Berkeley Journal of International Law

Volume 26 | Issue 1 Article 8

2008

From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action

Matteo M. Winkler

From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action

By
Matteo M. Winkler*

"EIGHT BILLION, 11 BILLION, 14 BILLION—IT'S ALL THE SAME."†

I.
INTRODUCTION

This Article explores a particular aspect of the biggest bankruptcy in history involving the Italian corporation Parmalat S.p.A. ("Parmalat"). This multi-

* Visiting Scholar, Uppsala Law School 2007; Ph.D. 2007, Commercial University Luigi Bocconi, Milan; LL.M. 2007, Yale Law School; Visiting Researcher 2005, Yale Law School; Attorney-at-Law, Milan. Email: *matteo.winkler@aya.yale.edu*. I am grateful to my parents, for their constant understanding and support, and my sister Giudy and our friend Ines, who bore my complaints about reading and writing this Article, notwithstanding the Alps' unusually warm sun in April 2007.

† Calisto Tanzi, patron of the Parmalat Group that collapsed in 2003, to Parmalat's CFO, as reported by Peter Gumbel, *How It All Went So Sour*, TIME INTERNATIONAL, Nov. 29, 2004.

national enterprise was involved in multibillion Euro transactions that included certain financial operations in Ireland, through a small subsidiary called Eurofood IFSC Ltd. ("Eurofood"). The transnational aspects of the *Eurofood* litigation and, more generally, the legal implications of multinational enterprises' default jurisdiction represent the objects of the present piece.

In commencing, it is useful to recall the history of Parmalat as well as provide a summary of the bankruptcy proceedings. In 1961, a 22-year-old student named Calisto Tanzi founded Parmalat and created a pasteurization plant, which was subsequently passed on to his sons. The plate bearing the original name, *Calisto Tanzi & Figli*, is still on the wall at the entrance to the company headquarters in Collecchio, near Parma. From its humble beginnings in pasteurization, the company soon expanded to the global production and trade of milk, the acquisition of TV channels and, finally, emerged into the industry of financial services. After two decades of aggressive acquisitions, especially in Latin America, Parmalat attained the status of a multinational giant in the world economy of milk, food and financial services. At the top of the group pyramid sat Coloniale S.p.A., the personal holding company owned by the Tanzi family, which held the majority of Parmalat Finanziaria S.p.A. ("Parmalat Finanziaria"), which in turn controlled the main operative entity, Parmalat. Parmalat's financial status in 2002 is described below:

> Parmalat's 2002 last quarterly report showed Euros 3.35 billion in cash and equivalents; Parmalat Group's assets amounted to Euros 10 billion and its liabilities Euros 7.17 billion. Amongst these liabilities was Euros 1.5 billion in bond debt, launched through 31 different issues.[1]

In 2003, the Parmalat CFO announced the issuance of bonds in the amount of 500 million Euros. Suddenly, newspapers and rating agencies began to publish suspicious statements about the Parmalat group's amount of debt, its complex structure, and its lack of disclosure. Calisto Tanzi, who did not like the idea of increasing the group's debts, replaced the financial board. The new CFO reassured the market that he would use the group's cash in order to pay its debts. Nevertheless, the summer newspapers began to rail against an alleged new bond that had suddenly been issued by Parmalat for an unknown amount. Journalists and analysts suspected that the group would not have exploited the cash for the purpose of paying debts. The CONSOB, the equivalent of the U.S. Securities Exchange Commission (SEC) in Italy, requested more information, but Parmalat's auditors declared that they could not be more precise about the existence of a mysterious "Epicurum Fund," in which Parmalat was said to have an interest.[2]

---

1. Guido A. Ferrarini & Paolo Giudici, *Financial Scandals and the Role of Private Enforcement: The* Parmalat *Case*, *in* AFTER ENRON: IMPROVING CORPORATE LAW AND MODERNISING SECURITIES REGULATION IN EUROPE AND THE US 159-213 (John Armour & Joseph A. McCahery eds., 2006), at 165.

2. Precisely, auditors "could not give a 'fairness opinion' of the true value of Parmalat's open ended mutual fund Epicurum, recorded as cash equivalent by Parmalat Finanziaria for a book value of Euros 497 million." Ferrarini & Giudici, *supra* note 1, at 167. On the problematic nature of the

By the end of Fall 2003, the controversy had escalated. On December 8, 2003, Parmalat announced that Epicurum was not able to liquidate Parmalat's interest and that, accordingly, Parmalat could not pay its debt on another bond. One day later, Calisto Tanzi publicly admitted that the group's financial statements were false.

As a result, several investigations were launched. The CONSOB demanded that Parmalat's auditors certify whether Eurolat, a Cayman Island-based subsidiary, held a significant bank account with the Bank of America ("BofA"). Evidence of this account's existence appeared in a document produced by Parmalat to confirm the group's solvency. The certified answer, rendered on December 19, was particularly astonishing: 3.95 billion Euros of the group's cash—which was presumably being held by BofA in the bank account of Bonlat, a company owned by Parmalat and incorporated in the Cayman Islands—did not exist and the aforementioned document had been falsified.[3] Subsequently, Parmalat's share price collapsed and, one by one, all of the group's companies fell bankrupt. The Italian government reacted by electing an extraordinary commissioner, Enrico Bondi, to oversee the group's restructuring.[4] It was "one of the largest and most brazen corporate financial frauds in history."[5]

Significantly, the SEC noted that "[i]n order to hide losses, Parmalat had used various wholly-owned entities."[6] Economic experts and scholars pointed to the role of these entities as one of the "various tactics [used by Parmalat] to understate its debt."[7] However, while the creditors' claims received much attention, scholars nevertheless ignored the potential litigation that the questionable

"true and fair view" of the corporate situation after the Parmalat scandal, see Andrea Melis, *Critical Issues on the Enforcement of the 'True and Fair View' Accounting Principle: Learning From Parmalat*, 2 CORP. OWNERSHIP & CONTROL 108 (2005).

3. According to Eric Sylvers, *A Parmalat Trial, But No Change to Law*, INT'L HERALD TRIBUNE, Sept. 29, 2005, "[t]he house of cards began to collapse in December 2003, when Bank of America revealed that a $4.8 billion account, worth about 3.9 billion at the time, that Parmalat claimed it had with the bank did not exist. Shortly afterward, Parmalat revealed that its net debt was more than 14 billion, eight times higher than it had previously stated."

4. On Dec. 23, 2003, the Italian government enacted a decree in order to subject Parmalat to insolvency proceedings. *See* Decree-Law no. 347, Dec. 23, 2003, (Gazz. Uff., Dec. 24, 2003, No. 298) ("Urgent measures for the industrial restructuring of large enterprises in insolvency" ["Misure urgenti per la ristrutturazione industriale di grandi imprese in stato di insolvenza"]).

