action by one creditor and allows all creditors to share equally and maximizes value for all. In fact, even creditors who are paid first because of territorial liquidations may do worse than they would in a reorganization case or an orderly universal liquidation. Territoriality, rather than benefitting creditors in a particular territory, may in fact result in worse treatment.

Creditors shouldn't have an advantage based on the country in which they are located. The only advantage should be between secured and unsecured, priority unsecured or general unsecured status. A secured creditor is entitled to better treatment than an unsecured creditor because it paid for that privilege and in so doing, has bargained for superior rights. A priority creditor is entitled to better treatment because a policy decision has been made to protect a class of creditors. But for one group of general unsecured creditors to get an advantage over others based on location is discriminatory, antithetical to single market, and might just be a bad economic decision based on wrong assumptions by states advocating territoriality.

Territoriality - time for a second look

The adoption of the Regulation did not mean that the issues that had been debated for forty years had finally been resolved. On the contrary, the Regulation was intended as a short term political compromise:

"The relationship between main proceedings and territorial insolvency proceedings represents a compromise which was the outcome of many years of discussion. It remains to be seen in practice whether the individual provisions can be applied by courts and liquidators as they stand or whether they will make excessive demands on the participants (for example 'conversion' as referred to in Article 37). The regulation itself should therefore lay down that the Commission is to assess experience of its implementation and propose improvements, and when it is to do so (Amendment 2)."[9]

Despite the compromise, it is clear that the Parliament was opposed to secondary territorial proceedings. The Parliament "considers that there exists no need to allow for secondary proceedings after the opening of the main proceedings" (citing the Report on the proposal for a Council Regulation on Insolvency Proceedings, 23 February 2000, A50039/2000 (final) at 7 and 10). Jona Israel, in his comprehensive study of the Regulation states:

"At least on one point Parliament has expressed a fundamental critique of the present text of the Regulation. The European Parliament considers that there exists no need to allow for secondary proceedings after the opening of main proceedings; 'here the unitary nature of main proceedings should prevail absolutely'. [citation omitted]. Instead, it considers the principle of universality 'inherent in the logic of the internal market and the creation of a uniform European legal area'. However, the mechanism of secondary proceedings has been critical to the adoption of the Regulation as it now stands." (Israel, p. 251-252).

Other contemporaneous documents reveal serious concerns with the Regulation. The opinion of the Economic and Social Committee, among other points, expresses a preference for unitary proceedings rather than the secondary proceeding mechanism.[10] Further, it emphasizes "the need to avoid an excessively complex system which might prove unworkable in practice" (section 3.1.3), calls the proposed Regulation "extremely modest and unambitious" (section 3.2.2); expresses a clear preference for unified rather than territorial proceedings and explicitly rejecting secondary proceedings (section 3.4) and the "insurmountable problems" which would be caused by concurrent primary and secondary proceedings (section 3.4.3). Indeed, the concept of concurrent proceedings involving the same company conflict with the basic premise of the Brussels I Regulation (lis pendens-related actions).

In summary, the history shows that the Regulation was meant as a short term experiment and that the legislators never envisioned the compromise, which is at the foundation of the Regulation, to be a permanent solution. Rather, it was to be reviewed on a regular basis in order to determine whether it could actually work in light of the serious reservations expressed during the approval process. Page 7/17 of the Parliament Report shows that the Parliament proposed an amendment requiring the first review to be five years after the Regulation entered into force.[11] This was later changed to seven years, with subsequent five year intervals. This apparently did not happen and the Regulation now provides in article 46, for a review in 2012. But the explanatory note in the Parliament Report after the proposed amendment is revealing, if not prophetic: "It remains to be seen in practice whether the individual provisions of the regulation can be applied by courts and liquidators

[9] Report on the proposal for a Council regulation on insolvency proceedings 23 February 2000 (9178/1999 – C5-0069/1999 – 1999/0806(CNS)) A5-0039/2000 Committee on Legal Affairs and the Internal Market (hereinafter, the Parliament Report") p. 10/17

[10] OJ 2000 C75/1 26 January 2000 The report Opinion of the Economic and Social Committee on the 'Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, submitted to the Council on 26 May 1999'(1) (2000/C 75/01) OJ 2000 C75/1,

[11] OJ 2000 C346/4 Amendment 5

as they stand or whether they will make excessive demands on the participants." (Parliament Report, p. 7/17).

2 Harmonization

Harmonization, although not the focus of this paper, needs to be mentioned because it is an essential part of any discussion of the Regulation. Indeed, the salient characteristic of the Regulation, a regime in which a main proceeding with universal effect is moderated by a limited territorial proceeding, is a result of this reluctance to harmonize, which in turn, is a result of the reluctance of Member states to give up whatever perceived advantage might be available to local creditors by virtue of advantageous provisions of the national insolvency regime.

Thus, on its face, the Regulation rejects the harmonization of insolvency law. Recital (11) provides: “This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community.”

Whether this makes any sense in a practical or theoretical analysis is part of the harmonization debate which is not the point of the discussion in this section. The point here is that although harmonization is rejected at the outset because it is considered by the drafters as impractical, a discussion is important background because it is the very rejection of harmonization which is the seed from which the Regulation is born.

The irony of this conclusion did not escape the drafters of the Virgos Schmit Report: “It seems hard to accept that undertakings' activities are increasingly being regulated by Community law while national law alone continues to apply in the event of the failure of an undertaking.” Nevertheless, even though the Regulation embodies a definite position against harmonization, the matter is far from resolved, and the tension between harmonization and state sovereignty persists in the insolvency context and is important to the 2012 review of the Regulation in several respects which are discussed below.

First, the lack of harmonization in the insolvency field impedes the operation of the internal market. Second, and as discussed below, the lack of harmonization is the direct cause of forum shopping, because, simply stated, if the law were the same in all member states, there would be no need to shop around for the most advantageous law. Finally, the lack of harmonization has created numerous specific legal problems which are addressed in the report produced for the Parliament in which top European insolvency scholars and professionals outline fifteen areas of the Regulation in which harmonization is required (hereinafter, the “Harmonization Report”).[12]

The Harmonization Report identifies fifteen separate problems that “might occur in the absence of common rules on insolvency”, for example:

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[12] Directorate General For Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, Legal Affairs, Harmonisation Of Insolvency Law At EU Level, April 2010. Also, many of these harmonization ideas are stated in an earlier article by Bob Wessels, “Twenty Suggestions for a Makeover of the EU Insolvency Regulation”, International Caselaw Alert, No. 12, October 31, 2006, pp. 68-73.

- Some states' insolvency laws provide for a general stay on creditors enforcement actions after the commencement of a proceedings, other don't;
- Each state has different ranking of creditors;
- Each state has different rules on filing and verification of claims, different rules on termination of contracts, thereby resulting in forum shopping;
- There is a lack of rules on coordination of insolvency proceedings with respect to different companies belonging to the same group of companies;
- There are widely different rules on who administers the insolvency proceedings;
- There are different rules on avoidance actions, i.e. recovery of transfers of assets, different time periods and criteria for clawbacks; and
- When a secondary proceeding is opened, the law applicable is the law of the member state where the secondary proceedings were opened, so that two different sets of law apply to one company in two different concurrent proceedings.

This paper is not focused on the harmonization debate and there is certainly no need to duplicate the efforts of the well reasoned and comprehensive report prepared by leading insolvency professionals. Harmonization is a major undertaking and involves fundamental substantive revisions of the Regulation. Pending the discussion and/or adoption of revisions, this paper proposes a different solution.

The debate that has already occurred in the context of the harmonization of criminal law is instructive. In his article "Why is the harmonisation of penal law necessary?"[13] Spencer analyzes the ideological and practical reasons for harmonization of criminal law in the European Union. He does not give much credence to the historical ideological reason for harmonization, i.e. that one particular set of rules is best and so should be adopted by all. While this is what occurred historically, for example, the imposition of the Napoleonic code by France, it should no longer be relevant in Europe today.

The ideological reason for harmonization of criminal law that he finds most valid, and which is also directly applicable to insolvency law, is expressed as follows:

"In a democracy, where the rights of individuals are recognized, there are certain basic rules that penal law must respect and certain unacceptable rules and features that it must avoid. For each country to keep its own separate criminal justice system, formed according to its national traditions, is right and proper. But if these systems do not conform to these minimum standards they must be modified so that they do." (Spencer, p. 47).

In the criminal context, Spencer asserts, the EU's accession to the European Convention of Human Rights has lead to the introduction of a harmonized set of basic procedural rules, relating to protection from overly invasive evidence

[13] John R. Spencer, Why is the harmonization of penal law necessary?, Harmonisation and harmonising measures in criminal law, Royal Netherlands Academy of Arts and Sciences, Proceedings of the colloquium, Amsterdam, 13-14 December 2001 . Available at http://www.knaw.nl/Content/Internet_KNAW/publicaties/pdf/20021103.pdf

gathering, i.e. phone tapping, and rights to participate in the often inquisitorial pretrial phase of criminal procedure. Thus, the adoption of ECHR respects the national traditions, does not harmonize the criminal law of the Member States, but rather, adds a limited overlay of basic procedural rules in order to ensure certain minimal standards.

It is both necessary and appropriate to apply this model to insolvency in general and the Regulation specifically, for a number of reasons. The most obvious and indeed, the most compelling, is simply that the Regulation does not provide a set of procedural rules. Section IV below includes a detailed analysis of the specific provisions of the Regulation which require, but lack, procedural rules. Perhaps the legislators expected that Member States would provide the necessary procedural rules to implement the Regulation. However, this was not a reasonable expectation because the Regulation deals with cross border issues and there is no reason to expect that national laws would cover this area. Whatever the reason for the omission, the reality is that in the ensuing decade since the Regulation went into effect, nobody has filled in the missing rules.

