

**THE EUROPEAN UNION GOES COMI-TOSE:
HAZARDS OF HARMONIZING CORPORATE
INSOLVENCY LAWS IN THE GLOBAL
ECONOMY**

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Parmalat, at its peak, was one of the largest global food and dairy conglomerates in the world.¹ Its insolvency in 2003 eclipsed the Enron and WorldCom cases because Parmalat executives allegedly created fraudulent bank records that drove the company to its demise.² Parmalat also had many subsidiary companies spanning the globe, including enterprises in North America, South America, and Europe.³ During the insolvency cases, creditors from around the world tried in many different ways to collect as much money as possible from the billions of dollars Parmalat and its subsidiaries owed them.⁴ The need to satisfy local creditors sparked jurisdictional battles, such as the one between Italy—the country where Parmalat was incorporated—and Ireland—the country where one of Parmalat's subsidiaries was incorporated.⁵ However, the various insolvency regulations in effect throughout Europe at the time of the jurisdictional battles did little to discourage such battles.⁶ To

1. See Claudio Celani, *The Story Behind Parmalat's Bankruptcy*, 31 EXECUTIVE INTELLIGENCE REV., Jan. 16, 2004, available at http://207.234.232.77/other/2004/3102parmalat_invest.html (noting the Parmalat was the largest Italian food company and fourth largest food company in Europe).

2. *Id.* ("Parmalat is the largest bankruptcy in European history, representing 1.5% of Italian GNP—proportionally larger than the combined ratio of the Enron and WorldCom bankruptcies to the U.S. GNP."); see also Gail Edmonson & Laura Cohn, *How Parmalat Went Sour*, BUSINESS WEEK, Jan. 12, 2004, http://www.businessweek.com/magazine/content/04_02/b3865053_mz054.htm.

3. See Group Structure Parmalat Finanziaria S.P.A., Dec. 31, 2003, <http://www.parmalat.com/en/doc/Group%20structure%2031dic03.pdf> [hereinafter Parmalat Group Structure] (listing other subsidiaries in Italy, as well as in Austria, Belgium, France, Germany, Ireland, Luxembourg; in North America—United States and Canada—as well as Central and South America).

4. See, e.g., Case C-341/04, *Bondi v. Bank of Am., N.A.*, CELEX No. 60400341, 2004 WL 3168085 (Sept. 15, 2004); Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813 (Sept. 27, 2005) (discussing the dispute between Irish and Italian courts over the jurisdiction of insolvency proceedings); Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. 1078 (May 2, 2006) (handing down the final judgment).

5. See *supra* note 4 and accompanying text.

6. See E. Bruce Leonard, *The International Scene: The International Year in Review*, 22-10 AM. BANKR. INST. J. 22 (2003) (discussing conflicts that could arise under the E.U.'s new regulations).

further complicate matters, many European states, including Italy, have undergone substantial insolvency law reform.⁷

This Comment discusses the great Parmalat scandal as an illustration of jurisdictional battles that await future insolvencies of multinational corporations, especially within member states of the European Union. Part I of this Comment will traverse the Parmalat scandal and the economic fallout leading to the insolvency of Eurofood IFSC Limited (Eurofood), one of Parmalat's foreign subsidiaries incorporated in Ireland. The Eurofood case demonstrates the existence of competition between countries over jurisdiction of large insolvency proceedings. Part II will discuss the recent attempts to harmonize the transnational corporate insolvency proceedings to avoid such competition along with the relevant theories used to develop such harmonization.⁸

To properly discuss the jurisdictional battles, Parts III and IV will trace the ancestry of insolvency laws and the histories of a few relevant countries. In so tracing, this Comment will compare the development of laws and policies to demonstrate that, while modern insolvency laws are approaching the same procedures, the policies behind such new procedures have developed independently and differently in each country. Finally, Parts V and VI will discuss why such battles occur and suggest some solutions to avoid future conflicts.

I. TRAUMA: THE SCANDAL

A. *Parmalat Becomes the Enron of Europe*⁹

Only a short time after the falls of Enron and WorldCom in the United States, the Parmalat scandal erupted in Europe.¹⁰

7. See Jeff Carruth, *Insolvencies in the Global Context*, 38 INT'L LAW. 353, 360–61 (2004).

8. Of key importance to this discussion is the European Union's Insolvency Regulation (E.U. Insolvency Regulation), United Nations Commission on International Trade Law's (UNCITRAL) Model Insolvency Act (the Model Act), and Chapter 15 of the United States' Bankruptcy Code (Chapter 15).

9. Craig Martin, *Eurofood Fight: Forum Shopping Under the E.U. Regs*, AM. BANKR. INST. J., Mar. 2005, at 36.

10. Daniel J. Wakin, *There Were Earlier Signs of Trouble at Parmalat*, N.Y. TIMES,

On December 19, 2003, Parmalat S.p.A. (Parmalat) announced that the company had overstated its assets by about five billion dollars (USD).¹¹ Immediately, “top executives . . . resigned and were arrested, and the company was declared insolvent.”¹² As many as sixteen top executives were held accountable for securities violations related to “Europe’s biggest corporate scandal.”¹³

There were many theories as to how Parmalat’s balance sheet developed this five billion dollar hole.¹⁴ Nevertheless, Parmalat was linked to the word “fraud,”¹⁵ and some commentators have even dubbed the scandal the “Enron of Europe.”¹⁶ Before the scandal, Parmalat was the eighth largest corporation in Italy with over 36,000 employees.¹⁷ Parmalat had also maintained a substantial presence in the global economy, owning subsidiaries in countries throughout the world.¹⁸

Jan. 15, 2005, at C1; John Paul Lucci, *The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. R. 211 n.3 (noting Enron’s petition for bankruptcy protection was filed on Dec. 2, 2001); Marvin E. Sprouse III, *Affairs of State: A Collision of Fairness: Sarbanes-Oxley and Section 510(b) of the Bankruptcy Code*, 24-8 AM. BANKR. INST. J. 8, 50 n.24 (2005) (noting WorldCom filed for protection on July 21, 2002).

11. Wakin, *supra* note 10.

12. *Id.*

13. Alessandra Galloni, *Founder, 15 Others to Stand Trial for Parmalat Scandal*, GLOBE & MAIL, June 27, 2005, at B11.

14. *See* Wakin, *supra* note 10. Among those under suspicion was the Bank of Italy for “not being attentive enough to the fact that some banks had built up vast exposure to the company.” *Id.* An Italian agency responsible for overseeing financial markets was also blamed. *Id.* Even the small community of Parma was implicated in the scandal or was thought to have protected Parmalat from exposure. *Id.* In addition, Merrill Lynch, which took part in many of Parmalat’s complex financial dealings, noted that Parmalat inefficiently managed its balance sheet by regularly reporting high cash balances while taking regular recourse to the bond market. *Id.*

15. *Id.*

16. Martin, C., *supra* note 9, at 36 (quotations in the original).

17. *See* Wakin, *supra* note 10, at C1.

18. *See* Parmalat Group Structure, *supra* note 3.

*B. Eurofood Fight*¹⁹

When Parmalat became insolvent, so did a number of its foreign subsidiaries, including Eurofood.²⁰ The Eurofood cases play an important role in the fallout resulting from Parmalat's insolvency. Because Eurofood was incorporated in Ireland,²¹ its main creditor, Bank of America, North America (Bank of America), presented an Irish winding up petition²² against Eurofood on January 24, 2004.²³ This petition was presented to the High Courts in Ireland one month after an Italian court determined that Parmalat was insolvent and placed the company into extraordinary administration under Italian law.²⁴ However, the Italian court waited until February 20, 2004, to rule that Eurofood was also insolvent and that the center of its main interests (COMI) was Italy.²⁵

The proper forum for Eurofood's insolvency proceeding became a hard-fought issue between both the Italian court and the Irish courts.²⁶ The Irish Supreme Court ultimately heard the case and discussed the various issues of Irish law.²⁷ The

19. See Martin, C., *supra* note 9, at 36.

20. See *id.*

21. *Id.* (noting that Eurofood was wholly owned by Parmalat and has four directors—two Italian and two Irish).

22. A winding up petition requests that a court open a liquidation insolvency proceeding resulting in the realization of the debtor's assets. PAUL OMAR, EUROPEAN INSOLVENCY LAW 75 (2004) (citing European Insolvency Convention art. 2(c) (1995)). In other words, the creditors are able to sell the debtor's assets to satisfy the debts owed to them. See *id.*

23. See Martin, C., *supra* note 9, at 36.

24. See *id.* Extraordinary administration of large insolvent enterprises, or *ammistrazione straordinaria delle grandi imprese in stato di insolvenza*, is an Italian type of reorganization where a special administrator is appointed to handle the reorganization. 3 COLLIER INT'L BUS. INSOLVENCY GUIDE ¶ 28A.04[3] (Richard F. Broude et al. eds., 2006); see also Nikki Tait, *Parmalat's Border Dispute*, FIN. TIMES, Mar. 29, 2004 (noting that the Italian government appointed Enrico Bondi to administer Parmalat's affairs).

25. See Martin, C., *supra* note 9, at 37 (noting the Italian court's grounds for deeming Italy to be Eurofood's center of main interests (COMI) was that directors of Eurofood operated out of Parmalat's Italian office) (citation omitted).