5. Securities and Exchange Commission v. Parmalat Finanziaria S.p.A., Case No. 03 CV 10266, 2003 SEC LEXIS 3078 (SEC 2003), at *1; Securities and Exchange Commission v. Parmalat Finanziaria, 2004 SEC LEXIS 1631 (SEC 2004), at *1 (considering that Parmalat "engaged in one of the largest financial frauds in history and defrauded U.S. institutional investors when it sold them more than $ 1 billion in debt securities in a series of private placements between 1997 and 2002.").

6. In addition, "amongst [these wholly-owned entities] the most significant was Bonlat, the Cayman Island waste basket of the Group in its final five years, and the holder of the Bank of America's false account. Uncollectible receivables were transferred from the operating companies to these nominee entities, where their real value was hidden. Fictitious trades and financial transactions were organized to offset losses of operating subsidiaries and to inflate assets and incomes. Securitization schemes based on false trade receivables and duplicate invoices were recurrently used to finance the group." Ferrarini & Giudici, *supra* note 1, at 169.

7. SEC v. Parmalat Finanziaria, 2004 SEC LEXIS 1631, at *2.

use of these entities triggered from a transnational standpoint.

This Article addresses this issue through its focus on the *Eurofood* litigation.[8] First, it examines the dispute between the Italian and Irish courts over the regulatory domain of Eurofood, motivated by the interest in acquiring Eurofood's assets, and also as a matter of prestige in big bankruptcy adjudications (Part 2). Moreover, this adjudication process is not without significant transnational implications. A European regulatory framework, enacted in 2000, attempts to allot jurisdictional claims between the national courts. Since the *Eurofood* litigation occurred under this framework, it is useful to describe it in depth (Part 3). By itself, the allocation of jurisdiction in a supranational context impacts the global economy; thus the purposes of the European framework should be correctly respected in order to prevent market distortions. This concept directly applies to the *Eurofood* litigation (Part 4). Finally, this Article will provide some critiques about the application of the European framework to *Eurofood* (Part 5) and conclusions about the broader problem of transnational insolvency regulation (Part 6).

II.
THE EUROFOOD CONTROVERSY

As mentioned above, Parmalat's wholly owned entities played, and continue to play, an important role in the scandal. In fact, when Parmalat collapsed in December 2003, nearly all of its subsidiaries, now deprived of any centralized direction and financial support, collapsed as well—although some still owned money or facilities. On the one hand, these entities represented an essential piece of the efforts by the new commissioner in Collecchio to depict a limpid schema regarding the group's assets, in order to assess the new group structure and, eventually, repay creditors and investors. On the other hand, the entities that Parmalat had used to conceal its debts, before being liquidated, required a proper investigation in order to reveal any potential criminal or civil liabilities on the part of managers and directors.

Incorporated in 1997, Eurofood represents one of these entities, with Parmalat as its sole stockholder. On January 27, 2004, its largest creditor, BofA, filed a petition to the High Court of Dublin and was granted the election of a provisional liquidator and the initiation of a compulsory winding-up (liquidation) procedure.[9] Yet, on February 9, the Italian government appointed Mr. Bondi as the extraordinary commissioner of Eurofood and charged him with the task of restructuring of the company.[10] Ten days later, the Tribunal of Parma de-

---

8. *See* Matteo M. Winkler, *Le Procedure Concorsuali Relative ad Imprese Multinazionali: la Corte di Giustizia si Pronuncia sul Caso* Eurofood [The Insolvency Proceedings Concerning Multinational Enterprises: The Court of Justice Decides Eurofood], INT'L LIS, 2007, at 15.

9. On the Irish compulsory winding up procedure, see Arthur Cox, *Ireland*, *in* EUROPEAN CROSS BORDER INSOLVENCY (Jennifer Marshall ed., 2d ed., 2005), at 14-5.

10. Ministero delle Attività Produttive [Decree of the Ministry of the Production Activities],

clared Eurofood's insolvency.[11] BofA and the Irish liquidator challenged the government's preemptive action before the Regional Administrative Tribunal of Lazio. On July 16, 2004, the tribunal decided that, having been seized first, the Italian courts had jurisdiction over the insolvency proceedings involving Eurofood.[12] According to the administrative judges, the appointment of a provisional liquidator was insufficient to initiate a regular insolvency procedure in Ireland. The Irish courts disagreed. On March 23, 2004, the High Court of Dublin confirmed the decision to liquidate the company,[13] and on July 27, the Irish Supreme Court rejected the opinion of the Italian courts and appealed to the European Court of Justice (ECJ) for a preliminary ruling as to which country had jurisdiction over the Eurofood insolvency.[14] The ECJ delivered a verdict on *Eurofood* on May 2, 2006, which will be discussed in greater depth later in this Article.[15]

Before discussing the outcome of the case, it is useful to note that the status of Eurofood as a Parmalat subsidiary in Ireland is the cause of these parallel litigations. As the Tribunal of Parma pointed out, Eurofood's incorporation was intended to "ease the cash-flow inside the group,"[16] and therefore Eurofood was "simply a financial articulation [of Parmalat]."[17] Moreover, Eurofood did not have an operative headquarters in Dublin; its seat was located in a financial center and consisted of only a mailbox.[18] Additionally, all of Eurofood's obligations were guaranteed by Parmalat, and whatever profits resulted from the few operations it carried out were transferred to other companies controlled by Parmalat.[19] Finally, any decisions concerning Eurofood were made in Collecchio by its managers, who presumably also sat as managers of the parent company,[20] and

Admission of Eurofood IFSC Ltd. into the procedure of extraordinary administration pursuant to the Decree-Law no. 347, Dec. 23, 2003, (Feb. 9, 2004) (Gazz. Uff., Feb. 13, 2004, No. 36).

11. Trib. di Parma [Court of Parma], *In re* Eurofood IFSC Ltd., 20 Feb. 2004, *Foro It. I*, 1567.

12. TAR del Lazio [Regional Administrative Court of Lazio], 16 July 2004, n. 6998, *Foro It. III*, 615.

13. *In re* Eurofood IFSC Ltd., [2004] IESC 607 (H. Ct., 23rd, March, 2004) (Ir.), http://www.bailii.org/ie/cases/IEHC/2004/607.html.

14. *In re* Eurofood IFSC Ltd., [2005] 1 ILRM 161 (S.C.) (Ir.), http://www.bailii.org/ie/cases/IESC/2004/45.html.

15. Case C-341/04, Bondi v. Bank of Am. (Eurofood IFSC Ltd.), 2006 E.C.R. I-3813.

16. Trib. di Parma, *supra* note 11, at 1577.

17. *Id.* ("[Eurofood] può considerarsi semplice articolazione finanziaria [di Parmalat]").