As described in section III below, the absence of procedural rules has resulted in the lack of a minimum standard of fairness, notice, availability of information, due process and opportunity to be heard. The implementation of the procedural rules suggested below is consistent with Union conceptual framework as suggested by Spencer. Using this framework to address these omissions in the Regulation makes sense.

Spencer points out that it is “right and proper” to keep a criminal law system which respects the national traditions, but that such a system should, if needed, be modified to comply with minimum standards. Whether the concept of a national criminal tradition exists can be debated. The existence of a national insolvency tradition however cannot seriously be maintained. Nothing about insolvency requires recognition of a historical or national character. The fact that debtors were hung in 17th century England, or that their benches were broken in 16th century Italy, is not a historical cultural legacy that any state seeks to preserve.

The point here is that by working within the existing Regulation and applying a minimal overlay of simple procedural rules necessary to ensure minimum standards of fairness is both consistent with the Regulation, and as discussed below, the rulings of the European Court of Justice. This model of limited procedural harmonization will be developed and applied in the sections that follow. Prior to that, however, there is one final area that needs to be discussed.

3 The Jurisdictional Mechanism of the Regulation: COMI, Forum Shopping and Corporate Groups – How the Regulation works (and how it doesn't)

At the core of the Regulation are its jurisdictional and choice of law provisions. Because the Regulation is, at least in part, universal in its jurisdiction, and because where the case is filed determines the choice of law, the determination of where the case may be filed is of critical importance and often outcome determinative. It is for this reason that "center of main interests" ("COMI") has dominated the scholarship and case law, focusing the discussion on where the case can be filed, rather than on what happens after the case is filed. The COMI issues are not what this paper is about, rather, the purpose of the analysis which follows is to show that even this issue, which has dominated the discussion, can and should be dealt with in a manner consistent with due process, through procedural rules that, albeit absent from the Regulation, are necessary for its operation.

3.1 The Fundamental Jurisdictional Provisions of the Regulation

In summary, the relevant jurisdictional provisions of the Regulation are as follows:

> *Article 3-International jurisdiction*
>
> *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.*
>
> *Thus, Article 3, par. 1 of the Regulation requires that the main case be filed where the debtor's center of main interests is located.*
>
> *Par. 2, however, allows for the opening of a secondary case, which partially divests the first court of jurisdiction. This secondary case must be a liquidation case only, and is subject to a different jurisdictional rule. Paragraphs 2 and 3 provide:*
>
> *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 that 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. These latter proceedings must be winding-up proceedings.*

This scheme is further explained in recital 12:

> *This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.*

Once the main or secondary proceedings have been opened, they must be recognized in all other member states. [Article 16] Further, any rulings from the court regarding the conduct of the proceedings should be automatically recognized by courts of other states. [Recital 22] The forgoing provisions are the essence of the Regulation and its uniqueness lies in its mechanism of concurrent universal and territorial proceedings.

Yet the language of the Regulation raises myriad questions. What are the “diversity of interests” referred to in recital 12 that are being protected by the opening of secondary proceedings? What are these “mandatory rules of coordination with the main proceedings” that “satisfy the need for unity in the Community”? How does the COMI test work? Why is it so easily manipulated? What is the COMI of a corporate group? How can two parallel proceedings be administered and doesn't that conflict with the basic tenants of the Brussels I Regulation?

3.2 The COMI question as a due process issue

COMI is critical under the Regulation because it determines where the case may be filed, which law applies, which court hears the case, and which procedure, whether liquidation or reorganization is available. Since insolvency schemes are so different, the forum is outcome determinative. One jurisdiction may allow a creditor to set off a debt, others may prevent it completely or only during a specified period of time. Other courts may allow creditors to propose a reorganization plan, or form a creditors' committee, while in others, all decisions are in the hands of a court appointed liquidator. One state may allow for a reorganization process in which all constituents, debtor, creditors, participate in a negotiated resolution; others may allow only a strictly administrative liquidation process without any significant participation.

Notwithstanding these critical issues which are determined by COMI, the determination of the COMI itself is done at the very outset of the case by the court where the case was filed, and often without any notice either to creditors or other interested parties. Further, once the decision is made, it is final and non-appealable, at least in practical terms, if not in strict legal terms. Therefore, it is no wonder that the COMI determination has become the overwhelming focus of the scholarship, debate and case law.

Legitimate expectations of creditors as a COMI element

Article 3(1) of the Regulation provides for the presumption that the center of main interests of a debtor is where the registered office is, but that such presumption may be rebutted. Yet, interestingly, this objective test is tempered by a different standard; the COMI is not only the place of incorporation, but the Regulation further describes COMI in recital (13) which provides that the "centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

Recital 13 raises a number of issues: the effect of "should", the meaning of "administration of his interests on a regular basis", and the level of knowledge required in order to be "ascertainable", who are eligible or relevant third parties, and whether the level of knowledge is the same for all third parties. The focus of this paper is not on COMI issues, and the point here is not to analyze what this language means or what courts have said that it means. The point is that the Regulation requires courts to come to many factual and legal conclusions in connection with the COMI determination.

The COMI determination is one of the most critical issues in the case. It is highly dependent on factual determinations and application of those facts to the applicable law, which itself is less than explicit or straightforward. Yet, this determination must be made on the first day of the case, usually before any creditors or any other party is provided notice. Further, this determination must then be automatically recognized without being subject to review by the court of any other member state. Therein lies the problem. That problem only becomes exacerbated when other factors arise, for example, when the debtor is a part of a group of companies, and may be either the parent or subsidiary of a related company, or where the registered office has changed, or when any number of additional factual scenarios arise.

The traditional choice of place of incorporation or "registered office" as the appropriate jurisdiction to file insolvency proceedings gives certainty, both in the administrative sense, and in addressing what is commonly referred to as the legitimate expectations of creditors, meaning that a creditor should be allowed to deal with a company in insolvency in the same place that it dealt with the company prior to insolvency. This emphasis on creditor expectation appears repeatedly in the legislative history. The Virgos-Schmit Report, paragraph 75, provides that: "Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated".

The Parliament Report was even more explicit about the need to acknowledge creditor expectations in the prior version of recital 13: "The centre of main interests is taken as meaning a place with which a debtor regularly has very close contacts, in which his manifold commercial interests are concentrated and in which the bulk of his assets is for the most part situated. The creditor is also very familiar with that place." [p.6/17] Although clumsy in its drafting, the meaning is very clear.

In whichever way the COMI test is applied, it must be applied in a way that takes into consideration the legitimate expectations of creditors, and therefore, creditors must be involved in the COMI determination. The protection of legitimate expectations is a general principle of Union law which indeed ranks superior to EU secondary law, including the Regulation. The Regulation is less than explicit in this regard and in the absence of procedural rules implementing that protection, the practical result is that the requirement is essentially ignored.

The legitimate expectations of creditors must reflect the realities of the single market and current business realities. A creditor today cannot legitimately expect that it will have a local relationship in its regular business with a company, or if there is a local relationship, that it would be through the main office rather than a regional office or representative. All the more so, a creditor cannot legitimately expect that an insolvency proceeding for that company would be filed in a court convenient to the creditor, rather than where the company's main office is located. Even further, and this directly relates to the whole procedure of territorial proceedings, a creditor today, when the single market is a reality, cannot legitimately expect that it can deal with, be paid, and in the event of a liquidation, be satisfied, from the local or even the national assets of the debtor. Thus, the local advantage granted in territorial proceedings are indeed beyond what can legitimately be expected by a creditor.

The only truly legitimate expectation for a creditor today is that they not be deceived or kept in the dark, so that when an insolvency case is filed, they be given notice, access to information, an opportunity to be heard and a real and practical way to participate at all stages of the insolvency proceedings, especially when so much is determined by the COMI determination which will typically occur on the first day of the case.

COMI at the ECJ

These COMI issues are often dealt with in courts of Member States, and the study of those cases is beyond the scope of this paper. One case however requires mention because of its far reaching implications. In the EU courts, the first definitive analysis of the COMI issue appeared in the case Eurofood IFSC, Ltd.[14]

The case involved an Irish remote financing company, Eurofood, the subsidiary of one of the many Parmalat entities based in Italy. "Eurofood IFSC Ltd ('Eurofood') is a company incorporated and registered in Ireland. It is a wholly owned subsidiary of Parmalat, a company incorporated in Italy which operated through subsidiary companies in more than 30 countries worldwide."[15] Eurofood's purpose was to obtain financing for other subsidiaries under the favorable tax treatment under Irish law. As seen below however, its actual operations were limited, the degree of which becomes a key factual issue.

The ECJ analysis follows the Regulation closely. The logical sequence of the analysis followed by the court was as follows:

1. The COMI is presumed to be the place of the registered office, citing article 3(1);

[14] Case C-341/04, Eurofood IFSC Ltd. (May 2, 2006)
[15] par. 25 Opinion of Mr Advocate General Jacobs EU: Case C-341/04 Celex No. 604C0341

2. The COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" citing recital 13 of the Regulation [Eurofood, par. 32] The criteria must be both objective and ascertainable by third parties "in order to ensure certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings." [par. 33];

3. The presumption that the COMI is the place of the registered office can therefore only be rebutted by factors which are objective and ascertainable by third parties. [par. 34] Such a situation would exist, for example, in the case of a "letterbox" company, where such a company did not carry out any business in the Member state in which its registered office was located. [par. 35] Under the standard set forth by the court, therefore, only having no business in the Member state in which the registered office is located is sufficient to rebut the presumption;

4. However, and this is the conclusion of the Court relevant to the preliminary question posed in the case, "where a company carries on its business" [par. 36] (apparently some minimal yet unspecified amount of business) in the Member state where the registered office is located, "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 the Regulation." [par. 36];

The Opinion of AG Jacobs sheds a little more light on the level of business required. He notes that the administration of Eurofoods was contracted out to Bank of America, so it is likely there were really no operations and no employees in Ireland, but that contracting out operations was sufficient to overcome the letterbox standard. Hence, the practical standard under Eurofoods appears to be that anything more than a post office box is enough to establish a COMI, which is something to bear in mind in the discussion below regarding forum shopping. Even more to the point of this paper, this shows that subtle factual and legal determinations may be required in the COMI determination and consequently, there is a need to make these outcome determinative decisions on the basis on adequate notice and opportunity to be heard by all affected parties.