26. See *id.*

27. See *In re Eurofoods IFSC Ltd.*, [2005] I.L.Pr. 2, 2004 WL 3222613 at *30 (July 27, 2004) (Ir.) (noting that the Court will determine the consequences of the

court noted that, under Irish law, the Companies Act of 1963 governed the appointments of liquidators in Irish winding up proceedings.²⁸ The key issue before the Irish Supreme Court was whether Irish courts should recognize Ireland or Italy as the COMI,²⁹ and as a consequence of such a recognition or nonrecognition, which country's courts would have jurisdiction over Eurofood's assets for purposes of Eurofood's insolvency proceeding.³⁰

The Irish Supreme Court, in analyzing Eurofood's COMI, noted that Eurofood "has at all times conducted its business lawfully and regularly in Ireland."³¹ Furthermore, the Irish Supreme Court focused its discussion on the ability of third parties to ascertain Eurofood's COMI, noting that Eurofood's creditors would have believed they were dealing with a company whose COMI was not Italy.³² The Court ultimately held that it should not recognize the Italian court's decision³³ and held, to the contrary, that Eurofood's COMI was Ireland.³⁴

"appointment of a Provisional Liquidator" and the "function of the Central Office of the High Court").

28. *Id.* ("For the purposes of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators." (quoting Section 225 of the Companies Act)). The Court further noted that courts may appoint Provisional Liquidators before or at any time after the filing of a winding up petition, and that, if a court so chooses, it may restrict the Provisional Liquidator's powers by such an order. *Id.* (quoting Section 226 of the Companies Act).

29. The Irish Supreme Court looked to the E.U. Insolvency Regulation that defines the "centre of main interests" as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." Council Regulation (EC) No. 1346/2000 of 29 May 2000 (OJ 2000 L160/2) [hereinafter E.U. Insolvency Regulation]. As the need to unify insolvency proceedings within the European community grows, the European Council adopted the E.U. Insolvency Regulation. MIGUEL VIRGÓS & FRANCISCO GARCIMARTÍN, EUROPEAN INSOLVENCY REGULATION: LAW AND PRACTICE 3 (2004) (citing E.U. Insolvency Regulation at L160/1).

30. *In re Eurofoods*, [2005] I.L.Pr. 2, 2004 WL 3222613 at *26–27 (discussing the Italian court's decision that Italy was the COMI).

31. *Id.* at *33–34.

32. *Id.* at *34. In considering third parties' perception of Eurofood's COMI, the Irish Supreme Court took a literal reading of the E.U. Insolvency Regulation's definition of COMI. See E.U. Insolvency Regulation, *supra* note 29, at L160/2.

33. Martin, C., *supra* note 9, at 36. On February 20, 2004, the Italian Court held that Eurofood's COMI was Italy. *Id.*

34. *In re Eurofoods*, [2005] I.L.Pr. 2, 2004 WL 3222613 at *34–35.

Dr. Enrico Bondi, the Italian court-appointed administrator for the Parmalat and Eurofood proceedings in Italy, appealed this decision.³⁵ In response to Dr. Bondi's appeal, the Irish Supreme Court stayed the proceedings and submitted questions to the European Court of Justice (ECJ) asking how to proceed. On September 27, 2005, the ECJ issued an opinion answering the Irish Supreme Court's questions and handed down a final judgment on May 2, 2006.³⁶ In its opinion, the ECJ seemingly agreed with the Irish Supreme Court's findings.³⁷ The ECJ held that the presentation of a winding up petition in the Irish court, coupled with the appointment of a provisional liquidator, was an act sufficient to constitute the opening of a main insolvency proceeding pursuant to the E.U. Insolvency Regulation.³⁸ More specifically, the ECJ held that:

[A] decision to open insolvency proceedings for the purposes of the [E.U. Insolvency 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 [1] a decision handed down following an application, [2] based on the debtor's insolvency, seeking [3] the opening of proceeding referred to in Annex A to the [E.U. Insolvency Regulation], where [4] that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the [E.U. Insolvency Regulation].³⁹

35. *Id.* at *35–36. Among the five questions posed were (1) whether the Irish court's appointment of a liquidator along with the liquidator's actions in the winding up of Eurofood in Ireland constituted the opening of an insolvency proceeding under the E.U. Insolvency Regulation; and (2) whether the governing factor for the COMI test favors where the administration occurs or where the power to appoint the administrators lies. *Id.*

36. Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813 (Sept. 27, 2005); Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. 1078 (May 2, 2006).

37. Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, paras. 47–88 (Sept. 27, 2005).

38. *Id.*

39. Case C-341/04, *Bondi v. Bank of Am., N.A. (In re Eurofood IFSC, Ltd.)*, 2006 E.C.R. 1078, para. 54 (May 2, 2006).

Accordingly, the Irish proceeding for Eurofood's insolvency was deemed a main proceeding and the Italian proceeding a secondary proceeding.⁴⁰ As a result, the Italian courts could only distribute Eurofood's assets subject to the Irish court's decisions.⁴¹ Thus, the Irish winding up proceedings continued in Ireland as the main proceeding, while a secondary proceeding continued in Italy.⁴²

II. SLIPPING INTO THE COMI: ATTEMPTS TO HARMONIZE

A. *The European Union Sings a Note*

Because E.U. member states continue to have conflicting laws with regard to insolvency procedures and proceedings, the European Union put into operation the E.U. Insolvency Regulation, effective in 2002.⁴³ The E.U. Insolvency Regulation was designed to govern insolvency proceedings⁴⁴ initiated in

40. *Id.* paras. 55–58.

41. See Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, para. 105 (Sept. 27, 2005). Article 3 of the E.U. Insolvency Regulation provides for the opening of two types of insolvency proceedings: (1) a main proceeding in the jurisdiction that is the COMI; and (2) secondary proceedings limited to the winding up of assets situated in particular jurisdictions that are not the debtor's COMI. See E.U. Insolvency Regulation, *supra* note 29, at L160/5.

42. See Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, para. 152 (Sept. 27, 2005) (answering the Irish court's questions). The significance of such a decision is that a secondary proceeding under the E.U. Insolvency Regulation must be a winding up proceeding. E.U. Insolvency Regulation, *supra* note 29, at L160/5. However, the extraordinary administration proceeding, or *amministrazione straordinaria*, is not considered a winding up proceeding under the E.U. Insolvency Regulation. See E.U. Insolvency Regulation, *supra* note 29, at L160/5, L160/16–18.

43. See 3 COLLIER INT'L BUS. INSOLVENCY GUIDE ¶ 28A.01[2] (Richard F. Broude et al. eds., 2006).

44. An insolvency proceeding under the language of the E.U. Insolvency Regulation is defined as "the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A." E.U. Insolvency Regulation, *supra* note 29, at L160/5. Annex A lists a breakdown of proceedings on a country-by-country basis. See *id.*, Annex A, at 14–15. Such proceedings in Italy include *amministrazione straordinaria*, or extraordinary administration. *Id.* In Ireland, an insolvency proceeding includes a compulsory winding up by the court, bankruptcy, and other procedures. *Id.* Furthermore, the E.U. Insolvency Regulation only applies to "insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator." *Id.* art. 1(1), at L160/4.

member states.⁴⁵ Furthermore, the E.U. Insolvency Regulation *only* governs conflicts or disputes arising *between* member states.⁴⁶ The European Union also enumerates what it means to be a liquidator under the E.U. Insolvency Regulation,⁴⁷ and further defines other important terminology.⁴⁸

One peculiarity of the E.U. Insolvency Regulation is its reliance on the COMI, as defined in Recital 13.⁴⁹ The definition of COMI becomes extremely important when determining the correct forum for a main insolvency proceeding under Article 3(1).⁵⁰ Such a definition provides for a great deal of flexibility.⁵¹ Its “open character” allows the E.U. Insolvency Regulation to do two things: (1) provide a legal definition of COMI; and (2) create a presumption that a COMI shall be the place of incorporation.⁵² Nevertheless, this “legal definition” and test for determining the COMI has become the epicenter of recent jurisdictional battles, such as the one in the Eurofood cases. What the E.U. Insolvency Regulation does not do, and what this Comment suggests it should, is provide member states with more formal and uniform guidelines by which courts may abide in making a determination of which country is the true COMI.

45. See VIRGÓS, *supra* note 29, at 21.

46. *Id.*

47. A liquidator is “any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs.” E.U. Insolvency Regulation, *supra* note 29, at L160/5.

48. *Id.* Other terms defined are winding up proceedings, court, judgment, the time of the opening of proceedings, the member state in which assets are situated, and establishment. *Id.*

49. “The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties.” *Id.* at L160/2.

50. “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.” *Id.*, art. 3(1), at L160/5.

51. See VIRGÓS, *supra* note 29, at 38.

52. *Id.*

Because the COMI provides such flexibility, the E.U. Insolvency Regulation is subject to jurisdictional conflict, or, more specifically, forum conflicts.⁵³ Recital 22 calls for the immediate and automatic recognition of judgments when a proceeding is opened in a member state.⁵⁴ Where concurrent proceedings are opened in different countries, as in the Eurofood cases, the ECJ will recognize only one of those member states as the proper forum for the main insolvency proceeding.⁵⁵ Thus, where one member state is the place of incorporation and another member state is able to rebut the presumption that the place of incorporation is the COMI using contrary evidence, the ECJ will hold that the country where a proceeding was filed first is the COMI and proper forum for the main insolvency proceeding.⁵⁶ Once the “first to file” insolvency proceeding is opened in a member state, all competing member states will have few, if any, grounds to disregard that proceeding as the main proceeding.⁵⁷ All proceedings that are not deemed the main proceeding are deemed secondary proceedings, and parties

53. See, e.g., *In re Eurofoods*, [2005] I.L.Pr. 2, 2004 WL 3222613 (July 27, 2004) (Ir.); Lynn M. LoPucki, *Global and Out of Control?*, 79 AM. BANKR. L.J. 79, 95 (2005) [hereinafter LoPucki, *Global and Out of Control?*] (noting that if the European Court of Justice (ECJ) rules for the first court to hear the case are binding on later courts, it would “be a green light for court competition”).