18. Case C-341/04, *supra* note 15, ¶ 17.

19. In particular, "[t]he Company engaged in three large financial transactions which were described as the Brazilian, Venezuelan and Swap transactions respectively. These were as follows: a) on 29th September 1998 the Company issued notes by way of private placement in an aggregate amount of US$80,000,000 (to provide collateral for a loan by Bank of America to Venezuelan companies in the Parmalat group); b) on 29th September 1998 the Company issued notes by way of private placement in an aggregate amount of US$100,000,000 (to fund a loan by the Company to Brazilian companies in the Parmalat group); c) there was a "Swap" agreement with Bank of America dated 10th August 2001. The liabilities of the Company under the first two transactions were guaranteed by Parmalat." *In re* Eurofood IFSC Ltd., [2005] 1 ILRM 161, *supra* note 14.

20. *See* Trib. di Parma, *supra* note 11, at 1574.

the firm had no employees in Ireland.[21] If one cannot conclude from these facts that Eurofood was a "shell company," then certainly Eurofood's status as a company does not signify very much.

Eurofood was apparently only a means for realizing financial transactions in Ireland to serve the interest of the group, by taking advantage of some fiscal benefits granted by Irish law. One must wonder why the courts of different states, governments and a creditor like BofA were so interested in apportioning the assets of such an empty vessel. In the absence of significant information, it is hard to answer this question. Instead, one could only compare two different readings of this *haute finance* operation, and begin by noting that each country's courts strove to adjudicate the case for different reasons. While the Italian courts were concerned with Eurofood's restructuring, Irish creditors like BofA, turned to the question of liquidation. Which side ultimately prevailed was, in turn, a function of the complex European regulatory framework within which this case occurred.

III.
THE EUROPEAN REGULATION ON TRANSNATIONAL INSOLVENCY

A. The Problem of Transnational Insolvency

Determining the most competent court for the adjudication of a transnational insolvency case is an old problem. In this regard, scholars and practitioners posit four different theories. Under an approach called "universalism," only one judge would be called to rule on the bankruptcy of a debtor holding assets or doing business in different countries. Accordingly, a universal forum could competently adjudicate all claims on that debtor's assets.[22] A second, and very different approach, is called "territorialism." The territorial theory, indeed the most traditional and practiced one, recommends several different proceedings

---

21. *Id.* at 1578.

22. On this theory, see John Lowell, *Conflict of Laws as Applied to Assignments of Creditors*, 1 HARV. L. REV. 259, 264 (1888), according to which

> [i]t is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge.

Therefore, according to Jay Lawrence Westbrook, *Theory and Pragmatism In Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L. J. 457, 464-466 (1991), the adoption of a universalist approach "will invariably change the outcomes for some or all claimants" and that "[u]niversalism internationally would provide the same benefit of maximization of asset values for creditors and other parties across the range of cases." *See also* Lucian Bebchuck & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J. L. & ECON. 775 (1995); Andrew T. Guzman, *In Defense of Universalism in Cross-Border Insolvencies*, 98 MICH. L. REV. 2177 (2000).

among the various countries in which the debtor maintains its assets. Necessarily, there would be a number of courts involved, which would have the authority to adjudicate parallel bankrupcty proceedings, with jurisdiction limited in each case to the assets present in that particular country.[23] Under a third approach, called "modified universalism," the court principally responsible for the debtor's insolvency is assisted by foreign courts in "ancillary proceedings," whose jurisdiction does not extend beyond the debtor's establishment and the territorial boundaries of the respective countries.[24] Finally, a fourth approach, known as "cooperative territorialism," suggests strict cooperation between equal courts, without any priority-standing or ancillary link between their initial competence settings.

Although different in some senses, all four theories aim to balance the same interests: domestic adjudication of foreign assets, efficiency of the bankruptcy proceedings, and protection of local investors and markets. Yet universalism and territorialism alone, in their pure forms, fail to capture the complexities of transnational insolvency characterized by these interests. On the one hand, both universal and territorial approaches require a strong legal framework characterized by strict cooperation between courts. The hypothetical universal court, in fact, must be determined carefully at the international level, for its jurisdiction needs to be established under a treaty signed by all countries that might potentially host major bankruptcy cases. In addition, the aforementioned treaty should establish a system of priority among courts, such that once a bankruptcy proceeding is initiated, all other courts must refrain from initiating parallel proceedings on the same matter.[25] Such a treaty does not exist yet, due to the problem of isolating the relevant criteria for determining the competent court and establishing a deferential setting. Significantly, all attempts to foster such a setting have failed so far.[26] On the other hand, a territorialism regime does not require that

---

23. In practice,

> [g]enerally, the courts of each country administer the insolvent firm's assets located within its borders according to its own laws without any regard to the firm's assets located elsewhere. This approach to transnational bankruptcies has come to be known as the "territorial approach," or, more derisively, as the "grab rule."

Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 16 (1997).

24. On this "intermediate position," see Albéric Rolin, *Des conflits de lois en matière de faillite [Bankruptcy-related choice-of-law]*, 14 RECUEIL DES COURS 25, 382-386 (IV-1926).

25. For instance, for a long time Luxembourg courts have acknowledged automatic enforcement to foreign decisions concerning the opening of bankruptcy proceedings. In *Finoper*, the Luxembourg *Tribunal d'Arrondissement* rejected a petition for the enforcement of the decision rendered by the Tribunal of Rome and declared the bankruptcy of an Italian company. The Tribunal argued that an appropriate decision was not necessary, since the recognition and enforcement is automatic. *In re* Finoper S.p.A., Judgm. Comm. II no. 1190/04 (Nov. 12, 2004) (Lux.).

26. All the treaties proposed at the international level had been abandoned because of lack of ratifications. The first treaty, called the Model Treaty on Bankruptcy, had been negotiated at the Hague Conference in 1925. It provided for a universal jurisdiction of the courts of the state "in which the debtor has his principal industrial or commercial establishment [or] his domicile[, or] where the statutory registered seat is located provided that it be neither fraudulent nor fictitious."

the initiated proceedings be strongly coordinated. It calls, as a matter of fact, on a "grand international free-for-all, with each country claiming plenary power [. . .] and pay[s] no attention to to what other countries may say[. . .] and no attention to whatever foreign interests may be involved . . . ."[27]

The difficulties arising from the application of these theories are rooted in the current international trade system. First, states differ as to their bankruptcy procedures, especially with regard to the nature of the bankruptcy itself, the remedies available to debtors and creditors, and the priorities of creditors over the debtor's assets.[28] Second, the differences among the various legal regimes generate competition between courts, which makes the prospect of an international treaty very difficult.[29] Finally, the present legal framework, or lack thereof, undermines the ultimate aim of bankruptcy proceedings, which is to efficiently allocate the social costs of market failures among creditors, while granting them equal treatment.[30] Efficiency and equality may scarcely be possible under a jurisdictional system with multiple venues, little cooperation and

---

Model Treaty on Bankruptcy § 2, 1925, adopted by the 5th Conference on Private International Law, *reprinted in* 93 U. PENN. L. REV. 94 (1944). Another treaty, negotiated in the European area, attempted to establish a universal jurisdiction based on the "place where the debtor normally administers his main interests." *See* European Convention on Certain Aspects of Bankruptcy art. 4, June 6, 1990, Europ. T.S. No. 136; LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 183-205 (2005); Muir Hunter, *The Draft EEC Bankruptcy Convention: A Further Examination*, 25 INT'L & COMP. L. QUART. 310, 315 (1976).