3.3 Forum shopping

We have just seen the ease with which the COMI could be manipulated under the applicable standard. The incentive is clear since the COMI determines which court has jurisdiction, which laws apply, from which country the liquidator or administrator is appointed, as well as many other legal and practical issues. Yet surprisingly, elimination of forum shopping is a stated goal of the regulation. The Regulation, however, actually achieves the opposite effect, enabling forum shopping.

The Regulation provides in recital 4: "It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)." Forum shopping, as implied in recital 4, is a pejorative term, implying a less than forthright manipulation of the jurisdictional rules in order to achieve a result different from that which would be achieved by the intent of the rule, or what is what is often referred to as "slick" lawyering by disapproving judges. This raises a number of issues.

First, from a client standpoint, forum shopping is good. It means that the lawyer has picked the most favorable forum for the client, and the failure to do so could be considered malpractice.[16] From the standpoint of the Regulation and from an overall legislative standpoint, however, forum shopping is a problem, because it means that the law is imprecise and ineffective because it allows companies or their lawyers to pick a forum different than the one that they should be in according to the intent of the legislation. The intent of the Regulation in general and its COMI rules in particular, is to avoid this manipulation.

Yet, the language of recital 4 is imprecise and confused, stating that the Regulation seeks to avoid the "transfer [of] assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)." Neither of these however are forum shopping. Forum shopping means filing a case in the most favorable forum. But, once a judicial proceeding is pending, it may be possible to transfer the proceeding to another court, but that action is subject to judicial review. Forum shopping is a problem because the choice of court is done by the company or its lawyers, prior to filing the case, thereby generally evading judicial review, since the inclination of a court is to retain jurisdiction rather than sua sponte transferring the case elsewhere. The "transfer of judicial proceedings" is not forum shopping. The sentence just doesn't make sense.

Further, the transfer of assets is not a method of forum shopping simply because the location of assets does not establish a jurisdictional basis. The legislative history, specifically the Parliament Report [page 6/17] indicates that the location of assets was one of the factors used as a jurisdictional basis in the old version of recital 13, which allowed jurisdiction "where the bulk" of a debtors assets were located. That rule however was not adopted in the Regulation, which does not mention the location of assets as a factor in determining COMI.[17]

Asset transfer in the insolvency context usually brings to mind the transfer of assets without consideration prior to insolvency with the intent or with the effect of removing assets from the reach of creditors, or in U.S. terms, a fraudulent transfer. But there is no jurisdictional factor in this type of transfer, and the transfer of assets to a third party would not establish a jurisdictional basis for the debtor/transferor to file an insolvency case in a particular jurisdiction under any reasonable legal system.

[16] See discussion, Wolf-Georg Ringe, Forum Shopping under the EU Insolvency Regulation, Oxford Legal Research Paper Series Paper No 33/2008 August 2008, in which the author questions the "hostile attitude" taken by the Regulation against forum shopping. Available at: http://ssrn.com/abstract=1209822.

[17] In fact, one astute commentator has used the sloppy drafting to argue that forum shopping is actually allowed under the Regulation because it does not involve the transfer or assets or judicial proceedings. See R Hänel, "Take the Debt Drain — Discharge-tourism Coming Up Roses?' INSOL World (First Quarter 2010) 30-31 arguing that the transfer of an individual's COMI with a view to a more favourable bankruptcy regime does not involve a transfer of assets' or 'judicial proceedings' and so does not conflict with recital (4). See page 11 of 'Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A View from England and Wales, Adrian Walters and Anton Smith. http://www.ntu.ac.uk/PSS/Nottingham%20Law%20School/Publications/99914.pdf

In short, the asset transfer reference in the context of forum shopping doesn't make sense.

The legislative history supports the viewpoint that the earlier drafters did not consider asset transfer to be a forum shopping issue, but rather, an issue of hiding assets from creditors, by keeping them out of any forum. The Parliament Report mentions that the lack of a universal proceeding allowed debtors to transfer assets to keep them from creditors. Page 12/17 states:

"Such regulation of cross-border effects at the national level constitutes a problem to the extent that insolvency judgments are frequently not recognised in foreign countries. Accordingly, the liquidator of the insolvent debtor has no access to the debtor's foreign assets. That means that creditors must open insolvency or enforcement proceedings in one or more foreign countries as well, and that gives the insolvent debtor time to transfer his assets and protect them from the creditors' attempts to gain access to his estate."

It is much more likely that forum shopping is accomplished by the transfer not of assets or judicial proceedings, but by transfer of the registered office itself. There is no prohibition of moving a registered office prior to filing, although some member states prohibit the move within a certain period prior to filing in order to establish a new COMI. But there is no prohibition under the Regulation. On the contrary, under EU law, a company can move its registered office to another state, or a company with its registered office in one member state may actually have its COMI in another member state.[18]

The problem, therefore, is that the COMI test itself, intended as the solution to forum shopping, has actually enabled the practice to take place and as a result, since the adoption of the Regulation, a new industry of "insolvency tourism" has arisen, generally sending both personal and corporate cases to the UK from other member states.[19]

It is ironic that Member States, in wishing to protect their own sovereignty by creating a territorial exception to universal proceedings, have instead created the unintended negative consequence of sending cases out of their own jurisdiction where the cases actually belong. This is a far more egregious affront to sovereignty. By insisting on this regime, the Regulation itself has fostered a system of forum shopping, which takes cases which rightfully belong in one state, and moves them to another, usually the UK. It is indeed ironic that Germany, one of the two sponsors of

[18] See Harmonization Report, p. 5

[19] See- The rise of insolvency tourism-An enquiry into the centre of main interests of natural persons, J.D. Weber, Leiden, Jan. 2010. This is an excellent thesis on the issue of forum shopping in personal bankruptcy cases, explaining the industry of bankruptcy tourism which leads to the filing of cases in the UK by citizens of other European countries. See also, "Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A View from England and Wales" Adrian Walters and Anton Smith, demonstrating how German insolvency cases end up in the UK. Available at: http://www.ntu.ac.uk/PSS/Nottingham%20Law%20School/Publications/99914.pdf

the Regulation (along with Finland), is apparently the country that loses most cases this way. [20]

3.4 Corporate Groups

Simply put, the Regulation has no provision allowing corporate groups to reorganize together. For that matter, they cannot even liquidate together. Even worse, the whole mechanism of territorial proceedings, which must be liquidation, prevents any reorganization of a company with cross border affiliates. Related companies can be liquidated separately, on a piece meal basis, but not reorganized. By requiring the filing of a proceeding in the COMI of the individual member of a group, rather than in the COMI of the parent or affiliate, numerous problems are created from a business and legal standpoint. Putting it bluntly, this provision is a death knell for cross border companies seeking to reorganize.

In contrast to forum shopping discussed above, this problem is nothing new nor an unexpected or unintended result, but was evident even at the time of the Convention: "The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity." (Virgos Schmit Report, par. 76).

Leading insolvency experts agree that the problem arises because the Regulation is from a time before the concept of reorganization had entered into the European consciousness, when liquidation was the only option, and before cross border operations through affiliated companies was the norm.[21] Now, however, such operations are the norm and cross border entities are inextricably intertwined. In Eurofoods, for example, Parmalat, incorporated in Italy, operated through subsidiaries in over thirty countries. Eurofoods' obligations were guaranteed by Parmalat and Eurofoods itself provided financing facilities for other subsidiaries.[22]

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[20] This statement is based purely on anecdotal evidence. Actual statistical evidence to determine how the Regulation works in the "real world" could only be obtained through a functioning unified European insolvency register.

[21] See: Multinational Groups of Companies under the EC Insolvency Regulation: Where Do We Stand? 2009; Bob Wesselswww.bobwessels.nl: "The lack of provisions concerning multinational groups of companies has been classified as an omission. However, not all critics take into account the fact that cross-border insolvency within Europe was discussed for over forty years before the Regulation finally enacted. The discussions concerned complex problems. At the time, the decision to postpone "group insolvencies" to a later date may have been considered both politically and practically prudent. Furthermore, the Regulation reflects thinking of the 1980s and 1990s, when the phenomenon of groups of companies was not as current as in the first decade of the 21st century and, moreover, in European domestic insolvency laws reorganisation or rescue of companies was not the prevailing option."

See also: Coordination Of Multinational Corporate Group Insolvencies: Solving The Comi Issue, Insolvencies of Corporate Group under the E.C. Regulation, Gabriel Moss, Christoph G. Paulus, June 7-8, 2010, International Insolvency Institute Tenth Annual International Insolvency Conference: "The problem is particularly acute in the case of reorganisation proceedings. Unfortunately, the Regulation, perhaps because it largely reproduces a Convention negotiated over many years and largely prior to the vigorous recent movement of Member States in favour of reorganisation, adheres to the old-fashioned approach of ignoring group structures"

[22] Opinion of Mr Advocate General Jacobs EU: Case C-341/04 Celex No. 604C0341, par. 25, 29.