54. E.U. Insolvency Regulation, *supra* note 29, at L160/3; see also Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, para. 39 (May 2, 2006) (discussing Recital 22 of the E.U. Insolvency Regulation, calling it the “rule of priority”). This Recital plays an important role in cases decided by the ECJ. See, e.g., Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813 (Sept. 27, 2005) (discussing the E.U. Insolvency Regulation in detail). The Recital seems to demand the competing member state’s immediate recognition of another member state’s proceeding as the main insolvency proceeding regardless of the possibility that the competing member state may be the debtor’s COMI. See E.U. Insolvency Regulation, *supra* note 29, at L160/3.

55. See Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, para. 102 (Sept. 27, 2005) (discussing the court’s view that Recital 22 calls for the Italian courts to recognize the Irish court’s actions).

56. See *id.* The ECJ held that the Irish court acted first and demonstrated sufficient grounds to qualify Ireland as the center of Eurofood’s main interests. *Id.*

57. Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, paras. 39–44 (May 2, 2006). The ECJ in the Eurofood case allowed the Irish court to disregard the Italian court’s holding as a rare public policy exception. E.U. Insolvency Regulation, *supra* note 29, at L160/9; Case C-341/04, *Bondi v. Bank of Am., N.A.*, CELEX No. 60400341, 2004 WL 3168085, para. 151 (Sept. 15, 2004).

involved in the secondary proceedings are encouraged to cooperate with the court adjudicating the main proceeding.⁵⁸ Thus, the ECJ held that Ireland's winding up proceeding would be the main proceeding under the E.U. Insolvency Regulation, and any subsequent proceeding opened with regard to Eurofood in Italy would be a secondary proceeding.⁵⁹

B. America Sings Along

In 2005, the United States embraced the United Nations Commission on International Trade Law's (UNCITRAL) Model Insolvency Act (the Model Act) by enacting Chapter 15 of the U.S. Bankruptcy Code (Chapter 15).⁶⁰ The purposes of Chapter 15 are to maintain cooperation between American and foreign courts, to promote greater legal certainty for trade and investment, to administer cross-border insolvencies fairly and efficiently, to protect and maximize the value of the debtor's assets, and to rescue troubled businesses.⁶¹

Chapter 15 contains mechanisms to open insolvency proceedings concurrently in the United States while there are ongoing insolvency proceedings in foreign countries.⁶² The new provisions were designed to use these mechanisms when a foreign court requires assistance from a U.S. bankruptcy court, when concurrent cases are filed in the United States and in a foreign country, or when creditors in foreign countries may have

58. E.U. Insolvency Regulation, *supra* note 29, at L160/5. "Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realization [sic] 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." *Id.* at L160/3.

59. *See* Case C-341/04, *Bondi v. Bank of Am., N.A.*, CELEX No. 60400341, 2004 WL 3168085, paras. 92-105 (Sept. 15, 2004) (concluding that Ireland maintains jurisdiction over the main Eurofood insolvency proceeding).

60. *See* 11 U.S.C.A. § 1501 (West Supp. 2006) (noting the purpose of Chapter 15 is "to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency").

61. *Id.* For a better explanation of the changes introduced by Chapter 15, its intricacies, and its purposes, *see* Jay Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 721-28 (2005).

62. *See* 11 U.S.C.A. § 1528.

an interest in requesting that a case be filed under Chapter 15.⁶³ Thus, U.S. courts are now able to open bankruptcy cases for subsidiaries of foreign corporations owning assets in the United States, such as Parmalat's American subsidiaries.⁶⁴

Chapter 15 is relevant to the jurisdictional battles discussion, because it also uses the term "center of its main interests."⁶⁵ While U.S. law generally uses the term "principle place of business" to refer to the nerve center of a corporation, Chapter 15 maintains its commitment to the Model Act by using the COMI language, possibly as an expectation of future conflicts with E.U. member states.⁶⁶ Should a conflict arise between American courts and European courts, how will an American court define COMI? Chapter 15 presumes that, absent contrary evidence, the country of the debtor's registered office is the COMI.⁶⁷ While this presumption is similar to the E.U. Insolvency Regulation's presumption,⁶⁸ America's different policy regarding the treatment of debtors may result in a different interpretation of a debtor's COMI.⁶⁹

Since the May 2, 2006 ECJ opinion, several U.S. courts have begun to interpret the Chapter 15 definition of COMI, and critics have weighed in on some of these opinions. An example of such interpretation came about in *In re SPhinX, Ltd.*⁷⁰ In that case, several hedge funds were registered and incorporated in the Cayman Islands.⁷¹ However, these funds did not conduct a trade or business in the Cayman Islands, nor did they have any

63. *Id.* § 1501(b) (listing the circumstances under which an American court may open a case under Chapter 15).

64. *See id.* § 1501(b)(4). The ability of foreign representatives to open proceedings in the United States based on foreign proceedings was not a new concept. *See Westbrook, Chapter 15 at Last, supra* note 61, at 716 (noting that Chapter 15, with some modifications, replaced the previously-existing Section 304 of the U.S. Bankruptcy Code).

65. 11 U.S.C.A. § 1502(4).

66. *See Westbrook, Chapter 15 at Last, supra* note 61, at 719–20; *see, e.g.*, 11 U.S.C.A. § 1502(4).

67. 11 U.S.C.A. § 1516(c).

68. *See* E.U. Insolvency Regulation, *supra* note 29, at L160/5.

69. *See infra* Part IV (discussing the different policies employed by America, Italy, and Ireland and the implications of such differing policies).

70. 351 B.R. 103 (Bankr. S.D.N.Y. 2006).

71. *Id.* at 106–07.

employees, physical offices, or any significant assets in the Cayman Islands.⁷² Rather, the business for the hedge funds was conducted by PlusFunds, an American company located in New York and incorporated in Delaware.⁷³ Furthermore, PlusFunds was the debtor in a separate Chapter 11 case before the Southern District of New York.⁷⁴ The conflict arose when SPhinX was forced to settle a \$312 million preference paid on its behalf in the PlusFunds proceeding.⁷⁵ To stymie the payment of the settlement, investors in the SPhinX funds opened insolvency proceedings in the Cayman Islands and then filed petitions under Chapter 15 in the U.S. court to have the Cayman Islands proceedings recognized as foreign main proceedings.⁷⁶

In deciding whether to recognize the Cayman Islands proceedings, the U.S. bankruptcy court underwent an overly complicated analysis, first noting that the proceedings were “entitled to recognition,” but then bifurcating the discussion into a separate analysis as to whether the proceeding was a foreign main or foreign non-main proceeding.⁷⁷ The Court ultimately held that because the purpose for opening proceedings in the Cayman Islands was to prevent the approval of the settlement in the PlusFunds case, the Cayman Islands were not the COMI for the SPhinX funds and, therefore, not a main proceeding.⁷⁸

While the *SPhinX* court’s opinion seemed well-reasoned and logically based on the ECJ’s interpretation of COMI, critics of the *SPhinX* opinion have stated that such reasoning “tortured” the purposes for enacting Chapter 15.⁷⁹ Rather than severing

72. *Id.* at 107.

73. *Id.*

74. *Id.*

75. *Id.* at 109. A preference payment is discussed in Section 547 of the Bankruptcy Code and, generally speaking, is a payment made by the debtor to a specific creditor within a certain number of days to the debtor’s petition date that may be viewed as unfairly preferential to the paid creditor and detrimental to other creditors. *See* 11 U.S.C.A. § 547 (West Supp. 2006).

76. *In re SPhinX*, 351 B.R. at 109.

77. *Id.* at 117–22.

78. *Id.*

79. *See* Daniel M. Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, AM. BANKR. INST. J., Dec./Jan. 2007, at 44, 84.

the analysis of whether to recognize a foreign proceeding and whether a proceeding is main or non-main, Glosband argues that because *SPhinX* did not have any establishment in the Cayman Islands and could not prove that its COMI was in the Cayman Islands, the Cayman proceedings should not have been recognized as either foreign main *or* non-main proceedings.⁸⁰ That is, the proceedings should not have been recognized in the American proceedings at all.⁸¹ Glosband further argues that the *SPhinX* opinion “creates a wholly unnecessary, serious and regrettable breach with European case law on the meaning of key concepts taken from a European statute.”⁸² Opinions such as the *SPhinX* opinion demonstrate how countries may pass laws with every intention of harmonizing their laws and policies, but when it comes time to interpret common language, different policies and backgrounds will undoubtedly lead to differing interpretations.

C. *Behind the Music: Common Theories*

In deciding how to conduct insolvency proceedings, courts often adhere to one of two commonly used principles: territorialism and universalism.⁸³ Whichever theory a court favors often determines how that court will treat foreign creditors and foreign assets of local debtors.⁸⁴ Furthermore, these theories have assisted UNCITRAL, the European Union, and the United States in drafting the Model Act, the E.U. Insolvency Regulation, and Chapter 15, respectively.⁸⁵ Because many well-written legal articles have greatly documented the

80. *Id.*

81. *Id.*

82. *Id.*

83. OMAR, *supra* note 22, at 23 (noting a court’s decision to “adhere to the universality or territorialism principle has a bearing on the overall question of the conduct and efficiency of insolvency proceedings”).