27. *See* Donald T. Trautman, Jay Lawrence Westbrook & Emmanuel Gaillard, *Four Models for International Bankruptcy*, 41 AM. J. COMP. L. 573, 574-75 (1993).

28. Significantly, "a . . . crucial aspect of any bankruptcy law is determining the relative priority of claimants to the debtor's assets. Countries have a wide array of interests that they prefer." Rasmussen, *supra* note 23, at 13-14. Indeed, "[t]he reality is that each national insolvency regime has a system of priorities." Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT'L L. J. 27, 30 (1998).

29. Actually, "[d]rafting of a convention acceptable to all, or most countries of the world, if not impossible, is apparently a very difficult undertaking." Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PENN. L. REV. 58, 86 (1944).

30. From this standpoint, "[b]ankruptcy laws are intended . . . to give to all creditors of equal rank an equal share in the debtor's property." Lowell, *supra* note 22, at 259. Moreover,

> bankruptcy proceedings aim primarily to the protection of creditors' interests. They protect the latter against their own egoism and for this purpose, domestic legislations provide the constitution of a creditors' mass, governed by the law of equality; they also provide for the suspension of all individual claims against the debtor's assets. At the same time, bankruptcy proceedings protect creditors against debtor's attempts to detour his positive assets.
>
> [la faillite tend premièrement à la protection des intérêts des créanciers. Elle les protège contre leur propre égoïsme et dans ce but les législations prévoient la constitution de la masse des créanciers, régie par la loi de l'égalité; elles prévoient aussi la suspension des poursuites individuelles contre les biens du débiteur. La faillite protège également les créanciers contre les agissements du débiteur tendant à détourner son actif.]

J.A. Pastor Ridruejo, *La faillite en droit international privé [Bankruptcy in Private International Law]*, 133 RECUEIL DES COURS 135, 158-59 (II-1971). *See also* Paul Volken, *Harmonisation du droit international privé de la faillite [The Harmonization of Private International Law in Bankruptcy Matters]*, 230 RECUEIL DES COURS 343, 376-77 (V-1991).

great competition at the transnational level.[31] Accordingly, a more efficient international trade system demands that there be a far-reaching international framework of cooperation between courts. To date, an international framework covering key aspects of transnational insolvency exists only on a very limited basis.

B. A Focus on the European Regulation

The earliest example of international regulation addressing the issue of transnational insolvency can be found in the UNCITRAL Model Law ("Model Law"), elaborated and enacted in 1997.[32] While the Model Law has no direct impact on national provisions unless enforced through an appropriate legal channel, a more effective instrument exists at the European level. This is the EC Regulation 1346/2000 ("EC Regulation"),[33] the first regional legal framework

---

31. This conclusion applies to both universalism and territorialism. From the first theory's standpoint, universalism is more fair as to the global treatment of creditors. In fact, "[a] universalist system would be far more fair, and produce more equality of distribution among creditors. Because equality of distribution is a central principle of default management in every country, universalism would serve a global notion of fairness." *See* Westbrook, *supra* note 22, at 466. On the other hand, territorialism generally challenges creditors' equality. *See* Ridruejo, *supra* note 30, at 159 (under a territorial approach, "creditors' equality is seriously undermined" ["[l]'égalité des créanciers est ainsi sérieusement compromise."]); Trautman, Westbrook & Gaillard, *supra* note 27, at 575. However, the technical realization of universalism does depend on the individual states' procedural settings and tools, thus the intervention of the public powers are inevitably territorial. For this criticism, see Volken, *supra* note 30, at 381. Finally, territorialism tends to be exploited as means for enforcing the States' policies, and this explains why "territorialism is the dominant approach to transnational corporate bankruptcy as each country's universalist ambitions are halted at its own borders." Sefa M. Franken, *Three Principles of Transnational Corporate Bankruptcy Law: A Review*, 11 EUR. L. J. 232, 235 (2005). *Cf.* Horatia Muir Watt, *Aspects économique du droit international privé (Réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions) [Economic Aspects of Private International Law]*, 307 RECUEIL DES COURS 25, 165-72 (2004), and Bebchuck & Guzman, *supra* note 22, at 395.

32. UNCITRAL Model Law on Cross-Border Insolvency, May 30, 1997, 36 INT'L LEGAL MATERIALS 1386. As comments, see K. Anderson, *Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law Cross-Border Insolvency*, 23 AUSTRALIAN Y.B. INT'L L. 1 (2004); S. Isham, *UNCITRAL's Model Law on Cross-Border Insolvency: A Workable Protection for Transnational Investment at Law*, 26 BR. J. INT'L L. 1177 (2001); A.J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309 (1998); Jenny Clift, *The UNCITRAL Model Law on Cross-border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-border Insolvency*, 12 TUL. J. INT'L & COMP. L. 307, 309 (2004); C. Esplugues, *The UNCITRAL Model Law of 1997 on Cross Border Insolvency: An Approach*, DIRITTO DEL COMMERCIO INTERNAZIONALE 657 (1998); M.C. Gilreath, *Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad*, 16 BANKR. DEV. J. 399 (2000); R.J. Silverman, *Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency*, 6 ILSA JOURN. INT'L & COMP. L. 265 (2000).