No reason was articulated for the omission of provisions for corporate groups in the Regulation or legislative history. The solution to the problem, however, is not difficult. Under the system in the United States, for example, the distinction is made between administrative consolidation and substantive consolidation. [11U.S.C.sec.302] "In substantive consolidation, the intercompany liabilities of the subject companies are eliminated, the assets of these subject companies are pooled and the third party liabilities of the subject companies are satisfied from this single pool of assets."[23]

In one moderately sized U.S. case, for example, over 50 separate corporate entities operated in several states, and forty-eight of the entities were consolidated substantively because they shared a common cash management system, had complex inter-corporate debt and cross collateralization of assets, and numerous inter-corporate guarantees.[24] In such a situation, the parties would typically request that the court issue an order for substantive consolidation which typically would provide:

- All intercompany claims between the consolidated debtors would be extinguished;
- All assets and liabilities of each of the consolidated debtors would be merged or treated as if they were merged with the assets and liabilities of the parent;
- Any obligation of a consolidated debtor and all guarantees thereof by one or more of the other consolidated debtors would be deemed to be one obligation of the parent;
- The stock, if any, of the consolidated debtors other than the parent would be cancelled;
- Each claim filed or to be filed against any consolidated debtor would be deemed to be filed only against the parent and deemed to be a single claim against the parent;
- All claims based upon guarantees of collection, payment or performance made by the consolidated debtors as to the obligations of another consolidated debtor would be released.[25]

Substantive consolidation is not granted without a substantial legal basis for ignoring the corporate separateness and consolidating assets and liabilities and is the exception rather than the rule. Nevertheless, it is necessary in those cases where it would be inequitable to maintain separateness. Administrative consolidation, in contrast to substantive consolidation, brings cases before one court, but doesn't combine assets or liabilities or affect the substantive rights of creditors. Administrative consolidation is intended to reduce the need for filing duplicative pleadings and duplicate notice to creditors, but not to consolidate assets or liabilities.

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[23] Prevalence Of Substantive Consolidation In Large Bankruptcies From 2000 To 2004: Preliminary Results, William H.Widen, American Bankruptcy Institute Review, Vol 14:47, p. 47
[24] In re Family Health Services, Inc. and related entities, Central District of California, filed 1989
[25] Order Granting Motion For Substantive Consolidation Of Debtors' Estates, In re SI Restructuring, Inc. Available at http://www.haynesboone.com/schlotzskys/%281181%29%20Order%20on%20Substantive%20Consolidation.pdf

The U.S. model of administrative consolidation, however does not translate easily to the EU because of the lack of a harmonized insolvency law. Administrative consolidation, which is the simpler of the two processes, actually would be the most difficult to apply in the absence of a harmonized insolvency law, since one court would be expected to apply different substantive law in each of the administratively consolidated proceedings. Substantive consolidation however would essentially merge all of the entities into one entity, would not require harmonization since the law of the country of the COMI of the parent would apply to all the substantively consolidated entities. One simple yet effective solution that has been proposed is to identify an "enterprise center of main interest", a single country where the center of main interest for the group is located and require the filing of all insolvency cases for the group, a single case for each entity, but all filed in the same court, with the cases being administratively consolidated.[26]

The issue has also been dealt with in Harmonization Report, as well as the followup report of March 2011. Point XIII on page 24 of the Harmonization Report identifies the problem as one of the main issues that requires a solution [p. 33]. In the followup reports of March 2011, the group issue is dealt with in a separate dedicated report which proposes, inter alia, substantive or administrative consolidation, coordination of hearings in different courts, appointment of same insolvency representative for a group, and cooperation between courts and insolvency representatives.

The Regulation is a creation of the last forty years. That's why it doesn't adequately deal with corporate groups. Now that we are in an era of multi-level cross-border group enterprise structures, updating is required, not only to deal with this specific issue, but also to address the notice and fairness issues that arise in so many of the areas of the Regulation. Another one of those areas follows.

3.5 The Problem with Concurrent Proceedings

Perhaps the most problematic area of the Regulation, both with regard to procedural issues and the issues of notice and fairness, is the mechanism of concurrent main and secondary proceedings. Under the Regulation, the same company can be subject to concurrent insolvency proceedings in two different member states, involving the same assets, the same creditors, and the same debtor company, but the priority among creditors will change once the secondary case is filed, as will the law governing the disposition of the assets.

The creditors will be the same, yet their rights will be different in each case: "The Regulation 1346/2000 provides that proceedings under Article 3(2) comprise only assets in the Member State where the proceedings are opened whereas all creditors may file their claims in such territorial proceedings. Thus Article 3(2) proceedings are territorial with respect to assets and universal with respect to creditors." [27]

[26] International Insolvency Institute Tenth Annual International Insolvency Conference Rome, Italy Coordination Of Multinational Corporate Group Insolvencies Enterprise Centre of Main Interests Principles – A Proposal Hon. Samuel L. Bufford, United States Bankruptcy Judge, June 7-8, 2010
[27] Robert van Galen, The revision of the EU insolvency regulation, briefing note p. 11 March 2011. Available at http://www.europarl.europa.eu/studies

When viewed in its best light, the situation is confusing. The reality however is that it creates a logistical and procedural nightmare, both from the administrative standpoint for the professionals administering the insolvency case, the court, and for the participants. The claims resolution process, which in a simple case is never simple, would become next to impossible with two concurrent cases. A creditor would have to file a claim with a specified priority in a territorial proceeding and another claim with possibly different priority in the main proceeding. Thereafter, the payment received in one case must be reconciled and offset against another payment received in the other case. Even if an insolvency administrator or court were able to undertake such a process, the administrative burden would render the task impossible. In cases where there are thousands of claims to be reconciled, this becomes a logistical nightmare. Without a common claims database between the concurrent cases, claims resolution becomes a logistical impossibility. Yet this is what is required under the Regulation.

The claims resolution process is just one of many problems that arise when there are two concurrent insolvency cases. It is logical then, and indeed a well established tenant of EU law, and in other legal systems as well, that concurrent proceedings involving the same parties and same issues are to be avoided as a waste of judicial resources and in order to avoid conflicting judgments. For this reason, Article 27 of the Brussels I Regulation[28] provides that as soon as a claim is initiated in one Member State, it has the automatic effect to preclude claims from being heard in another Member State. The Brussels I Regulation prevents the same case with the same parties being litigated at the same time, but this is allowed and indeed a central feature of the insolvency Regulation.

The Regulation, before its final stages, did not allow dual concurrent proceedings. The 1980 Draft Convention "provided that for each insolvency only one court should have exclusive jurisdiction. Thus proceedings opened by a competent court would take effect with respect to all of the debtor's property". Israel, p. 226 Due to the desire of Member States to preserve perceived advantages, territorial proceedings were created apparently as a political compromise rather than an intentionally designed mechanism. As such, the mechanism should be subject to a high level of scrutiny in its review. Further, and as seen next, it is in the context of concurrent proceedings that the procedural lacunae of the Regulation become most obvious and issues of due process, notice and fairness issues come to the forefront.

3.6 The Regulation in action- how liquidators comply with the Regulation's mandatory duty of cooperation

The most revealing of the concurrent insolvency cases were the Eurofoods and Daisytek cases.[29] In Eurofoods, both the Irish and Italian courts opened main insolvency proceedings for the Parmalat subsidiary Eurofoods. In Daisytek, both the English and French courts opened main insolvency cases. In the first of his two seminal articles, Judge Bufford goes into a detailed day by day analysis of the notice given by the Italian liquidator to the Irish liquidator, the court hearings, the notice and papers provided, and the opportunity to be heard or lack thereof. The most

[28] EC No 44/2001 of 22 December 2000

[29] 12 Colum. J. Eur. L. 429, 473-4, Spring, 2006. International Insolvency Case Venue In The European Union: The Parmalat And Daisytek Controversies, Hon. Samuel L. Bufford,

striking aspect of the process is the last minute and inadequate notice given by the Italian liquidator to the Irish liquidator and Irish creditors and the failure of the Italian court to require adequate notice or provide a fair opportunity to be heard.

Similarly for Daisytek, Judge Bufford reviews the complete lack of notice provided to French and German creditors of the first day hearings opening the proceedings and which resulted in the decision to open the cases in the UK. He similarly details the lack of notice given to English administrators or creditors of the hearings opening proceedings for other Daisytek entities before the French court. All these failures occur despite the specific notice and cooperation requirements in the Regulation.

The facts lead to an inevitable conclusion. The solution proposed by Judge Bufford is simple yet compelling. On page 475 of the article, he proposes that the Regulation be supplemented with procedural rules to insure fairness and due process, and suggesting that the determination of whether a proceeding is a main or secondary proceeding, making the COMI determination, and all the critical factual determinations that encompass the COMI determination and jurisdiction, be subject to notice to the other administrators in pending proceedings in other countries, as well as creditors and other parties in interest. The suggestion that this critical hearing not be rushed though without anybody knowing about it, but rather, that it be set for a prompt hearing, makes sense.

The Eurofoods Decision

Shortly after publication of Judge Bufford's article, the European Court of Justice proposed a similar solution, only reaching into its own judicial tradition and rather than using the term “due process”, calling it “equality of arms”. The Court did not suggest a revision to the Regulation, which is beyond its scope as a Court, but it did send a clear message, a message that goes to the very heart of the Regulation. Simply put and as discussed in detail below, the Court held that absent compliance with procedural due process rules which are implicit in the Regulation, the key provisions of the Regulation do not apply. As we shall see in the text of the decision, the Court's directive is clear.

Eurofoods is most often cited for its analysis of the COMI issue. But it is not until we get to the fifth and final of the preliminary questions raised in that case that we get to the question which is the focus of this paper.