84. *Id.*

85. See Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 Am. Bankr. L.J. 105, 108–17 (2005) (discussing the influence these theories have had in developing international insolvency policy); LoPucki, *Global and Out of Control?*, *supra* note 53, at 84–89; Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 147 (2005) [hereinafter LoPucki, *Universalism Unravels*] (implying that a universalist system is “about to be thrust on the world”).

advantages and disadvantages of these theories, this section will only briefly articulate key points of the two theories.⁸⁶

1. *Territorialists Sing Alone*

Territorialism—commonly known as the “grab rule”—focuses on dealing with local assets for the benefit of local creditors.⁸⁷ The traditional approach for territorialism consists of the courts in each jurisdiction physically seizing the property and distributing it according to local rules.⁸⁸ This approach dominated the United States until the 1970s.⁸⁹ Participation in insolvency proceedings is subject to the availability of knowledge, information, and in some instances, the ability of foreign creditors to overcome procedural hurdles.⁹⁰ While this particular view of territorialism has developed a bad connotation for some attorneys and practitioners, in the modern context this theory requires cooperation among states and results in something less than pure territorialism.⁹¹

One advantage of territorialism is more favorable treatment for local creditors, because assets will be distributed to a smaller pool of creditors.⁹² However, foreign creditors may also benefit from laws derived from this theory, because they may have the ability to pick and choose the best forum and the most favorable laws for them to make claims against a debtor.⁹³ Disadvantages

86. For further discussion of the arguments between universalism and territorialism, see Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2193–2215 (2000); Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT'L L. & POL. 787, 789–803 (2000); Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 464–66 (1991) [hereinafter Westbrook, *Theory and Pragmatism*]; Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 704–08 (1999) [hereinafter LoPucki, *Cooperation in International Bankruptcy*].

87. OMAR, *supra* note 22, at 23.

88. See Guzman, *supra* note 86, at 2179.

89. See Bufford, *supra* note 85, at 114.

90. See OMAR, *supra* note 22, at 24.

91. LoPucki, *Cooperation in International Bankruptcy*, *supra* note 86, at 742 (envisioning a form of territorialism more like universalism).

92. See *id.* at 743–44.

93. See *id.* at 744.

of this theory, however, seem to be more numerous.⁹⁴ For example, territorialism makes reorganization more difficult for domestic debtors with assets distributed in foreign jurisdictions unless the laws of a given jurisdiction allow for the shifting of assets across borders.⁹⁵ Another disadvantage is the increased costs of bankruptcy due to the need to engage in parallel insolvency cases in multiple jurisdictions to maximize recovery for all creditors.⁹⁶

2. *Universalists Sing in Harmony*

Universalism, on the other hand, comes in two forms: pure and modified.⁹⁷ Under a pure form of universalism, all proceedings for a single debtor would be held in a single jurisdiction and would distribute all assets to both local *and* foreign creditors.⁹⁸ A goal of this method is to distribute assets to creditors within various countries as evenly and fairly as possible without favoring local creditors.⁹⁹ The main argument for universalism in this form is harmonization.¹⁰⁰

Realizing that perfect harmonization within a single legal regime may not be feasible, proponents of universalism acknowledge the utility of a modified form of universalism.¹⁰¹

94. See Bufford, *supra* note 85, at 114–15; OMAR, *supra* note 22, at 24.

95. OMAR, *supra* note 22, at 24.

96. See Bufford, *supra* note 85, at 114 (citing Jay L. Westbrook, *A Global Solution to International Default*, 98 MICH. L. REV. 2277, 2309 (2000) [hereinafter Westbrook, *A Global Solution*]). Other disadvantages include the ease of conflict between jurisdictions; the inability of creditors to know in advance where the debtor's assets will be located when bankruptcy intervenes; uneven distribution of assets; and the opportunity for both creditors and debtors to use strategic methods to advance their own interests. *Id.* at 116 (discussing a case where a territorial regime in Japan refused to enjoin a major resort development in Australia, but the American court, under a universalist approach, was able to impose an automatic stay to prevent secured creditors in Australia from foreclosing on the Australian real property).

97. *Id.* at 110 (noting that the pure form of universalism occurs only in an ideal world and is only practical as a theory).

98. *Id.* (citing Westbrook, *A Global Solution*, *supra* note 96, at 2292–97).

99. See OMAR, *supra* note 22, at 26.

100. See Bufford, *supra* note 85, at 111.

101. See *id.* at 111–12 (discussing the modified form of universalism).

Thus, the modified form calls for a main proceeding in the “home country” of the debtor with the assistance of secondary or ancillary proceedings held in other jurisdictions.¹⁰² One problem with this theory is the very idea of secondary or ancillary proceedings.¹⁰³ Foreign courts working together on sensitive areas of law heavily influenced by local public policy may impede certain creditor rights, such as seizure of assets.¹⁰⁴ However, the most relevant problem of modified universalism within the context of forum shopping and jurisdictional battles is not the existence of concurrent proceedings, but how to define the home country or COMI to determine which proceeding is the main proceeding.

III. A LOOK AT THE PATIENT’S CHART: FAMILY HISTORY

As most countries begin to provide corporate debtors with the option to reorganize rather than liquidate, insolvency laws around the world appear to be heading in the same direction.¹⁰⁵ This section will trace the ancestry of a few relevant jurisdictions to point out that, while insolvency laws and procedures may now be similar, the policies behind the procedures have not developed concurrently and may achieve far different results.¹⁰⁶ The roots of traditional Western insolvency law may be traced back to ancient Roman law around 450

102. See *id.* at 112 (citing as an example Westbrook, *A Global Solution*, *supra* note 96, at 2297).

103. See OMAR, *supra* note 22, at 27.

104. See *id.* (discussing the apparent contradiction between the strategy of secondary or ancillary practices and their actual effects).

105. See Tony McAuley, *Chapter and Verse: Insolvency Laws in Europe Are Being Overhauled*, May 2005, <http://www.cfoeurope.com/displaystory.cfm/3929315/> (chronicling the changes and reforms in different European countries’ bankruptcy laws). Countries like England and Italy have even attempted to model their reorganization laws after America’s Chapter 11. *Id.*

106. See Westbrook, *Theory and Pragmatism*, *supra* note 86, at 479–80 (discussing the outcome differences in *Felixstowe Dock & Railway Co. v. U.S. Lines, Ltd.*, [1987] 2 *Lloyd’s Rep.* 76).

B.C.¹⁰⁷ During this era, a debtor was liable for his debts “with his life and body.”¹⁰⁸ If a man could not pay his debts, he could be enslaved, imprisoned, or even executed.¹⁰⁹ By 326 B.C., early insolvency laws had moved toward the notion that proper recovery of debts should be made against the debtor’s property rather than his life.¹¹⁰ This school of thought led to the liquidation of the debtors’ assets by creditors.¹¹¹ *Venditio bonorum*, an early example of such a liquidation procedure, was in existence by 118 B.C.¹¹² However, this form of full scale liquidation was considered a criminal and defamatory measure against the debtor and was initiated by the creditors.¹¹³

By 17 A.D., communities began to allow *cessio bonorum*, a form of assignment of the debtor’s estate for the benefit of his creditors.¹¹⁴ Such a procedure provided recovery for the creditors while avoiding defamation to the debtor.¹¹⁵ In rare circumstances, debtors were able to reduce their debt through a

107. See McAuley, *supra* note 105, at 4 (noting that early insolvency law was based on Roman penal laws, which resulted in harsh punishments for the debtors); see also 1 JAN DALHUISEN, DALHUISEN ON INT’L INSOLVENCY & BANKR. § 1.01 (Matthew Bender ed., 1986) (noting that while modern insolvency laws are derived from Roman laws, ancient Roman law was not static and developed over a thousand years).

108. DALHUISEN, *supra* note 107, § 1.02[1]. A person could become indebted only by obtaining a loan. *Id.* (citations omitted). Such loans, however, were uncommon in early Roman rural communities and could only be obtained by the *nexum* (literally “fettters”) or an early form of contract known as *sponsio*. *Id.*

109. *Id.*

110. *Id.* § 1.02[1] (discussing the passage of *Lex Poetilia Papiria de nexis*).

111. *Id.* Liquidation was made possible by the growing use of contracts that legally bound the debtor to pay his debts. *Id.*

112. *Id.* In this procedure, if a debtor defaulted on a legally recognized and enforceable obligation, the debtor’s estate would be attached. *Id.* Though the debtor remained in control of his estate, he was supervised by his creditors or by his trustee if there were many creditors. *Id.* If the debtor continued to refuse payment, his creditors would recover such payment by a sale of the estate to the highest bidder. *Id.*

113. *Id.*

114. *Id.* § 1.03. This procedure was designed for the *bona fide* debtor who became insolvent or unable to pay debts due to a force of nature. *Id.* Through this procedure, a debtor could petition the Praetor, or Governor, for relief by assigning all of the debtor’s estate, with certain exemptions, to his creditors. *Id.*

115. *Id.* There are conflicting theories on whether such a procedure granted the debtor a discharge of his debts. *Id.* (citations omitted).

procedure called *remissio*, also known as a composition.¹¹⁶ While recovery upon the person of the debtor—such as execution or imprisonment—was never abolished completely, recovery upon the debtor's estate became the norm.¹¹⁷

The early influence of Roman law on Western European legal institutions declined with the fall of the Roman Empire in 476 A.D.¹¹⁸ Roman legal influence continued in the background until a rediscovery of ancient Roman insolvency laws in the twelfth century.¹¹⁹ By the fourteenth century, ancient Roman notions of insolvency were evident in northern Italian merchant cities using *distractio bonorum*.¹²⁰ Meanwhile, in other Western European nations, such as England, creditors used individual remedies to recover debts.¹²¹ By the fifteenth and sixteenth centuries, local or regional laws began to have substantially different effects on the development of each region's insolvency jurisprudence.¹²² While the revival of early Roman law led to the use of ancient tenants for the insolvent,¹²³ the effects of these regional and local laws on insolvency law during the Medieval era began the decline of a coherent and global rule of insolvency law and the creation of different variations of local insolvency laws.¹²⁴

116. *Id.* § 1.04[2]. Debt reduction was typically granted to heirs of the debtor upon a majority decision by creditors to make the acceptance of inheritance more attractive. *Id.*

117. *Id.* § 1.05.