33. Council Regulation 1346/2000, On Insolvency Proceedings, 2000 OJ (L160) 1 [hereinafter EC Regulation 1346]. On this regulation, see Roland Lechner, *Waking from the Jurisdictional Nightmare of Multinational Default: The European Council Regulation on Insolvency Proceedings*, 19 ARIZ. J. INT'L & COMP. L. 975, 985-1010 (2002), which is actually more a survey on the domestic

on issues related to jurisdiction and applicable law in transnational insolvencies. The EC Regulation aims to establish a legal basis for cooperation among EU member states in order to make "cross-border insolvency proceedings [. . .] operate efficiently and effectively."[34] It represents the culmination of a long process of negotiations involving the European countries and applies the modified universalism theory. Specifically, the EC Regulation establishes a proper statutory venue for bankruptcy proceedings in the internal market; creates a cooperative structure for recognizing the decisions of other member states' courts regarding the initiation of bankruptcy proceedings; sets up a hierarchy among competent courts; and finally, determines which law will be applicable to each of the issues faced by courts in the ongoing proceedings.[35]

Regarding the venue of bankruptcy, the crucial norm of the EC Regulation lies in article 3, providing that:

> [t]he 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.[36]

Thus, the adjudication process is linked to the concept of the "centre of a debtor's main interests" ("COMI"), a rule that appears in the Model Law as well.[37] Where the COMI lies, so lies the competent court.[38] The EC Regulation designates the proceedings opened by the COMI's court as the "main proceedings"; any other proceedings are named "secondary proceedings."[39] Secondary proceedings have four characteristics. First, they may be opened in countries where the debtor has an "establishment."[40] Second, by definition, they exclusively deal with the assets present under the courts' jurisdiction, and do not extend to assets located abroad.[41] Third, once a main proceeding has been initiated, other courts may only interfere in debtor's insolvency through "secondary pro-

---

and transnational regulatory regimes of bankruptcy than a specific criticism of the regulation; Francesco Duina, *Between Efficiency and Sovereignty: Transnational Actors, the European Union, and the Regulation of Bankruptcy*, 4 COMP. EUR. POLITICS 1 (2006).

34. EC Regulation 1346, *supra* note 33, at 2nd recital.

35. *Id.* at 23rd recital, art. 4.

36. *Id.* at 23rd recital, art. 3(1).

37. UNCITRAL Model Law, *supra* note 32, at art. 2(b).

38. EC Regulation 1346, *supra* note 33, at 12th recital ("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.").

39. *Id.* ("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.").

40. *Id.* at 12th recital, art. 3(2).

41. *Id.*

ceedings."[42] Finally, secondary proceedings must be limited to those involving liquidation procedure.[43] What clearly emerges from these provisions is that the courts of the states where the debtor owns some assets—but not an establishment, nor where the COMI is present—have no jurisdiction over the debtor's insolvency.

As mentioned above, the EC Regulation is a product of the modified universalism theory, which contains some elements of both universalism and territorialism. On the front of universalism, the EC Regulation adopts the unique jurisdiction criterion, such as "main proceedings," and determines jurisdiction through a unique test based on the concept of COMI. However, since the realm of transnational insolvencies still manifests the need "to protect the diversity of interests,"[44] to solve complex cases involving the debtor's estate,[45] and to settle any differences between the legal systems concerned,[46] secondary proceedings may be opened in other states, subject to the aforementioned requirements. Thus, the scheme of secondary proceedings resembles an application of territorialism. Indeed, since "[m]ain insolvency proceedings and secondary proceedings can [. . .] contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated,"[47] and courts are accordingly required to cooperate closely, the EC Regulation seems to draw a line midway between universalism and territorialism.

As mentioned above, the universalist theory requires a precise criterion for determining the competent court's jurisdiction. The EC Regulation uses the

42. *Id.* at 12th recital, art. 3(3) ("Where [main] insolvency proceedings have been opened . . . any proceedings opened subsequently under paragraph 2 shall be secondary proceedings.").

43. *Id.* (stating that the secondary proceedings "must be winding-up proceedings.").

44. *Id.* at 12th recital.

45. *Id.* at 19th recital.

46. *Id.* Moreover, under EC Law, the concept of "establishment" derives directly from the principle of free movement and establishment of persons, created by the EC Treaty and by a longstanding interpretation held by the European Court of Justice (ECJ). *See* Treaty Establishing the European Community, (consolidated version), 1997 O.J. (C340) 3 ("EC Treaty"), art. 43 [ex 52](freedom of establishment includes "the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State [and] shall include the right to take up and pursue activities as self-employed persons, and to set up and manage undertakings, in particular companies or firms..."). Thus,

> [t]he concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities . . . .

Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 25 (1995). Moreover, "[i]n the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries . . . A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State . . . ." Case 81/87, The Queen v. H.M. Treasury and Commissioner of Inland Revenue, ex parte Daily Mail and General Trust PLC ("Daily Mail"), 1988 E.C.R. 5483, ¶ 17 (1988).

47. *Id.* at 20th recital.

COMI to determine this criterion. Thus, the most immediate problem relates to the definition of COMI. While the concept of "establishment" is not controversial in EC law,[48] the notion of COMI is highly questionable. Where, for instance, is the COMI of a single debtor? Or, where is the COMI of a multinational enterprise—a group of companies incorporated in different countries but all under the control of a common entity? Both questions give rise to very problematic issues. As to the former, article 3 of the EC Regulation expressly states that 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."[49] For legal persons, article 3 also presumes that the COMI be located in the state of incorporation.[50] However, that presumption is rebuttable where one party demonstrates that the company's COMI is located in a different state.

There are several other issues that the EC Regulation does not solve. The EC Regulation does not address the problem of mobility among controlling stocks, since a debtor could very easily incorporate in another state before filing for bankruptcy. With regard to the second issue, that of multinational enterprises, the EC Regulation patently ignores the problem. Multinational enterprises, of course, do not have a COMI. Universalists would consider the COMI of a multinational enterprise to be in the place where the controlling company is located; were all the group's companies actually under the jurisdiction of the courts of that place, the full enterprise's reorganization would be simpler. Yet, in this circumstance, companies without any link with the forum would be subjected to bankruptcy proceedings according to remedies and priorities which the creditors, and the debtor itself, would find difficult to predict. Finally, since the transfer of headquarters and controlling shares from country to country are very easy for single debtors, one could imagine how much easier it would be for multinationals: the enterprise's essential apparatus could shift from one company to another without changing its surface appearance, but nevertheless have implications for the legal framework related to future bankruptcy proceedings. These issues represent only a few examples of the problems that arise from transnational bankruptcy.

IV.
EUROFOOD AND THE EUROPEAN COURT OF JUSTICE

The time has come to apply the EC Regulation to the *Eurofood* case. As described above, Eurofood had been engaged in a winding-up procedure since January 27, 2004. The first court to act on Eurofood was the High Court of Dublin. Although the Italian government showed interest in the case a few days later, according to article 16 of the EC Regulation the Irish court took the earli-

48. *See id.* at 20th recital, art. 2(h) (defining "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.").

49. *Id.* at 13th recital.