1. The fifth question

Paragraph 60 of the opinion provides: “By its fifth question, the referring court essentially asks whether a Member State is required, under Article 17 of the Regulation, to recognise insolvency proceedings opened in another Member State where the decision opening those proceedings was handed down in disregard of procedural rules guaranteed in the first Member State by the requirements of its public policy.”[30]

[30] Article 17 provides that the opening of proceedings “shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings..” As quoted by the ECJ, “Article 26 provides that a Member State may refuse to recognize insolvency proceedings opened in another Member State where the effects of such recognition would be

The actual text of the fifth question as quoted in the AG opinion is more detailed and provides as follows:

> *5) 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?*

The Court then reasons as follows: First, it refers to the Krombach case [Case C-7/98 2000], in which the Court held that Article 27 of the Brussels Convention, which allows recourse to the public policy exception to the free movement of judgments, is to be used only in "exceptional cases", and one such case would be when enforcement of the judgment would infringe on a fundamental principle which would breach a rule of law essential to the legal order of a state. In applying that standard to Article 26, to thereby allow one member state to refuse to recognize insolvency proceedings opened in another state, the Court in par. 65 first refers to "the general principle of Community law that everyone is entitled to a fair legal process", which is itself inspired by "the fundamental rights which form an integral part of the general principles of Community law which the Court of Justice enforces, drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights and Fundamental Freedoms ..." In par. 65, therefore, the Court reiterates that due process rights form part of the general principles of Community law, which are superior to secondary law, including, specifically, the Insolvency Regulation itself.

Par. 66 of the opinion is a key paragraph in that it further develops the right to fair legal process of par. 65 and describes further more specific rights:

- The right to be notified of procedural documents;
- The right to be heard;
- "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." Further, any restriction on the right to be heard "must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency."

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manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual." Eurofoods, par. 61

Based on these rights, the Court concludes in paragraph 67, that, based on Article 26, a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."

The impact of the rights enumerated in these paragraphs of the Eurofoods opinion cannot be overstated. It is nothing less than a "Bill of Rights" in the insolvency context. A failure to comply negates the fundamental mechanism of the Regulation, i.e. the mandatory recognition of the effect of the opening of insolvency proceedings. The statement of these rights, however, goes beyond merely negating the effect of the Regulation, for it establishes rights that are not limited to recognition of proceedings, but which must be observed in all aspects of insolvency regulation. This is evident in the way the ECJ presents its analysis, first establishing these fundamental rights in the insolvency context in general, and only then applying them to the specific question of recognition.

2. The AG Opinion

The AG opinion is consistent with the foregoing conclusion that these are generally applicable fundamental rights based on general principles of Union law which are then applied to the specific question. The AG opinion then further explains these rights. In paragraph 143 of the AG opinion, he cites the "essential procedural guarantees" of "opportunity to be heard", and "rights of participation in the proceedings":

"Public policy does not involve a general control of the correctness of the procedure followed in another Contracting State, but rather of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings. Creditors whose participation is hindered are expressly mentioned." [citing the Virgos-Schmit Report]

In par. 145 of the opinion, the AG again refers to the rights of "due process", "right to be heard" and "rights of participation in the proceedings": "The public policy referred to in Article 26 of the Regulation thus in my view clearly does encompass failures to observe due process where essential procedural guarantees such as the right to be heard and the rights of participation in the proceedings have not been adequately protected."

3. Equality of Arms

Paragraph 66 of the ECJ opinion refers to equality of arms: "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." Interestingly, however, the AG opinion doesn't use "equality of arms" to explain the right to participate. What does equality of arms mean and why was this chosen as the language to describe the specific right of creditors to participate in insolvency proceedings? What does this add to the explicit statement of rights already articulated in the ECJ and AG opinions?

In an insightful and in depth analysis in his 2007 article,[31] Judge Bufford ties the equality of arms principle to the right to a fair trial under Article 6 of the European Charter of Human Rights, and specifically in the insolvency context, that the "the principle requires that each party in interest in an insolvency case be given a full and fair opportunity to present both the fact 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 the opponent." [p. 398-9]

On a practical level and more specifically, in the context of the opening of an insolvency procedure, it requires, first, that reasonable advance notice be given of the initial opening matters to the major unsecured creditors, affected secured creditors and supervisory governmental authorities. Second, equality of arms requires that any orders issued at such initial hearing must be temporary and limited to what the debtor needs to operate or preserve the estate in the first few weeks of the case. Judge Bufford points out that these rights under the principle of equality of arms were denied in the Eurofoods case because simply, the Italian liquidator would not provide copies of relevant court documents for an upcoming hearing to the Irish liquidator, and the Irish liquidator was not given a reasonable amount of time to submit documents to the Italian court.

4. Conclusion- the Regulation is self-defeating because it fails to incorporate the procedural rules necessary for its own operation

Whether the term equality of arms is used, as in the ECJ opinion, or the term due process, as in the AG opinion, the fundamental principles and direction from the ECJ is clear. The Regulation does not and cannot function without adherence to the rights outlined, including the right to advance notice, the right to be heard, the right to participate in the proceedings, the right to receive documents in advance, with such rights being granted to all affected parties to the insolvency. It is essentially an insolvency bill of rights, consistent with general principles of Union law, and superior to all secondary law.

When these rights are violated, the ECJ has ruled that the fundamental provision of the Regulation, the mandatory recognition of the opening of an insolvency proceeding by a Member State, becomes nullified. Thus, the Regulation is essentially self-defeating because it fails to incorporate the procedural rules necessary for its own operation. This is a clear statement and directive from the ECJ, a clear message that procedural rules and due process mechanisms must be provided at the Union level to fix the Regulation. That is what this paper proposes in the following sections, specifically, a minimal set of procedural rules consistent with the structure suggested by Spencer, along with a proposal for the modification and implementation of the already existing interconnected insolvency database.

[31] 27 Northwestern Journal of International Law and Business 351, Winter 2007, The Honorable Samuel L. Bufford, Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice

4 The Existing Notice Provisions of the Regulation

Before proposing specific measures to comply with the direction from the ECJ, it is instructive to review the rules that are already in the Regulation and their adequacy in light of the due process rights enumerated in Eurofoods. An analysis demonstrates that the Regulation directs three distinct levels of notice and information sharing: (1) specifically identified information which must be provided; (2) non specified, generally described information which must be provided; (3) other information which may optionally be provided.

Surprisingly, the only information which is specifically identified and which is required to be provided relates to the notice of opening of the proceedings. Article 40 requires that notice of opening of proceedings must be given to creditors in other Member States:

> *Article 40- Duty to inform creditors*
>
> *1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.*
>
> *2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.*

Presumably, notice to domestic creditors is covered under national law. The Regulation does not require that notice to domestic creditors comply with any minimum standards. Par. 1 requires notice of opening of the proceedings be provided to creditors in other Member States. . This does not allow creditors to participate in the hearing regarding the determination of COMI or any other proceedings which occur in the first couple of weeks of the case. As discussed above, the determination of COMI is subject to various legal criteria and evidentiary showing. Further, it is outcome determinative, establishing the applicable law, and is not subject to later review. Prior notice and opportunity to be heard in these matters is critical, and under the Eurofood standards, failure to provide notice and opportunity of creditors and parties to participate would allow a court in another member state to refuse to recognize the proceedings.

The notice procedure set forth in paragraph 1 omits the details necessary for providing notice. Practically, how is the court or liquidator supposed to immediately provide notice to all creditors with registered offices, domiciles or residences in other states? Is the insolvent company required to maintain and immediately provide a list of foreign creditors? Does each national law require that such a list be in a format that can easily be used by a court or liquidator to send out thousands of notices? What if the books and records of the company are not complete and up to date, which is more common than not for distressed businesses? If the court or liquidator simply uses the accounts payable ledger of the company, it will likely exclude non-trade creditors such as a landlord, equipment lessor, secured creditor, or disputed creditors. Does the court have the necessary administrative capability to sort through these issues in order to provide "immediate" notice? In short, the mandatory notice requirement of Regulation, in the absence of sufficient procedural rules, is illusory.

Par. 2 refers to notice of time limits and procedures regarding the filing of claims. In that regard, it is similarly inadequate. Further, the Regulation does not include the requirement to provide notice to creditors of specific procedural matters in the administration of the case that may affect them directly, such as requests for approval of the disposition of assets, settlement of controversies, or other significant matters in the case.

A second category of mandatory notice relates to information which the Regulation requires to be provided, but which is described only in general terms. Recital 20 requires that liquidators share current information in order to coordinate concurrent proceedings:

"Recital (20) - Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information."

Similarly, Article 31 contains a mandatory requirement for liquidators in main and secondary proceedings to "communicate information" to each other which "may be relevant". It further requires that a liquidator in secondary proceedings give the liquidator in the main proceedings "an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings."

First, these two provisions require sharing of information only between liquidators, and not with the court, creditors or other interested parties. One commentator has pointed out that Article 31 does not require courts to cooperate with each other, only liquidators, and that a general duty of courts to cooperate cannot be deduced from community law.[32]

These two provisions of the Regulation require that the proceedings be coordinated between liquidators, not that notice sufficient for meaningful participation by parties needs to be provided. Even as a coordination mechanism, however, the provisions fail miserably. They are unacceptably vague, requiring the sharing of "a sufficient amount of information". It might be assumed that the vagueness is because the drafters expected that the details be dealt with under applicable national law, however it is unreasonable to expect that a cross border insolvency information sharing protocol between liquidators would be covered in any national insolvency law. Alternatively, the drafters may have expected that liquidators would be mutually reasonable and cooperative. The case law has proved otherwise.