118. *Id.* § 2.01[1]–[2].

119. *Id.* (discussing tribes throughout Spain, northern Italy, Germany, and France where Roman law still appeared during the period of decline).

120. *Id.* § 2.01[2]. The liquidation procedure of *distractio bonorum* was a form of *venditio bonorum* designed for two or more creditors that led to a piecemeal sale of the debtor's estate. *Id.* § 1.02[4].

121. *Id.* § 2.01[2]. Certain individual remedies, depending on local laws, could include governmental attachment of the debtor's movable or immovable property in addition to the restriction of the debtor's intangible rights. *Id.* § 1.02[3] (discussing early individual remedies used under Roman law).

122. *Id.* § 2.01[2] (noting the different procedures of Roman law being used in different regions of Western Europe).

123. *See id.* § 2.01[1].

124. *See id.* § 2.01[2].

A. *Uncle Italy*

During the thirteenth and fourteenth centuries in Italy, creditors began using formal bankruptcy proceedings, presumably to prevent the first attaching creditor from taking all the debtor's assets.¹²⁵ These proceedings were criminal in nature and could have resulted in severe consequences if a court determined that a debtor's insolvency developed fraudulently.¹²⁶ Throughout the fifteenth, sixteenth, and seventeenth centuries, most parts of Italy practiced forms of compositions and liquidation for the benefit of both creditors and debtors.¹²⁷

In 1861, Italy enacted a uniform code to harmonize Italian laws, including Italian insolvency laws.¹²⁸ During the twentieth century, Italian insolvency laws underwent minor changes allowing for compositions in more cases¹²⁹ but eventually preferred liquidation proceedings.¹³⁰ In 1942, Italian insolvency law introduced the *amministrazione controllata* procedure to prevent automatic liquidation.¹³¹ In 1979, because most large enterprises within Italy were either directly or indirectly owned by the state, the Italian government began the practice of

125. *Id.* § 2.02[1] (discussing the use of *distractio bonorum* and new innovations in bankruptcy proceedings).

126. *Id.* For example, if a debtor incurred debt with no intent to repay it, the debtor would be subjected to a severe punishment called *banca rotta*. *Id.* The term literally means "broken bench" and denotes a ceremonial breaking of the debtor's bench to deny the debtor his ability to continue his craft. *Id.*; see also OMAR, *supra* note 22, at 5 (discussing the etymology of bankruptcy).

127. See DALHUISEN, *supra* note 107, § 2.03[1] (noting that even though compositions were only available in limited situations, debtors benefited from them due to the diminished debt and possible discharge, and creditors benefited by the avoidance of complicated bankruptcy proceedings and accelerated payment).

128. *Id.* (noting that Book III of this Code contained the bankruptcy laws).

129. *Id.* § 3.05[1] (noting that small merchants were treated as nonmerchants, and nonmerchants were subject to special insolvency rules consisting of little more than individual remedies).

130. *Id.* § 3.05[2].

131. *Id.* *Amministrazione controllata* requires a plan the court feels will lead to full recovery of the enterprise. See Andrew Chetcuti Ganado, *Heralding a New Corporate "Rescue Culture"*, THE ACCOUNTANT, Sept. 2002, at 9, available at <http://www.miamalta.org/MagSept02Page09.htm>. Creditors must agree by a majority vote. *Id.* (citing Italian Law, arts. 187–93).

reorganization in extreme cases.¹³² Using this practice, creditors' rights were respected only to the extent possible, and creditors did not take an active role in the process.¹³³ This practice demonstrated a sudden change in the trend of Italian insolvency policy.¹³⁴ Rather than favoring the creditor or debtor specifically, the practice demonstrated that the government was taking a regulatory role, potentially for the benefit of the Italian economy.¹³⁵

B. Aunt England and Cousin Ireland

To fully understand the policy behind Ireland's insolvency laws, it is helpful to consider the development of insolvency laws in England.¹³⁶ English insolvency laws did not formally begin to develop until the late thirteenth century.¹³⁷ From the thirteenth through the sixteenth centuries, English insolvency laws developed to allow creditors to seize debtors' land, profits, and chattels, while also allowing creditors to imprison debtors in most cases.¹³⁸ Early laws did, however, provide for some protection of debtors' assets, such as the inability of creditors to levy upon the debtors' oxen and beasts of plough.¹³⁹ By 1705, debtors could obtain a discharge of his or her debts through a formal bankruptcy proceeding.¹⁴⁰ However, a debtor did not

132. See DALHUISEN, *supra* note 107, § 3.05[3] (discussing the *ammistrazione straordinaria delle grandi imprese in crisi* whereby the government and judiciary took the role of reorganizing the enterprises).

133. *Id.* (noting that the reorganization practice was a highly political matter).

134. The introduction of *ammistrazione controllata* and *ammistrazione straordinaria* marked a movement away from the use of traditional Roman insolvency remedies.

135. See DALHUISEN, *supra* note 107, § 3.05[3] (noting that the approach gives the cabinet committee in charge of economic policy the regulatory powers to interfere with corporation reorganizations).

136. See 2 COLLIER INT'L BUS. INSOLVENCY GUIDE ¶ 27.01[2][b] (Richard F. Broude et al. eds., 2006) (noting that Ireland inherited its common law from the English common law system after obtaining its independence in 1922 and continued to follow English common law in most cases thereafter).

137. See DALHUISEN, *supra* note 107, § 2.02[8].

138. *Id.*

139. See *id.* (discussing early forms of exemptions).

140. See *id.* (noting that the Act of Queen Anne established the debtor's first right to a discharge).

have the option to voluntarily petition for such a discharge until 1844.¹⁴¹ It was not until 1825 that England began to recognize a modern form of composition that required approval from a large majority of creditors.¹⁴² The development of English insolvency law formed the basis for more modern bankruptcy developments.¹⁴³

By the late 1800's, the English Company Law governed corporate insolvencies through extensive winding up provisions.¹⁴⁴ Today, Ireland's insolvency legislation comprises the Companies Acts of 1963–2001.¹⁴⁵ Under this act, both creditors and debtors may petition for compulsory liquidation should the debtor become insolvent.¹⁴⁶ However, the most common ground for presenting a petition for compulsory liquidation is the company's inability to pay its debts, and such a petition is usually presented by a creditor.¹⁴⁷ This trend demonstrates Ireland's continuing hostility to debtors and a preference of payment to creditors in favor of a fresh start for the debtor.¹⁴⁸

C. *The American Step-Child*

The ancestry of American bankruptcy is very similar to Ireland's insolvency ancestry.¹⁴⁹ The framers of the U.S.

141. *Id.*

142. *Id.* (noting that before abolishing compositions in 1621, creditors were forced into composition agreements with debtors; after many years without compositions, English law took its cue from Scottish law and reintroduced compositions to benefit creditors).

143. *Id.* (noting that settlements derived from composition were not binding on the minority creditors and did not provide a discharge for the debtor).

144. *Id.* § 3.08[2] (noting that the Act of 1844 for Winding-Up the Affairs of Joint Stock Companies traditionally covers corporate insolvencies).

145. 2 COLLIER INT'L BUS. INSOLVENCY GUIDE ¶ 27.02[2][a] (Richard F. Broude et al. eds., 2006).

146. *Id.* ¶ 27.04.

147. *Id.*

148. *Compare id.* (noting that creditors typically prefer to wind up an insolvent debtor) with Marjorie L. Girth, *Rethinking Fairness in Bankruptcy Proceedings*, 73 AM. BANKR. L.J. 449, 450 (1999) (noting that involuntary petitions by a party other than the debtor are rare in American bankruptcy).

149. See Charles J. Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6 (1995) (noting that America, like Ireland, initially followed

Constitution included a provision *permitting* Congress to make American bankruptcy laws uniform throughout the states, but the first bankruptcy laws in America merely emulated existing English law.¹⁵⁰ The federal government did not use this power to unify American bankruptcy and insolvency laws for most of the eighteenth and nineteenth centuries.¹⁵¹ Thus, some early American colonies and states were more liberal in providing relief to debtors than was England, and each state was able to regulate creditor-debtor relationships according to local state policy.¹⁵² A notable deviation from English policy in the eighteenth century was the Americans' almost unanimous view that insolvency should not be punishable by death.¹⁵³

As federal bankruptcy law developed in America, legislation continued to evince a more pro-debtor view than did English legislation.¹⁵⁴ When Congress passed the first permanent federal bankruptcy laws in 1898, American bankruptcy policy continued to extend eligibility for those wishing to file voluntary bankruptcy, and creditors had fewer grounds for petitioning a court to open an involuntary bankruptcy proceeding against a debtor.¹⁵⁵ While continuing developments throughout the twentieth century appeared to provide more relief to debtors, these developments, such as the right to file voluntary cases, did

English common law with respect to treatment of debtors). This is similar to Ireland, which also initially followed English common law with respect to treatment of debtors. 2 COLLIER INT'L BUS. INSOLVENCY GUIDE ¶ 27.01[2][b] (Richard F. Broude et al. eds., 2006).