50. *Id.* at 13th recital, art. 3(1).

est step.[51] Thus, following the judgment rendered by the High Court of Dublin, Eurofood's status was liquidation everywhere in the European Union. The question now is: did the Irish court have jurisdiction pursuant to article 3 of the EC Regulation? In other words, was Ireland the proper locus of Eurofood's COMI? Since Eurofood had been incorporated in Ireland, the presumption established by article 3 was satisfied. A different perspective leads to the following question: can Italian tribunals revise the Irish decision to determine that Eurofood had its COMI in Italy? Certainly, the answer is *no*. The recognition of the earlier liquidation decision is automatic, except under the strict circumstance of a manifest violation of the recognizing state's public policy,[52] which here is unquestionably not the case. Unless Italian courts find a violation of Italian public policy, they are obliged to give deference to Eurofood's liquidation status.

Although the pattern is clear, it did not seem to work properly. Despite the deference to the Irish court's statement imposed by the EC Regulation, Italian courts continued to assert their jurisdiction over Eurofood, and the extraordinary commissioner in Collecchio initiated the reorganization of the company as part of the broader restructuring task concerning Parmalat. This led to the Irish Supreme Court's request that the ECJ determine proper jurisdiction. On May 2, 2006, the ECJ rendered its verdict. It stated, first, that:

> [the COMI] must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.[53]

Given this, the ECJ emphasized, article 3's presumption

> can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.[54]

---

51. EC Regulation 1346, *supra* note 33, art. 16 ("Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.").

52. EC Regulation 1346, *supra* note 33, art. 26 (recognition and enforcement are mandatory, unless "the effects of such recognition or enforcement would be manifestly contrary to that States's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.") Generally, conflict of law rules allow the State of recognition and enforcement of a foreign court decision to disregard its obligations, giving deference to the forum's public policy. *See* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on September 27, 1968 [hereinafter "Brussels Convention"], art. 27(1), 1998 OJ C 027, ("A judgment shall not be recognized – if such recognition is contrary to public policy in the State in which recognition is sought.") The Convention has been recently replaced by the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 OJ L 12 (January 16, 2001).

53. Case C-341/04, *supra* note 15, ¶ 33.

54. *Id.* ¶ 34.

Accordingly, "the mere fact that [debtors'] 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 EC Regulation."[55] In the Court's view, then, another company's control over the debtor is not sufficient to locate the debtor's COMI anywhere other than the country of incorporation. The only court entitled to open the main proceedings over Eurofood, therefore, was the Irish one, and Italian courts had no jurisdiction. Second, the Court clarified that once a court had been determined for the main proceedings, its decision was final and binding for all other member states pursuant to article 16 of the EC Regulation. The deference given to that court's decision must be complete: the principle of mutual trust precluded other states from reviewing the foreign court's earlier decision to open the main proceedings.[56] Finally, the Court established that the EC Regulation actually applies in this specific case.[57] The final ruling, therefore, was that Eurofood's winding-up procedure in Ireland had been lawfully initiated, and that the courts of all other member states lacked jurisdiction over the main proceedings.

The Italian Council of State [Consiglio di Stato, CdS] pursued this matter further in a recent decision on *Eurofood*, published on January 25, 2007. The CdS had been seized by Eurofood's provisional liquidator and BofA, who sought the annulment of the earlier Decree of 2004, which had opened the insolvency of Eurofood in Italy.[58] It concluded that the Italian Minister who involved Eurofood in the Parmalat reorganization procedure had acted in absence of jurisdiction (*détournement de pouvoir*).[59] The CdS's decision revoked the Decree

55. *Id.* ¶ 36.

56. *Id.* ¶¶ 41, 42 ("[i]t is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation, that is examine whether the centre of the debtor's main interests is situated in that Member State."). Under the Brussels Convention, recognition and enforcement of other Member States' judicial decisions are automatic and do not require any formality or ascertainment by the courts of the State in which recognition and enforcement are sought. Brussels Convention, *supra* note 52, art. 26 ("A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.").

57. The question was whether the appointment of a provisional liquidator by the High Court of Dublin could be considered the "main proceedings" according to article 3 of the Regulation, and therefore follow the norms concerning recognition and enforcement of such a decision. The ECJ responded that "a decision to open insolvency proceedings" for the purposes of the Regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present. *Id.* ¶ 54.

58. Decree of the Ministry of the Productive Activities, *supra* note 10.

59. Council of State [Cons. stato], 6th Session, 25 Jan. 2006, n. 296/2007, *available only in*

and annulled the previous decision by the Regional Administrative Tribunal, which asserted jurisdiction of Italian courts and government over Eurofood.[60] This outcome would not have been possible if not for the *Eurofood* ECJ verdict.[61]

V.
CONSTRUCTIVE CRITICISM

A. Right Question, Wrong Answer?

The response given by the ECJ in *Eurofood* creates new problems rather than resolving the complicated set of issues concerning transnational insolvencies. In large part, this is due to the fact that the ECJ addressed a very specific issue with very generalized reasoning. First, one must focus on the interests involved. As to this point, the question raised by the Irish Supreme Court was very specific: whether a subsidiary's relative degree of autonomy of control by the parent company constitutes appropriate criteria for determining the COMI.[62] The ECJ responded with only a general statement, relying upon the presumption contained in article 3 of the EC Regulation that the parent company's control is not a relevant factor in the assessment of the COMI of the subsidiary. The Court also vigorously reaffirmed that the legal persons' COMI is where their registered office is situated. However, this aspect of COMI is a flexible concept. Indeed, the concept of debtor's "interests" cannot be defined without emphasizing the relationships between the debtor and other subjects. In other words, "interest" is not something that may be defined objectively, but depends upon the debtor's interactions with the surrounding business world. Accordingly, the

---

Italian at http://www.studiolegalelaw.it/new.asp?id=1276 [hereinafter Case no. 296/2007).

60. TAR del Lazio, *supra* note 12, at case no. 6998.

61. Case no. 296/2007, *supra* note 59, ¶ 14 ("[T]he here impugned Decree of the Ministry [concerning Eurofood] is unlawful because the Ministry omitted to verify the existence of jurisdiction on adopting the decision that opened the insolvency proceedings. More precisely, it implicitly stated that it had jurisdiction, that is contrary to the provisions of the applicable EC Regulation, as clarified by the *Eurofood* decision rendered by the ECJ; it did not abide by the ascertainments that the Regulation, expressly thorugh its provisions and the ECJ interpretation, conferred to the national authorities" ["il DM impugnato è illegittimo per non aver verificato la propria competenza ad adottare la decisione di apertura delle procedura in questione, o, più esattamente, per aver implicitamente ritenuto che tale competenza sussistesse, in violazione delle norme del regolamento comunitario qui in rilievo, così come chiarite dalla riportata decisione della CGE, senza compiere, cioè, le valutazioni che il regolamento, secondo le sue previsioni e l'interpretazione di esse fornite dalla CGE, demanda all'autorità nazionale."]).