[32] Heinz Vallender, Judicial cooperation within the EC Insolvency Regulation. Available at http://www.justiz.nrw.de/WebPortal_en/projects/ieei/documents/public_papers/judicial_cooperation.pdf

Although the duty to communicate relevant information specified in Article 31 is mandatory, the vagueness of the requirement effectively renders it optional. The Eurofoods case is an example of how likely information sharing is to occur in the real world. Aside from the political or other reasons why liquidators may not be inclined to share information, even if the inclination was present, from a practical standpoint, a tremendous amount of ongoing real time information exchange and coordination is required in order to coordinate two or more concurrent insolvency proceedings involving the same assets, claims and creditors. The provision needs an explicit list of documents that must be provided.

As for providing information necessary for parties in interest, including the other liquidators and creditors, this provision fails under the standards of the ECJ. The March 2011 follow-up study to the Harmonization Report identifies 13 different classes of stakeholders in an insolvency case.[33] All stakeholders need notice. Notice provisions need to be explicit, based on explicit procedural rules. The Regulation should provide that the information provided to the Court and the other liquidator, and which should be available to all such stakeholders, should include but not be limited to the following: a copy of all filings in the case, including advance notice of all court hearings; copies of motions and requests to the court; any court rulings; notice of meetings of creditors; notice of sale or other disposition of property; notice of proposed settlement of litigation or disputes; and notices of requests for compensation from insolvency professionals paid from the assets of the debtor. Additionally, the court, the other liquidators, governmental regulatory agencies, and major creditors and any creditors committee should receive additional information beyond that given to general unsecured creditors, including regular financial reports, a monthly statement of assets and liabilities, a list of all expenditures and income during the relevant period, and the payment and/or accrual of administrative expenses and professional fees.

Liquidators, or debtors, or whomever is operating or liquidating the business, need to be given clear direction about providing information necessary for the meaningful participation by other parties in the proceeding. It is not a matter for national law because it involves concurrent proceedings in two or more member states. The Regulation requires a clear statement of what information needs to be provided, when and by whom.

In summary, the Regulation itself acknowledges that this unique system, where universalism and territoriality co-exist, can work “only if” information is shared:

> *20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information.*

[33] Harmonisation of insolvency at EU level: avoidance actions and rules on contracts, March 2011, p. 5. Available at http://www.europarl.europa.eu/activities/committees/studies/download.do?language=es&file=35211

Yet, the Regulation does not implement that sharing of information. Sections V and VI below present a mechanism for accomplishing this objective, primarily through a unified EU insolvency register. .

4.1 Notice and logistical issues in distribution of proceeds in concurrent proceedings

The above discussion about providing information for coordination between liquidators and providing basic information to creditors and other parties is the simple part. The real hard part is what happens when liquidators, courts or insolvency administrators have to figure out how to actually pay the creditors. Recital 21 provides in pertinent part that: "the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims."

Article 32, par. 2, requires that "liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed."

A creditor is entitled to file a claim in both the main and territorial proceedings. The recital requires that the distribution of proceeds be coordinated in order to insure the creditors of equal priority receive the same percentage distribution. The only direction provided by the Regulation is that the "distribution of proceeds must be coordinated."

Since this is a cross border insolvency issue, there is no national law that provides the procedural rules for this process. This however is a huge logistical undertaking requiring the sharing of large amounts of information between concurrent insolvency proceedings in two or more different member states. This requires that the liquidator or administrator or court, depending on which party administers payments to creditors under the law of the member state, must provide a complete list of all claims filed, with name of the creditor including the names of related entities which also may have filed claims for the same debt, with the analysis of the validity of the claim, the percentage payout received, an analysis of the priority of the claim, and a reconciliation of each claim in each proceeding.

Further, creditors often file multiple and/or duplicative claims, or claims may already have been filed by a related entity for the same debt.. Therefore, a copy of the claim and attached backup information needs to be provided and needs to be reviewed and compared and reconciled with the other claims. Moreover, in the event of two or more concurrent cases, two of more sets of national laws must be applied to the same claim for the same company in the different cases, with potentially two or more different judicial determinations as to the validity of the claims. Finally, all of the claims resolution proceedings would have to be noticed to the related parties in the other pending cases.

Once the claims themselves are reconciled, the payments need to be equalized among the various concurrent proceedings to ensure that a creditor who files in one proceeding is not paid less than a creditor who files in two or more proceedings. In addition, during this process, all relevant documents need to be provided to the creditor whose claim is being reconciled and equalized. Again, it is a logistical and procedural nightmare and the Regulation does not provide any guidance or procedure, nor is it available under national law.

A third category of information is that which the Regulation recommends be shared, but does not make such sharing mandatory. Per Article 21, the publication of notice of the judgment opening insolvency proceedings, whether a main proceeding, or secondary proceedings, is optional under the Regulation: "The liquidator *may* request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State." (emphasis added) "However, any Member State within the territory of which the debtor has an establishment may require mandatory publication." Recital 29 provides that notice of the opening of proceedings "should" be published.

Article 40, discussed above, imposes the mandatory requirement that the liquidator provide individual notice to known creditors in other member states. Presumably, national law requires notice to domestic creditors. With actual notice of the opening of the proceedings being provided to all known creditors, it must be assumed that the purpose of this optional publication requirement is to provide notice to unknown creditors, such as those that may not have been listed in the records of the debtor as creditors. This may occur for any number of reasons, for example, the debtor's accounting is not current, or there may be a dispute as to the balance, or the claim itself is disputed by the debtor, or the claim arises from a tort claim. The concern regarding unknown creditors is well placed, however the mechanism to provide notice is outdated and incomplete.

First, as mentioned above, the use of a debtor's accounts receivable ledger as a list of creditors will omit a large number of creditor claims such as non vendor type claims, lease claims or disputed contingent or unliquidated claims. These types of claims should be required to be disclosed in the initial filing papers opening the case as part of a set of minimum procedural harmonization rules. This would reduce the number of claims which otherwise would be omitted from the list of creditors used to provide notice.[34]

Second, assuming that there are unknown claims that have not been listed, the use of publication notice is outdated and ineffective and neither reflects the currently available technology for providing information nor provides adequate notice and opportunity to be heard under the Eurofoods standard. Rather, this is one of the circumstances where an efficient and accessible insolvency register is needed in order to post critical and timely information about the proceedings. This will be discussed in the following section.

[34] A list of minimum procedural harmonization rules consistent with the Spencer model and the bill of insolvency rights set forth by the ECJ is the subject of a future study by the author.

5 The Insolvency Database

When one considers the Regulation in actual use, the practical complexities can be overwhelming. The exercise of universal jurisdiction in the case of an operating business or even liquidation is not a simple matter. It requires immediate freezing of lawsuits or other attempts by creditors to collect pre-filing debts and enforcement procedures to prevent such attempts. All these require universal real time notice to courts, creditors and numerous other parties. When a main proceeding with universal jurisdiction is then modified by subsequent secondary proceedings which create a carve-out from universality, the ensuing complexities require further immediate notice to additional parties in several countries.

How is this combination of universal and territorial jurisdiction supposed to work without full and immediate notice? And how are parties able to exercise their right to create an exception to universal jurisdiction if they don't have immediate access to the information necessary to make the determination of whether to file a secondary proceeding? For example, in the recent Probud case, a German creditor seeking to recover an asset located in Germany but subject to a main Polish insolvency proceedings failed to file a secondary case which would have preserved the asset in Germany for the German creditors.[35]

These and other logistical complexities demand adequate real time information flow. The Regulation, however, was conceived and implemented before the technological tools needed to effectuate its operation existed. Nor were there provisions for notice in the Regulation sufficient to meet the fundamental standards articulated by the ECJ. The technological issues, procedural issues and substantive issues of the Regulation are inextricably intertwined and mutually dependent. Now is the time to reconsider them in light of current realities.

5.1 The calls for an insolvency database

The calls for an effective centralized EU insolvency database have been many. Monti mentions the insolvency regulation as part of the section titled "Facilitating the solution of cross-border of (sic) commercial and civil law disputes" [36]:

"In the context of the current crisis, the possibility of reviewing the regulation on cross-border insolvency should be examined. More efficient and faster insolvency proceedings - notably when cross-border groups of companies are involved - would be in the interest of both debtors and creditors. Enhancing administrative cooperation through the support of the E-justice portal could also bring practical benefits in the short term."

Further, the Harmonization Report notes the "need for an EU database of court orders and judgments" and also notes that "cost effective administration is hindered by the absence of an EU database containing relevant court orders and judgments."

[35] MG Probud Gdynia, C-444/07 2010.

[36] A New Strategy For The Single Market At The Service Of Europe's Economy And Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010, page 40; http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf

Nora Wouters, one of the authors of the Harmonization Report, in the Insolvency Harmonization Workshop held at the Parliament on March 22, 2011, reiterated the need of central database containing all insolvency judgments so that creditors would know where and when to file claims.

The Council supports the creation and use of an interconnected insolvency register and expounds on some potential uses:

The use of new technologies has proved indispensable for modern life and in the field of Justice it can benefit the economy in many ways. Therefore, the Council:

> *(b) indicates that one possible use of these new technologies would be to interconnect business registers and/or insolvency registers which exist in the Member States so as to ensure easy access to the data contained therein. This could help, for instance, potential buyers of an insolvent company, thus permitting the acquiring company to expand its market and enabling the company being purchased to avoid bankruptcy and save the jobs of its employees. In the process of interconnection, data protection rules should be respected.*[37]

To date however, there have been no comprehensive statements of what information an insolvency database requires, how it needs to be designed for effective use, or how it could be used to satisfy the due process requirements articulated by the ECJ. Yet the database is the single most important and critical tool for providing information necessary for the exercise of basic due process rights to courts, creditors and other parties. An insolvency database may sound like a mere technical exercise, but it goes to the very fundamental issues of due process, right to notice, right to information, and the right to participate in insolvency proceedings as addressed in the Eurofoods decision.