150. Tabb, *supra* note 149, at 6–7 (citing U.S. CONST. art. I, § 8, cl. 4).

151. *Id.* at 12–13 (citations omitted) (noting that federal bankruptcy laws existed only from 1800 to 1803, from 1841 to 1843, and from 1867 to 1878).

152. *Id.*

153. *Id.* at 13 (citing Symposium, *Contemporary Issues in Bankruptcy and Corporate Law: "A View from the Bench"*, 61 U. CIN. L. REV. 511, 513–14 (1992)) (noting the single vote against the inclusion of the clause carried the power to punish bankruptcies by death).

154. *See, e.g., id.* at 16–17 (discussing the Bankruptcy Act of 1841 and noting that America departed from English precedent by providing debtors the right to voluntarily petition for bankruptcy in 1841, a few years before England did the same).

155. *See id.* at 25–26 (citing the Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (repealed in 1978)). The Act of 1898, however, was not actually aimed at expanding relief for the debtor. *Id.* at 25. Rather, Congress intended to facilitate a more equitable and efficient administration and distribution of the debtor's property to creditors. *Id.*

not extend to corporate debtors until 1910.¹⁵⁶ The Great Depression and subsequent legislation continued this trend of pro-debtor bankruptcy law.¹⁵⁷ The Bankruptcy Act of 1978 marked the first time Congress enacted bankruptcy legislation that was not a response to a national financial disaster.¹⁵⁸ Such an undertaking demonstrates America's clear deviation from its English ancestry with respect to treatment of creditors and debtors.

IV. DIAGNOSIS: MODERN LAWS

A. *The Pro-Debtor America*

Under Chapter 11 of the modern Bankruptcy Code,¹⁵⁹ a debtor, or "debtor in possession" may remain in control of the administration of the corporation.¹⁶⁰ In addition, a debtor in possession has the right under Chapter 11 to submit a plan of reorganization.¹⁶¹ Other rights of a debtor in possession include the right to receive compensation as if the company were not insolvent.¹⁶²

While the insolvency laws in Europe are becoming more akin to American bankruptcy laws,¹⁶³ European countries' underlying policies that have led to current insolvency reform

156. *Id.* at 27 (citing Ch. 412 § 3, 36 Stat. at 839 (1910)) (noting the act's extension of eligibility for voluntary bankruptcy to "[a]ny person except a municipal, railroad, insurance, or banking corporation").

157. *See id.* at 28–30.

158. *Id.* at 32 (discussing the Act of 1978).

159. *See* 11 U.S.C.A. § 1101 et Seq (West Supp. 2006).

160. *See id.* § 1101(1) (defining "debtor in possession"). The management of a debtor corporation ordinarily remains in control of the corporation after filing its bankruptcy petition. *Id.* § 1104(a) (listing the instances in which a court may appoint a trustee to replace a debtor in possession; such instances require evidence of fraud or some sort of mismanagement).

161. *Id.* § 1121(a).

162. *Id.* § 330(a)(1) (including "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and reimbursement for actual, necessary expenses" as a right of a debtor-in-possession).

163. *See, e.g.,* McAuley, *supra* note 105 (discussing the recent Italian insolvency reforms).

differ from American bankruptcy policy.¹⁶⁴ Though American policy also wishes to see its creditors replenished, the policy behind the bankruptcy procedure in America has always been to provide debtors with a fresh start.¹⁶⁵ Forgiveness of debtors is ingrained in American bankruptcy history dating back to the Constitutional Convention.¹⁶⁶

B. Uncle Italy's Governmental Interests

The flaws in the pre-existing Italian insolvency procedures led to the development and use of the extraordinary administration procedure¹⁶⁷ as used in the Parmalat and Eurofood cases. The chief aim of this procedure is to sell off the debtor company's assets and distribute the proceeds in satisfaction of the company's debts, saving the company only where possible and where it would be in the best interest of the economy.¹⁶⁸

In late 2003 and early 2004, Italian insolvency laws underwent additional reforms, commonly known as the Marzano laws.¹⁶⁹ Under this system, the extraordinary administrator is placed in charge of the corporation and has 180 days to devise a

164. See, e.g., Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367, 374 (2003) (noting that English bankruptcy common law is founded upon the mantra that "once bankrupt, always bankrupt" while American history demonstrates more forgiveness) (citing Lucinda Kemeny & Garth Alexander, *Blair Chases American Dream*, TIMES (London), Feb. 18, 2001, at A1).

165. See generally Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) (discussing policy underlying U.S. bankruptcy law, discharge, and prohibitions); see also Tabb, *supra* note 149, at 17 (noting a pro-debtor attitude in American bankruptcy law).

166. James M. Olstead, *Bankruptcy: A Commercial Regulation*, 15 HARV. L. REV. 829, 831 (1901) (noting that the framers were aware that bankruptcy was punishable by death in England but determined not to grant such a power in America).

167. DALHUISEN, *supra* note 107, § 3.05[3]. See generally Commission Decision (EC) No. 1403/2000 of 16 May 2000 (OJ 2000 L79/29) (discussing the 1979 Italian act in relation to European Community treaties on the subject of the aid scheme implemented by Italy to assist large firms in difficulty).

168. See DALHUISEN, *supra* note 107, § 3.05[3] (describing the aim of the procedure as "orderly transfer").

169. McAuley, *supra* note 105.

plan of reorganization.¹⁷⁰ In March of 2005, two additional procedures became available in the hopes of averting the use of formal insolvency procedures.¹⁷¹ These procedures provide incentives to debtors or potential debtors to avoid insolvency. The procedures allow unsecured creditors to agree on an out-of-court plan and allow significant secured creditors to agree on a court-sanctioned plan should the company become insolvent at a later time.¹⁷² While the Marzano laws have helped debtors reorganize and avoid liquidation, these procedures are not quite the same as Chapter 11 procedures.¹⁷³ These differences may be interpreted to mean that Italian insolvency policy favors governmental interests over debtors' and creditors' interests.

C. *Cousin Ireland Looking Out for Creditors*

While American insolvency policy favors the debtor¹⁷⁴ and Italian policy arguably favors governmental interests,¹⁷⁵ Irish policy favors the creditors.¹⁷⁶ Rather than appointing an administrator as Italian law provides,¹⁷⁷ Irish insolvency law opts for a compulsory liquidation and places a liquidator in charge of the debtor as soon as the debtor becomes insolvent.¹⁷⁸ In addition to liquidations, separate legislation allows corporate entities to engage in arrangements with their creditors, much

170. *Id.*

171. *Id.* (discussing the *concordato preventivo* and *accordi di ristrutturazione dei debiti* procedures).

172. *Id.*

173. *See id.* (noting that the new Italian procedures give complete discretion to the administrator rather than involving committees of creditor classes, as is the case in American Chapter 11 proceedings); 11 U.S.C. § 1102 (2000) (providing for the appointment of unsecured creditors committees and any other committees the U.S. trustee deems necessary).

174. *See supra* Part IV.1.

175. *See supra* Part IV.2.

176. *See* 2 COLLIER INT'L BUS. INSOLVENCY GUIDE ¶ 27.04[2] (Richard F. Broude et al. eds., 2006) (noting that creditors are the most common party to present winding up petitions when the debtor is unable to satisfy his debts).

177. *See* McAuley, *supra* note 105.

178. *See In re Eurofoods*, [2005] I.L.Pr. 2, 2004 WL 3222613 at *30 (July 27, 2004) (Ir.) (discussing the Companies Act, 1963 (Irl.)).

like compositions.¹⁷⁹ The option for the debtor to stay in business and reorganize was not introduced into Irish legislation until 1990.¹⁸⁰

The fact that Ireland has only recently allowed a corporate debtor to reorganize demonstrates Ireland's long-standing policy of ensuring its creditors have justified expectations, and Ireland's desire to immediately benefit the creditors further illustrates Ireland's pro-creditor policy.¹⁸¹ The Eurofood case is a standard example of the lengths Irish courts are willing to go to maintain control over a debtor's assets and to prevent any potential mistreatment of creditors, whether local or foreign.¹⁸²

D. No Family Reunion in Sight

America has the mentality that a debtor corporation should be entitled to file bankruptcy as it chooses.¹⁸³ Most corporate bankruptcies filed in the United States are done so voluntarily.¹⁸⁴ Thus, a corporation has the option to liquidate or reorganize under Chapters 7 or 11.¹⁸⁵ The Italian system has changed drastically over the past few years into a scheme where reorganization, especially for multinational corporations such as Parmalat, is preferred if in the government's best interests.¹⁸⁶ Why then would it matter if an Italian court hosts the main

179. 2 COLLIER INT'L BUS. INSOLVENCY GUIDE ¶ 27.08[8] (Richard F. Broude et al. eds., 2006).

180. *Id.* ¶ 27.09[1] (discussing the examinership procedure) (citing Companies (Amendment) Act, 1990 (as amended) §§ 2–7).