62. Case 341/04, *supra* note 15, ¶ 24(4)(c). (denoting control as the situation in which "the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated," while in case of autonomy "the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary.").

same debtor could potentially hold different "interests" regarding voluntary and involuntary creditors, employees, consumers, savers, the market, and the state. A single debtor could, hence, have more than one COMI.

Moreover, in the case of a multinational enterprise the problem of determining the relevant enterprise's "interests" is clearly broader since more subjects are involved. In multinational enterprises, every foreign subsidiary has "interests" not only with third parties, but also with the parent company. Indirectly, it also has "interests" with the parent company's creditors. Suppose a subsidiary has "interests" only with the parent company, and it has only one creditor that also is the major financial investor of the parent company. Why should it matter where the subsidiary has its registered office? Why should one enforce a rebuttable presumption when it is so clear that the subsidiary's COMI is in the parent's home country? Whatever the response is, control and autonomy are just third parties' "interests" in the same sense expressed with respect to the COMI.

Following this interest-based approach, according to the Court of Justice, the bankruptcy location must coincide with one which is predictable to third parties. The protection of predictability raises another problem. In fact, predictability is the reason why, when the presumption of the place of incorporation was not valid, the Court required evidence based on "factors which are both objective and ascertainable by third parties."[63] Now, is not the control by a foreign parent company such a factor? When negotiating with a company, creditors, especially sophisticated creditors like banks or financial institutions, are usually aware of the debtor's foreign control. Indeed, in most cases the debtor's affiliation with a multinational group of companies signifies certain contractual settlements concerning a debtor and his creditors. The very rationale of article 3 of the EC Regulation is not a theoretical treatment of the issue of the COMI's location. Rather, it is a very practical matter involving the arrangement of the concerned parties' interests and the effective placement of the debtor's own interests. In applying article 3, domestic courts are required to respect not only predictability and ascertainability, but also efficaciousness. They should not extend hyperprotection to third parties who do not deserve it. National courts, in sum, must base their analysis on an appropriate balance of interests that demands more than a simple, presumption-based, summary analysis.

B. Is the EC Regulation Actually Working?

The doubts raised with regard to article 3's application by the ECJ broadly affect the EC Regulation's effectiveness. The errors that might result from a summary analysis of the "interests" involved in a particular case are well illustrated by three different bankruptcy proceedings involving the same corporate group, *ISA Daisytek*. The U.S. parent company, which filed for bankruptcy in Texas, held stock in 16 subsidiaries in Europe. One of the 16, ISA-Daisytek

63. *Id.* ¶ 37.

Ltd., controlled all the other 15 other companies, three of which were incorporated in Germany and one in France. When Daisytek-ISA Ltd. filed for bankruptcy in England, the High Court of Justice in Leeds affirmed that the COMI for all 15 companies was located in England and included all of them in the proceedings.[64] This seems to be a common trend in England,[65] and has occurred elsewhere.[66] According to article 16 of the Regulation, such a decision had to be recognized and automatically enforced in all other member states' courts. Unsurprisingly, this did not happen, as the norm went largely ignored. In France, the *Tribunal de Commerce* in Clergy-Pontoise affirmed that the English Court was wrong to dictate that the COMI of the French Daisytek-ISA S.A. be in England.[67] In Germany, the District Court of Düsseldorf simply ignored the findings of the Court in Leeds and maintained that the COMI of the Daisytek-ISA German subsidiary was in Germany.[68] Both French[69] and German Courts of Appeals[70] reversed, resulting in a seemingly stabilized system, that is now in accordance with the EC Regulation.[71] However, the immediate lack of mutual trust among European courts patently signals an emerging nationalism in the adjudication of major bankruptcy cases.

First, *Eurofood* and *ISA Daisytek* demonstrate that domestic courts, disre-

64. *In re* Daisytek-ISA Ltd., [2003] B.C.C. 562, [2004] B.P.I.R. 30, 2003 WL 21353254, at *1.

65. In the case of the *Crisscross Telecommunication*, the group consisted of 14 companies, with its subsidiaries incorporated in several European countries. The High Court of Justice of England claimed jurisdiction over all of them, and some foreign courts gave deference to this decisions according to article 3 of the EC Regulation. *See* High Court of Justice, Chancery Division, Judgment of May 20, 2003, not published, and Tribunal of Milan, Prosecutor v. Criss Cross Communication S.r.l., March 18, 2004 (honoring the judgment of the High Court of Justice of May 25, 2003). One should wonder why the Milan Tribunal is so deferential to the EC Regulation, while the Parma Tribunal is not. Maybe *Criss Cross* was not such an important case as *Parmalat*?

66. In the case decided by the Tribunal of Rome, *In re* Cirio Finance Luxembourg SA, 26 Nov. 2003, [2004] FORO IT. I 1567, the judge held that the Luxembourg company, controlled at 95% by the Italian Cirio Finanziaria S.p.A., had its COMI in Italy. *See also* Trib. of Parma, *supra* note 11.

67. *See* Judgment of May 26, 2003, 8th Ch., trib. comm. Pontoise (Fr.).

68. *Daisytek/ISA/PAR/Supplies Team*, Mar. 3, 2004, AG Düsseldorf, 501 IN 126/03, at 1 (Ger.). It is noteworthy that "[a]pparently, as of June 6, 2003, the Düsseldorf court did not have a copy of the published opinion by the Leeds court issued on May 16, 2003." Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, at 463, http://www.iiiglobal.org/country/european_union/ (follow "1_Bufford_Case_Venue.PDF" hyperlink).

69. Klempka v. ISA Daisytek SAS, 2003 WL 22936778, [2004] I.L.Pr.6 (C d' A 2003) (Fr.). Eventually, the Court of Cassation dismissed the claim against the Court of Appeal's decision. Cour de Cassation [Court of Cassation], Ch. Comm., Judgment of June 27, 2006, Case no. 921 FS, *Klempka et al.*, (Fr.).

70. Order of the Court of Appeals of Düsseldorf, July 9, 2004, I-3 W 53/04 (not final; lower court: D.Ct. Düsseldorf). *See* Bufford, *supra* note 68, at 464.