5.2 What insolvency databases are operational at this time?

1. Insolvency registers via the e justice portal[38]

The interconnection of existing national insolvency registers is part of the overall E-Justice Action Plan adopted by the Council in 2009.[39] The system provides for the interconnection of criminal records, land records, insolvency registers, company

[37] Draft Council Conclusions on Economic Crisis Prevention and Support for Economic Activity, March 29, 2010, document no. 7881/10;
http://register.consilium.europa.eu/pdf/en/10/st07/st07881.en10.pdf
See also Green Paper on: The interconnection of business registers 15801/09, 4.11.2009; highlighting the need for information access for the operation of the single market in the cross border context;
http://register.consilium.europa.eu/pdf/en/09/st15/st15801.en09.pdf

[38] Information about the current state of the process of interconnection of insolvency databases is from publicly available information on the internet. The author thanks Margaret Tuite, Deputy Head of Unit, Criminal Law, European Commission, Directorate-General for Justice; and Marc van Opijnen, Senior Adviser Legal Informatics, Department for Internet Applications of the Dutch Council for the Judiciary, Utrecht, for taking the time to explain how the systems operate.

[39] Multi-Annual European E-Justice Action Plan 2009-2013
(2009/C 75/01)Official Journal of the European Union C 75/1 dated 31.1.2009

registers and other electronic records. Access to the E Justice System is through the E-Justice Portal.[40] The portal is a work in progress.[41]

The interconnected insolvency register is not a comprehensive or complete database, but a series of separate national registers. Each national register is maintained solely by each member state. Via the Portal, a user will be able to utilize a single search page to search all the registers and provide translated results. The project however does not contemplate any standardization of the separate national databases, nor does it require any minimum standard of information. Further, it does not mandate member states to maintain a register at all. The project is still in the formative stage and is not expected to "go live" for some time.

2. The current national insolvency registers in practice

Separate insolvency register information is currently available through an E-justice search page which in turn provides a link to the insolvency register information for each of the participating member states.[42] Clinking on the links, however, produces varying results and indicates that many states do not have working insolvency registers. Clicking on each state on the site leads to the following results:

- **Belgium**: no insolvency register
- **Bulgaria**: no insolvency register, but list of trustees and sales and auctions is available
- **Czech Republic**: searchable insolvency register, in Czech language only
- **Denmark**: no insolvency register
- **Estonia**: Commercial register includes list of bankruptcies, in Estonian only; additionally, official electronic publication Ametlikud Teadaanded has searchable list of bankruptcies in Estonian
- **Ireland**: non-electronic insolvency register in Dublin available for in person searches only
- **Greece**: Greece has no website for insolvency registers. "We are in the process of designing the digitisation of our databases and their electronic interface."

[40] "The European e-Justice Portal, which was launched in July 2010, makes it easier to find information about legal issues and to work on legal matters. The launch of the portal is a first step towards a well-developed, multilingual portal that will make things easier for individual citizens, businesses and legal practitioners in the EU." http://www.sweden.gov.se/sb/d/2710/a/151335

[41] See for example, Memo on the status of implementation of the European e-Justice action plan, which provides that, "With reference to the interconnection of insolvency registers, it provides, inter alia, for the continuing integration of data from the insolvency registers of Member States, the creation of a multi-lingual user interface and glossary of terms." 9714/1/10 REV 1, Brussels, 21 May 2010; available at http://register.consilium.europa.eu/pdf/en/10/st09/st09714-re01.en10.pdf
See also memo from The Informal Group on Interconnection of Insolvency Registers to: Working Group on e-Law (e-Justice), Report on Insolvency Registers Brussels, 23 July 2010; 11487/10. This memo deals with the status of the technical aspects of the interconnection process.

[42] https://e-justice.europa.eu/contentPresentation.do?lang=en&idTaxonomy=110&idCountry=EU&vmac=L5GUTY_fcRJzjYetP_mx9VxsHw82eaE2Eg0pUSLi-VlKpYi32QJdQ_RbagESKM5ajn0ylN_9fP7k45eNksn25AAADmgAAALi

- **Spain**: "In Spain, the Registro Público Concursal (Public Insolvency Register) was created by Royal Decree Law No 3/2009 and will replace the current Registro Público de Resoluciones Concursales (Public Register of Insolvency Rulings). The Public Insolvency Register will publish the rulings in insolvency proceedings. It will be an administrative, public and free register and will be operational in 2010."
- **France**: no insolvency register.
- **Italy**: "The Italian Ministry of Justice is setting up a new electronic system to manage data related to insolvencies."
- **Cyprus**: no online insolvency register.
- **Latvia**: on line searchable insolvency register in Latvian.
- **Lithuania**: no separate insolvency register, but "You can check the status of companies in this respect on the website of the Register of Legal entities."
- **Luxembourg**: no insolvency register.
- **Hungary**: online information about in solvency proceedings in the Business Register and Company Gazette in Hungarian.
- **Malta**: no insolvency register.
- **Netherlands**: online searchable Central Insolvency Register in Dutch.
- **Austria**: online searchable insolvency register in German.
- **Poland**: online insolvency register, link broken (last searched on Feb. 24, 2011).
- **Portugal**: online insolvency register in Portuguese.
- **Romania**: "the Insolvency Proceedings Bulletin (IPB) published by the National Trade Register Office registers summons, communications, convening notices, notifications of procedural documents issued by courts and by judicial administrators/liquidators performed in the frame of insolvency proceedings in accordance with Law no. 85/2006 on insolvency proceedings." The site highly detailed English instructions and, along with the Slovenian register, is the most developed of all the countries. However, after the informational page, the website is in Romanian.
- **Slovenia**: This register has a very detained on line searchable insolvency database with a detailed English description, but after the informational page, the website is in Slovenian. It contains very detailed and useful information including all court insolvency orders, notices of initiation of insolvency proceedings, notice of hearings, all minutes of hearings and meetings of creditors' committees, administrator's reports, lists of claims, and notices of auctions and other disposition of assets.
- **Slovakia**: "The Slovak insolvency register contains information on bankruptcy decrees and is owned and maintained by the Ministry of Justice of Slovakia. However, the data contained on the register has not been made public as the register currently remains at a pilot stage."
- **Finland**: requests for insolvency information must be made to the Finnish Legal Register Center and are charged 10 euro per abstract.

- **Sweden**: "Information contained in The Insolvency Register of Sweden is available free of charge by contacting the Swedish Companies Registration Office by phone. Requests for written information from the Register incur a fee in most cases."
- **United Kingdom**: separate searchable online insolvency registers for Scotland, Northern Ireland, and England and Wales.

Despite the fact that some member states have operating online searchable insolvency databases, the current system is wholly inadequate. The language problem is an immediate barrier, but this is just one of the many problems, which include lack of information, no standardization of basic information, or, in some cases, the absence of a national requirement to register the opening of an insolvency proceeding.. Significantly, none of the national registers disclose the existence of a related main or secondary proceeding, which is the key item of information needed for the effective operation of the Regulation. This is a major flaw in the interconnection program.

Nevertheless, the technology exists for an effective and accessible system, and other databases have been up and running for as long as a decade or more. These include advanced insolvency databases in certain Member States[43] and the United States[44], in addition to other EU databases such as the interconnected database used for VAT and the European Pollutant Release and Transfer Register.[45]

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[43] Norway has an advanced real time and accessible insolvency database. Since March 2008, Norway's "Electronic Bankruptcy Estate Management" system has provided a detailed and comprehensive system which includes the following features: each estate is given its own website; the website allows for an electronic dialogue between the bankruptcy administrator and other parties, including creditors; information on the website is updated on a current basis as the bankruptcy case proceeds; and information is provided by and coordinated between various public agencies.

[44] PACER (Public Access to Court Electronic Records) is a service which allows the public access to court records via the internet, including access to bankruptcy case and docket information, including copies of all documents filed by all parties in federal courts, which include the bankruptcy courts. Originally, all documents were digitized at a local court level, however, now many are electronically filed and so no digitization is required. All documents filed by all parties are available for viewing and downloading with minimal cost (8 cents a page).

Since the U.S. bankruptcy system is federal, there is one substantive and procedural statute for all bankruptcy courts in all states, although there are minor procedural variations between courts, i.e. local rules. The information required to file a bankruptcy case is standardized, hence, complete case and financial information is available. Pacer has been operational for over a decade and is operated by the Administrative Office of the United States Courts, a federal agency.

The big question is if such a system or similar system is viable for the EU. Its primary characteristic is that it covers all federal courts, including bankruptcy. Although bankruptcy law in the United States is based on a single federal law throughout all fifty states, having a single insolvency law is not a prerequisite for such a system. Nor is it crucial at this point to have a complete set of all case documents available on line; rather, simply making certain basic information available is the first step, for example, the name and address of the insolvent company, the court where the proceeding was filed, the date of upcoming court hearings, and the name and contact information of the liquidator or attorney.

Further, it is not necessary to have a central infrastructure for PACER to operate. Even though PACER is centrally administered by a federal agency, according to the website, "Each court maintains its own databases with case information. Because PACER database systems are maintained within each court, each jurisdiction will have a different URL. Each court service is comparable to the others; however, the format and content of the information may differ slightly."

[45] The commission currently operates several databases in connection with customs and taxation. These databases include SEED, the system for exchange of Excise Data, EXPORT, the system for

5.3 Moving forward step by step based on existing technology and due process requirements- A proposal for a three part due process package

Minimal procedural harmonization-The Spencer Model applied

As discussed above, the model proposed by Spencer is an overlay of basic procedural minimum standards along with a very low level of harmonization, not of the substantive national laws, but of procedural rules. In the cross border context, this becomes essential because, as discussed above, numerous procedural issues arise which are not addressed in national law. Spencer calls this "pragmatic harmonization" [page 47], i.e., the need for a uniform rule, regardless of whether one national rule is better than another, because of the pragmatic requirements of cross border transactions. His proposal was made in the criminal law context, specifically cross border crime, but it is equally relevant to insolvency proceedings.