181. *Id.* For example, Irish courts wanted to maintain jurisdiction over Eurofood to appease the main creditor, Bank of America, an American corporation. See *In re Eurofoods*, [2005] I.L.Pr. 2, 2004 WL 3222613 at *30–34 (discussing Irish law and arguing that the COMI is Ireland).

182. See *id.* (demonstrating a bias for determining that the COMI is Ireland by discussing the Italian court's arguments only briefly and with disapproval).

183. See Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 100–07 (1992) (discussing the options the Bankruptcy Code provides for corporate debtors).

184. See generally Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number is Not Too Small*, 57 BROOKLYN L. REV. 803, 803–05 (1991) (discussing the reasons why debtors ordinarily file petitions voluntarily rather than creditors filing an involuntary petition).

185. See Rasmussen, *supra* note 183, at 100–07.

186. See McAuley, *supra* note 105.

insolvency proceeding rather than an American bankruptcy court?

Without declaring either country's approach as better than the other, the point is that a country's policy goals will greatly affect the outcome for the parties involved in the insolvency, as well as the economy, depending on the debtor.¹⁸⁷ Take, for example, a multinational corporation based in Italy, presumably with its COMI in Italy as well. If the creditors are all American, and the main insolvency proceeding was opened in an Italian court, the American creditors would be left to abide by the decisions of the Italian administrator, especially for assets within Italy. The Italian corporate debtor, assuming it does business in the United States and has assets to recover in the United States, may then file a secondary proceeding in the United States under Chapter 15 to take advantage of the automatic stay over assets within the United States.¹⁸⁸ If a U.S. bankruptcy court determines that the proceeding in Italy is a foreign main proceeding,¹⁸⁹ the American creditors may receive far less equal treatment than they would receive if the U.S. bankruptcy court had hosted the main proceeding. Certainly, the Italian court would not like its own economy damaged by the fall of such a commercial giant, especially at the hands of foreign (American) creditors.

If the main proceeding was held in the United States under Chapter 11—because the Italian corporate debtor successfully argued to a U.S. bankruptcy court that it does all its business and holds most of its assets in the United States—the outcome may be tremendously different. With the main proceeding in the

187. Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 47–49 (2005) (noting that countries like Germany may allow for reorganization but are very biased toward corporate debtors, resulting in courts leaving the debtor's financial future in the hands of its creditors).

188. See 11 U.S.C.A. § 1520(a)(1) (West Supp. 2006); see also *id.* §§ 361–362.

189. The Bankruptcy Code defines a “foreign main proceeding” as “a foreign proceeding pending in the country where the debtor has the center of its main interests.” *Id.* § 1502(4). This definition, however, does not specify whether the court should make its own determination or whether the court should defer to foreign courts' findings regarding whether such a proceeding is a main proceeding. See E.U. Insolvency Regulation, *supra* note 29, at L160/5.

United States, the creditors would have a stake in the reorganization plan.¹⁹⁰ In this hypothetical scenario, the E.U. Insolvency Regulation would not apply because the United States is not a member state.¹⁹¹ However, one could imagine a real scenario where two member states are battling for jurisdiction over the main insolvency proceeding, each having very different policy goals.¹⁹² The purpose of this scenario is to demonstrate how one court's procedural determination may affect the substantive rights of the debtor, creditors, and other parties of interest.

The presence of differing policy goals emphasizes the need to create a system where forum shopping is less available and prominent. Though many countries are conforming to the same or similar procedures for winding up or reorganizing a corporate debtor,¹⁹³ two identical laws in countries with contrasting policy goals could be as different as night and day.¹⁹⁴

V. PROGNOSIS: GUIDELINES AND PANELS

There are many theories predicting what will come of the current E.U. Insolvency Regulation. With the recent ECJ opinion handed down on the Eurofood battle, there may now be an increase in court competition over the main proceeding.¹⁹⁵ The "first to file" strategy appears to be the rule, at least for E.U. member states.¹⁹⁶

190. Chapter 11 provides creditors the right to participate in the drafting and approval of a plan of reorganization. 11 U.S.C. §§ 1121, 1126; *see also supra* Part IV.1.

191. *See* E.U. Insolvency Regulation, *supra* note 29, at L160/3.

192. *See, e.g.*, Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813 (Sept. 27, 2005) (umpiring the fight between Irish and Italian courts over the proper jurisdiction for Eurofood's bankruptcy).

193. *See generally* McAuley, *supra* note 105 (comparing the bankruptcy law and policy of several European nations and the United States).

194. *See* Martin, *supra* note 187, at 52; Westbrook, *Theory and Pragmatism*, *supra* note 86, at 482–83 (noting foreign courts that are accustomed to liquidations, such as English courts, may struggle to apply unfamiliar reorganization schemes).

195. *See* LoPucki, *Global and Out of Control?*, *supra* note 53, at 95 ("If [the ECJ] rules—as it probably must—that the decision of the first court to hear the case is binding on later courts, it will be a green light for court competition.").

196. *Id.* *See generally* Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813 (Sept. 27, 2005) (holding that the court in which the bankruptcy action was first filed is the court with main jurisdiction over the bankruptcy).

Universalists stand by the E.U. Insolvency Regulation and claim that, with a few modifications, it will be successful.¹⁹⁷ For example, the race to open the first insolvency proceeding may be controlled by delaying the determination of which country is the true COMI until all parties have notice and sufficient time to respond and present evidence.¹⁹⁸ Furthermore, adding mechanisms to prevent an insolvent corporation from moving its COMI will prevent forum shopping as well.¹⁹⁹

The problem, however, is not the “first to file” race by competing forums. The problem is with the racing guidelines and officials.²⁰⁰ The E.U. Insolvency Regulation’s definition of COMI is too vague and allows the foreign courts too much discretion in determining whether a particular country is the debtor’s COMI.²⁰¹ Even Chapter 15 lacks a clear definition of the COMI and fails to provide any guidelines by which bankruptcy judges may determine whether a foreign proceeding is a main or a non-main proceeding.²⁰² Without such guidelines, U.S. bankruptcy judges may rely on differing choice of law analyses, such as the “center of gravity” analysis.²⁰³ To ensure uniformity in making determinations as to whether a proceeding

197. See, e.g., Bufford, *supra* note 85, at 107–08.

198. See *id.* at 132–34 (discussing the need to notify all interested parties and provide them with the opportunity to be heard before making a COMI determination).

199. See LoPucki, *Global and Out of Control?*, *supra* note 53, at 97–98 (detailing the ease in moving a corporation’s headquarters, assets, and all other grounds by which a court may determine the COMI). See generally Bufford, *supra* note 85, at 139 (suggesting a residency requirement similar to that used in the United States to prevent a corporation from changing its COMI).

200. See *supra* Parts III–IV (discussing how policies, procedures, and regulations differ from country to country).

201. See E.U. Insolvency Regulation, *supra* note 29, at L160/1–3, 5.

202. See 11 U.S.C.A. §§ 1502, 1516 (West Supp. 2006) (discussing the treatment for a foreign main and foreign non-main proceeding); see, e.g., *In re SPhinX*, 351 B.R. 103, 111–22 (Bankr. S.D.N.Y. 2006) (attempting to define COMI under Chapter 15). See generally Glosband, *supra* note 79 (criticizing the SPhinX court’s analysis of COMI under Chapter 15).

203. See *In re Aerovio Nacionales de Colombia S.A. Avianca*, 303 B.R. 1, 18 (Bankr. S.D.N.Y. 2003) (noting that courts may defer to the center of gravity, if ascertainable). Under a center of gravity analysis, a court will determine the controlling jurisdiction based where the “relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.” *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963).

is main or non-main, courts need more conclusive and uniform guidelines by which to abide. Such guidelines will reduce forum shopping, provide courts with a better ability to apply the law to the reality of the circumstances, and increase predictability and uniformity.

A. Providing Guidelines

The recent ECJ Eurofood ruling made some headway into providing specific guidelines for determining the proper COMI of a debtor. The court held that “the centre of main interest must be identified by reference to criteria that are both *objective and ascertainable to third parties*.”²⁰⁴ The court stated that the COMI is presumed to be the member state where the subsidiary company is registered, and this presumption can be rebutted only if there are “objective and ascertainable” factors establishing that the company’s actual COMI is somewhere else.²⁰⁵ The court listed the “letterbox company” an example of such a circumstance, but did not elaborate on the definition of a letterbox company aside from describing a “company not carrying out any business in the territory of the Member State in which its registered office is situated.”²⁰⁶ The court made clear that in the case of a company like Eurofood, “the mere fact that [the debtor’s] 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 [E.U. Insolvency] Regulation.”²⁰⁷

Where additional guidelines are necessary, courts may look to alternative “objective and ascertainable” factors, such as choice of law rules.²⁰⁸ The American Law Institute’s Second Restatement of Conflicts of Laws (Restatement) presents some

204. Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. 1078, para. 33 (May 2, 2006) (emphasis added).

205. *Id.* para. 35.

206. *Id.* para. 36.

207. *Id.*

208. *See id.* para. 33. To avoid forum shopping in ordinary civil cases in the United States, many courts use choice of law rules. *See, e.g.*, *Mutrubuonco v. Shearson Lehman Huton*, 514 U.S. 52 (1995).

helpful guidelines,²⁰⁹ and many states in America have enacted, or promulgated through case law, versions of these guidelines for courts to use in determining which laws should apply to tort and contract cases.²¹⁰ With a uniform set of guidelines, competing courts would be less tempted, or able, to use tenuous contacts to arrive at a biased conclusion of debtor's COMI.