71. As to the decision of the Court of Appeal of Versailles (*see* Klempka v. ISA Daisytek SAS, *supra* note 69), for instance, it represents "an excellent result and brings the French courts completely into line with the EC Regulation." Gabriel Moss, *The Triumph of "Fraternité:" ISA Daisytek SAS (Court of Appeal of Versailles, 4 September 2003)*, at 4, http://www.iiiglobal.org/country/european_union/ (follow "Daisytec_note.pdf" hyperlink).

garding the European legal framework, are competing in adjudicating big bankruptcy cases. As the EC Regulation states, the first court seized for the main proceedings becomes the COMI court and therefore the only one allowed to initiate these proceedings. Also, governments' jurisdiction to open restructuring programs for corporate groups is removed if a foreign court has been seized with the bankruptcy of a solvent subsidiary beforehand.[72] Despite this, the adjudication of transnational bankruptcy proceedings increasingly resembles a race against time in which creditors and debtors rush to choose the most favourable forum and courts compete to adjudicate the case. As it has been argued, "with billions of dollars at stake for bankruptcy professionals, competing courts cannot be counted on to determine fairly and in good faith whether they are the home court of multinationals that choose to file with them."[73] *Eurofood* indicated the actual status of the EC Regulation: that the lacunae of its regulatory framework runs so deep that future insolvency proceedings in Europe would scarcely be efficient.

Another fundamental issue arises from these cases. As illustrated in *Eurofood*, sometimes the restructuring of a multinational enterprise is a matter of State sovereignty. Italy, for instance, had a remarkable interest in renovating the entire Parmalat group, including Eurofood, as a matter of prestige in front of the international community. Is this not an important "interest" even when a compelling reason of mutual trust to other European courts is at stake?

Finally, one should focus on the negotiation of contracts among the debtor and its creditors. The latter count on the fact that they could enforce the secured contract against the debtor's assets and, eventually, initiate bankruptcy proceedings before a competent court, should the debtor be unable to repay its debts. Hence, the remedies available to creditors and their priorities are essential when negotiating secured contracts. What if the debtor could easily change the remedies and priorities merely by changing the venue of insolvency proceedings? The debtor's employees, creditors and shareholders, as well as the security holders and consumers, would watch their contractual framework transform itself from one day to the next. In this case, their only recourse would be to anticipate the costs of this harmful forum shopping.[74] An economic analysis of law demonstrates that creditors can internalize the risk of bankruptcy by asking the debtor for a higher guarantee. In a world of universal bankruptcies and competing courts, the guarantee system would be effectively broken, and the prices raised accordingly.[75] Once the insolvency procedure is initiated, creditors can only ap-

---

72. *See* Case 296/2007, *supra* note 59, ¶ 17.

73. LoPucki, *supra* note 26, at 209.

74. The predictability of bankruptcy rules is important in the negotiation process of the firm's contracts. In fact, "[i]f creditors do not know which set of insolvency rules apply, they will raise their interest rates to compensate for this uncertainty. This increase in interest rates without a corresponding benefit is a net social loss." Rasmussen, *supra* note 23, at 17.

75. Accordingly, "[t]he most important [aspect of transnational insolvency] is the inability to predict the results of default, which adds to the cost of every international transaction, especially

pear before the seized court. In order to avoid forum shopping on the part of the debtor, creditors should increase their monitoring of the debtor's behavior. This is unlikely, especially over the long term, and seems virtually impossible.

One of the aims of the EC Regulation is to ensure the proper functioning of the internal market by avoiding incentives for forum shopping.[76] However, forum shopping is unavoidable in a system where courts and professionals enjoy the prospect of having multinational enterprises, who hold billions of Euros in assets and are engaged in significant productive sectors, file for bankruptcy in their own countries. The combination of arrogant courts with the dilution of legal principles such as the COMI, based on broad notions like "interests," results in harm to creditors and market failure.

VI.
CONCLUSIONS

As a solution to the EC Regulation's initial failure, one prominent scholar proposes an international convention providing for a cooperative territoriality regime.[77] In his view, only territorially limited proceedings should exist, and liquidators in different countries should cooperate under the umbrella of a legally imposed framework.[78] Another author proposes a reform of the EC Regulation through the introduction of norms for corporate groups and mechanisms of review for any decisions regarding the COMI.[79] These proposals patently disregard the complex structure characterizing transnational debtors, especially when these debtors are multinational enterprises.

First, the essence of multinationals is control, and control has an economic value. The value of a complex multinational firm is therefore also determined by the degree of transnational control. Liquidating or reorganizing the single, distinct entities that comprise a corporate transnational group is very different from liquidating or reorganizing the entire group itself. What differs between the two situations is the question of what constitutes an adequate consideration of control. For these reasons, a transnational bankruptcy regime that failed to consider the complex structure of a multinational enterprise—such as the cooperative territorial solution—would perpetuate a market failure due to bankruptcy.

Second, control is an important component of the assessment made by

---

international financings." Westbrook, *supra* note 22, at 460; moreover, "[transnational companies] need a stable and predictable regulatory environment." Duina, *supra* note 33, at 17.

76. *See* EC Regulation 1346, *supra* note 33 at 4th recital ("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 the more favourable legal position (forum shopping).").

77. LoPucki, *supra* note 26, at 231.

78. *Id.* at 225, ("A cooperative territorial system is one in which each country's courts administer the assets located in the country and authorize a representative to cooperate with representatives appointed in foreign proceedings.").

79. Bufford, *supra* note 68, at 60-67.

creditors in their contracts with the firm. The presence of links to a parent company are essential for some creditors in order to negotiate with the subsidiary. Accordingly, one could argue that Eurofood, as an experiment in *haute finance* under the complete control of its parent company Parmalat, did not deserve the treatment granted by the ECJ. Eurofood's creditors, such as BofA, were perfectly aware that the company was only a means for transactions involving the Parmalat group. The benefits that they received from these transactions passed through Collecchio.

Finally, appropriate deference should be given to the national interest, as opposed to the mutual trust compelling strength. When governments have a strong interest in restructuring or liquidating an enterprise in default, this "interest" should be taken into account, when justified, in the outcome resulting from the EC Regulation's enforcement. If the EC Regulation's system of adjudication is linked with the concept of "interest," one could hardly see why both national and private parties' interests should not be enforced.

In conclusion, the future regime should interpret, or eventually reform, the EC Regulation to give greater importance to the factor of control, in a way that forces national judges to balance it with the other interests involved in the case, thus casting more attention to multinationals' structure. In addition, the specific "interests" should be solidified. A correct balance between these components might solve the problem. While control has received no attention by the EC legislator, the "interest" has been too flexible thus far. First, the EC Regulation, by some indications, should lead the judge's investigation about the existence of a link of control inside the multinational enterprise in default. From this standpoint, control is one of the most problematic issues in corporate law, both in the EU and in the Member States. Nevertheless, in some circumstances it should be given attention. Second, the COMI is a hyperflexible concept that must be reduced in order to discourage a schizophrenic race to the court by the parties involved in a transnational default, like in the cases described in this Article.

At any rate, one could be sure that a reform will not come soon. The European legislator is preoccupied with building strong cooperation among the Member States in civil and commercial matters, while insolvency remains off the calendar. In fact, European institutions are convinced that the issue has been settled, while in reality, much work has yet to be done.