Spencer does not propose, however, to harmonize substantive law or even procedural rules, but instead "to superimpose on the national penal laws of the Member States a new single body of European rules, which would operate alongside the national ones." In the criminal context, this proposal was made as the Corpus Juris project, which had three parts: first, to focus on and identify types of transnational financial fraud involving the EU budget, second, to create a uniform set of procedural rules which apply alongside national rules in certain cases only, and third to create a transnational agency, the European Public Prosecutor, to be in charge of investigation and prosecution. [pages 50-51]

This Corpus Juris model is relevant and instructive to the insolvency area. First, both areas concern trans-national issues. Second, both areas require an overlay of common procedural rules. In the context of the Insolvency Regulation, these rules are needed in order to implement the Regulation and to fill in the obvious procedural gaps. Third, and as described below, an oversight agency at the EU level is critical as part of an overall package.

Step 1: Guidelines for information to be included in the database

The above analysis shows that the technology is available and the basic infrastructure has already been set up at the EU institutional level. There is a

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tracking of export goods, and VIES, the VAT Information Exchange System. The VIES system is a particularly relevant model for the interconnected insolvency database. The VIES system allows for the public to verify VAT identification numbers, using a web page established and maintained by the Commission, allowing the user to search a national VAT database. The Commission does not maintain the database, but merely provides a search portal thru which the national databases are accessible through an intranet. Although this is a true interconnected database, it is different from the insolvency database because there is no issue of language and the data is easily standardized.

There are also several other interconnected databases in various stages of development at the EU level, including the European Business Register (EBR), the Business Register Interoperability Throughout Europe (BRITE) project and the Internal Market Information System (IMI). Among the most advanced of these databases is the European Pollutant Release and Transfer Register (E-PRTR) , a harmonized and accessible database containing localized environmental data about industrial facilities throughout Europe and which is maintained by the European Environment Agency.

sufficient technological foundation on which to move forward. There are however, no guidelines on which to base a coherent, useful and standardized database content.[46]

Standardized data guidelines must be tailored to requirements articulated by the ECJ in Eurofoods and to the actual need and usage of the database described above. They must then be communicated and coordinated with the technical aspects of the database. Moreover, the concurrent revision of the Regulation and the further development of the insolvency database not only need to be coordinated, but need to be conceptualized, managed and undertaken as a single endeavor. The status quo at the EU institutional level, in which the database and the Regulation are considered as separate undertakings, must be changed.

Once the database becomes an efficient and accessible provider of basic insolvency information, it should be expanded to provide additional information and features in order to assist in the orderly and transparent administration of cross border insolvency proceedings.[47] First, using the same technology commonly used on social websites, it should be expanded to allow interactive use, allowing attorneys and liquidators secured access in order to post current case information. For example, the posting of information related to the filing of a secondary or related case would avoid the Eurofoods scenario, in which liquidators in concurrent cases failed to share essential documents. Second, the database should add detailed claim information covering all stages of the claims filing and resolution process, including the claims form, instructions, applicable deadlines, a register of all filed claims and the status of the resolution process. Third, court documents and documents filed by all parties should be available on-line. This also becomes a possible method to make the project self funding by charging a small amount per page downloaded.

Step 2: Insolvency institutions and infrastructure: the Creditors' Committee and Office of the European Insolvency Administrator

The centralized EU insolvency register is the central part of a package, but it requires other structures and institutional support to work. Along with the minimum procedural rules and database mentioned above, a creditors' committee model and an oversight agency is needed for a comprehensive due process regimen to accompany and implement the Regulation.

1. The Creditors' Committee as a crucial due process mechanism in cross border cases

Creditors' committees are not a new concept. They appear in various systems in Europe and are an integral part of Chapter 11 reorganization process in the United States. They already exist in some form in various continental proceedings both in France and in the German preliminary creditors' committee (vorläufiger

[46] To the author's knowledge, there is no project to coordinate the existing database project with substantive insolvency issues. Plainly stated, nobody is telling the technical people what needs to go into the database.
[47] The information provided should meet the standards set articulated by the World Bank and UNCITRAL "Creditors Rights and Insolvency Standard" http://www.worldbank.org/ifa/FINAL-ICRStandard-March2009.pdf

Gläubigerausschuss).[48] Further, the World Bank and Uncitral recognize their value and encourage their use as a fundamental part of creditors' rights. [49]

A creditors' committee is a representative group of creditors formed in order to protect the interests of the creditor body as a whole. Acting both as a fiduciary for all creditors and as a creditor ombudsman, the committee participates in the proceedings through counsel, representing the common interests of all creditors, and insuring that due process rights are granted to all creditors, particularly those for whom it is neither practical nor economic to hire a lawyer. Typically, it is formed of a manageable group of seven to eleven creditors, i.e. representing various industries, geographical areas and types of claims.

In light of complexities of concurrent cases across national boundaries, there is an even more compelling reason to incorporate this procedure into a set of minimally harmonized procedural rules. Despite several national laws about creditors' committees, the process differs extensively because of differing national procedures and does not incorporate provisions tailored to creditor protection in cross border cases. A minimal procedural harmonization in this regard would be consistent with the developing practices in Member States and would serve as a key element in insuring adequate notice and due process under the Regulation. A single committee, representing creditors in all the concurrent proceedings would serve as a crucial coordination mechanism, insuring that the claims distribution process did not result in discriminatory treatment between creditors in different jurisdictions, providing a real possibility of equal participation by all creditors, and ensuring compliance with the unique due process requirements that arise in concurrent cross border proceedings.

2. A European Insolvency Oversight Agency as the coordinating and oversight body

Along with the centralized insolvency register and creditors' committee, the third component of a comprehensive due process package is a European Insolvency Oversight agency, operating at the EU institutional level. This agency would serve to monitor the insolvency process and ensure the integrity and efficiency of cross border insolvency proceedings and the operation of the Regulation. Specific functions would include:

1) Oversight of liquidators and debtors in cross border proceedings to ensure compliance with due process and notice requirements, as well as establishment of standardized professional qualifications for liquidators and administrators;

[48] Clifford Chance, 29 October 2010 client briefing, Consultation Paper on First Step of Insolvency Reform; Available at http://www.cliffordchance.com/publicationviews/publications/2010/10/consultation_paperonfirststepof insolvenc.html

[49] Creditor Rights And Insolvency Standard Revised 21 Dec 05, World Bank Revised Principles for Effective Creditor Rights and Insolvency Systems, UNCITRAL Legislative Guide on Insolvency Law Original documents as of 21 December 2005 , page 25.
Available at http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRStandard-March2009.pdf
See also UNCITRAL p. 197, containing well reasoned recommendations, albeit lacking specifics.

2) Coordination with courts, liquidators, debtors, attorneys and committees regarding use of the insolvency database and oversight and monitoring of data input from the various parties;

3) Administration of the committee formation process, i.e. appointing representative committees and arranging and supervising initial creditor meetings to ensure the integrity of the process and efficient operation of committees;

4) Coordination with technical database management personnel and Member States regarding content of the centralized database;

5) Interface with Member States insolvency administrative personnel;

6) Preparation of policy proposals and ongoing monitoring of the operation of the Regulation;

7) Ensuring coordination between various EU institutional parties working in the insolvency and E-justice areas in order to avoid ongoing fragmentation.

Conclusion

This goal of this paper has been to present the context, the issues, and a proposed solution of discrete aspects of the European Insolvency Regulation.

The context is dramatic. We are in the middle of the greatest financial crises since the Great Depression, in a Europe where the goal of the single market is paramount, and where the only legislation of cross-border insolvency consists of a short regulation that was negotiated starting in 1963 and which, because of its age, doesn’t deal with reorganizations, or multinationals or even one parent and its subsidiary together, but instead requires concurrent proceedings, multiple courts and the simultaneous application of widely varied and potentially conflicting laws.

Faced with that context, there is a consensus that the Regulation needs extensive revision and that the upcoming review in June 2012 is the time to do so. What revisions should be done is the subject of much discussion and not the main focus of this paper, but most commentators agree that the COMI rules need to be revised to prevent cases flowing to the UK. There is consensus as well regarding the need to provide for groups of companies as well as for the reorganization of companies, not just their liquidation.

This paper, however, has focused on needed revisions relating to due process rights, and specifically the rights of creditors and other interested parties to participate in insolvency proceedings in an informed and meaningful way. Significantly, the European Court of Justice has spoken clearly on this issue, pointing out that there is indeed a problem with due process in the Regulation, and that without due process, adequate notice and opportunity to be heard, the Regulation does not and cannot function.

Yet, we should not expect the ECJ to fix what is a legislative problem. The ECJ has provided the direction and the mandate; this paper is a response and provides a proposal to fix the legislative problem. That proposal consists of a three part due process package: (1) an accessible and efficient centralized EU insolvency register, (2) the formation of creditors' committees, and (3) the establishment of a European Insolvency Administrator.

The centralized register, as the cornerstone of the due process package, must respond to the requirements articulated by the ECJ. It cannot be overemphasized that this is an issue where technology and law go hand in hand. The technology and infrastructure already exist and are in place at the EU institutions. The next step must be to provide the content.

Finally, on the institutional level, this paper proposes that the concurrent revision of the Regulation and the development of the centralized register not only need to be coordinated, but need to be conceptualized, managed and undertaken, not as the separate efforts of diverse institutions, but as a single, unified endeavor.