A uniform set of guidelines should focus on the debtor's relationships with its creditors. Contracts govern much of an insolvent debtor's business.²¹¹ The debtor has contracts with its creditors, including, for example, its employees.²¹² European countries use Restatement-like guidelines to determine which laws will apply to contracts.²¹³ The Rome Convention generally provides parties within the European economic community with Restatement-like guidelines that grant parties to a contract freedom to choose the applicable law to govern their contracts.²¹⁴ In the absence of any such choice, the Rome Convention presumes that the law of the country where a corporation's "central administration" is located will apply to the contract.²¹⁵ This so-called presumption is rebutted where the agreement calls for performance in a country other than the corporation's principal place of business, in which case the law of

209. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971). The Restatement directs a state to follow its applicable statutory directives, but where a state has no such directives, a court may consider (i) the needs of the interstate and international systems; (ii) the relevant policies of the forum; (iii) the relevant laws and policies of other interest states, or countries; (iv) the protection of justified expectations; (v) certainty, predictability, and uniformity of results; and (vi) ease in determination and application of the law to be applied. *Id.*

210. In cases concerning contracts, the Restatement focuses on the following factors: (i) where the contract was executed; (ii) where negotiations occurred; "[iii] the place of performance; [iv] location of the subject matter of the contract; and [v] the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.* § 188.

211. See generally Rasmussen, *supra* note 183, at 56 (observing that "bankruptcy law is a term of the contract between the firm and those who extend credit to it").

212. See *id.* at 57–58.

213. See generally Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) [hereinafter Rome Convention].

214. *Id.* art. 3(1).

215. *Id.* art. 4(2) (defining "central administration" as the corporation's principal place of business).

the place of performance shall apply.²¹⁶ The Rome Convention provides some helpful guidelines, but its application is limited in the insolvency realm.²¹⁷

Additionally, guidelines may be found in UNCITRAL's Legislative Guide to Insolvency Law (Legislative Guide).²¹⁸ On December 16, 2004, the United Nations endorsed the Legislative Guide for all states considering implementing the Model Law or E.U. Insolvency Regulation.²¹⁹ The Legislative Guide focuses on drafting effective and efficient insolvency laws in spite of numerous differences in policy and legislative treatment from country to country.²²⁰ With the many different policies in mind, the Legislative Guide emphasizes issues arising in reorganization proceedings.²²¹

Among the issues discussed in the Legislative Guide is which law should apply in insolvency proceedings.²²² Most countries apply the choice of law rule of *lex fori concursus*, or the law of the state hosting the insolvency proceedings.²²³ This means the law of the forum state will apply to most issues arising during the insolvency proceeding, whether the proceeding is one of liquidation or reorganization.²²⁴ However, many countries also have exceptions in which the forum country will not apply its local law, but rather the law that is more applicable to the particular litigation.²²⁵ Examples of these exceptions are

216. *Id.*

217. *Id.* art. 1(2)(e) (noting that the Rome Convention shall not apply to "questions governed by the law of companies and other bodies corporate or unincorporate such as . . . winding up of companies and other bodies corporate or unincorporate").

218. U.N. COMM'N ON INT'L TRADE LAW, LEGIS. GUIDE ON INSOLVENCY LAW, U.N. Sales No. E.05.V.10 (2005) [hereinafter UNCITRAL DRAFT LEGIS.].

219. G.A. Res. 59/40, U.N. Doc. A/Res/59/40 (Dec. 16, 2004).

220. See UNCITRAL DRAFT LEGIS., *supra* note 218, at 1.

221. *Id.*

222. *Id.* at 67.

223. *Id.* at 68. The E.U. Insolvency Regulation also recommends that "*lex concursus* determine[] all the effects of the insolvency proceedings, both procedural and substantive, on the person and legal relations concerned." E.U. Insolvency Regulation, *supra* note 29, at L160/3.

224. See E.U. Insolvency Regulation, *supra* note 29, at L160/3; UNCITRAL DRAFT LEGIS., *supra* note 218, at 69.

225. *Id.* at 69–70.

employment contracts,²²⁶ security interests,²²⁷ and avoidance actions.²²⁸

B. Appointing a Panel

While uniform guidelines may remove bias from a court's COMI determination, such a determination will still depend largely upon the policy of that country.²²⁹ Because so much depends on where a court determines a debtor's COMI to be, such a determination should not be made by a single country's court.²³⁰ Recital 22 of the E.U. Insolvency Regulation specifically calls for the "first to file" rule, which puts courts in a rush to declare their home country the debtor's COMI.²³¹ To avoid such a hasty and potentially biased decision, the European Union should consider forming a panel of transnational insolvency

226. *Id.* at 70 (stating the reason as the expectations of the employees and their relatively lesser bargaining power); *see also* E.U. Insolvency Regulation, *supra* note 29, at L160/4.

227. UNCITRAL DRAFT LEGIS., *supra* note 218, at 71 (noting that an exception to *lex fori concursus* should especially apply for interests in real property not located within the forum country). The risk of foreign law applying to local security interests may cause crippling instability to the secured lender, which may be further crippled if the debtor transfers its COMI. *Id.* Rather than applying the laws of another country, the E.U. Insolvency Regulation recommends opening a secondary proceeding in the jurisdiction where the rights *in rem* reside. E.U. Insolvency Regulation, *supra* note 29, at L160/3.

228. UNCITRAL DRAFT LEGIS., *supra* note 218, at 71 (discussing different approaches used to help the third party seeking to protect the transaction).

229. *See supra* Part IV.4 (discussing the implications that differing local insolvency policies may have on the outcome and treatment of the parties).

230. *See* Westbrook, *Theory and Pragmatism*, *supra* note 86, at 481 ("[T]he difficulty is that a single judge in the midst of litigation is all too likely to err about questions of foreign insolvency law, including reciprocity."). At least one legal scholar believes it to be naïve to expect that courts will proceed in good faith to determine the best application of standards when a single large bankruptcy can bring more than a billion dollars in fees to local bankruptcy professionals. LoPucki, *Global and Out of Control?*, *supra* note 53, at 92.

231. *See* E.U. Insolvency Regulation, *supra* note 29, at L160/3; *see, e.g.*, Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813 (Sept. 27, 2005) (determining which court correctly determined that its home country was the center of Eurofood's main interests); Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, paras. 10, 61 (May 2, 2006) (discussing how the priority rule requires mutual trust from all member states and noting that "a Member State may refuse to recognise insolvency proceedings opened in another Member State where the effects of such recognition would be *manifestly* contrary to that State's public policy") (emphasis added).

specialists, preferably consisting of acting or retired judges. Each member state could appoint such a specialist to represent itself on panels. When an insolvency proceeding is opened in a member state and an issue over which member state is the COMI arises, a special panel, consisting of three arbitrarily chosen specialists, would convene.

The competing proceedings would be stayed until the special panel has the opportunity to consider all interested parties' arguments. For this reason, notification of the special panel's proceeding is of key importance.²³² The panel would then make its determination and the stayed proceedings could continue, subject to the panel's designation of the true COMI. The proceeding in the member state that the panel deems as the COMI would be the main proceeding, and the proceeding in the member state that is not the COMI shall be deemed a secondary proceeding and could only be a liquidation proceeding.²³³

Applying these concepts to the facts of Eurofood would result in both the Irish and Italian courts' proceedings being stayed until the specialists' panel could have made its own determination. The panel would have had the opportunity to hear from all parties of interest about what they had expected with regard to Eurofood's insolvency proceedings. If Eurofood's creditors had expected an Irish winding up proceeding, the creditors could present their expectations before the panel to consider with the other aforementioned factors. On the other hand, Dr. Bondi, the Italian administrator of the Parmalat reorganization, could argue that Eurofood, part of a larger corporate structure, could not be liquidated without upsetting the Parmalat reorganization.²³⁴ The panel could then make its

232. See Bufford, *supra* note 85, at 131–40 (arguing that parties deserve to have notice and an opportunity to be heard before a court can make its COMI determination).

233. See E.U. Insolvency Regulation, *supra* note 29, at L160/5.

234. See LoPucki, *Global and Out of Control?*, *supra* note 53, at 92–97; Bufford, *supra* note 85, at 135–38 (discussing the problem with, and possible solutions for, declaring the home country of a single corporate entity that is part of a larger corporate group). The panel's main duty would only be to determine the correct COMI of the single corporate entity, not the COMI of the corporate group as a whole. See *id.* However, as others have discussed, the corporate group should be considered when determining the proper adjudication of an entity within this group. See *id.*

determination before the other courts begin reorganizing or liquidating, rather than after the fact.²³⁵

VI. CONCLUSION: SLIPPING OUT OF THE COMI

It is difficult to imagine a country or a union with many different insolvency laws harmonizing those successfully. However, if not for the passage of the Bankruptcy Act of 1898, that may well be where America would stand today.²³⁶ Instead, the United States has taken many steps over the course of the last hundred years—some steps in response to economic need, and other steps due to the growth and development of American bankruptcy policy.²³⁷ Europe is heading there too, but its countries have longer traditions of differing laws and policies to overcome.²³⁸ As this Comment has discussed, even countries with similar insolvency laws can have substantially different outcomes based on their long-standing policy goals.²³⁹

As the Eurofood cases demonstrate, if it is possible that an insolvent corporation's COMI could be within a court's jurisdiction, that court will open an insolvency proceeding to stake its claim. The ECJ may have implicitly endorsed through its Eurofood opinion a "first to file" rule for a forum to proclaim itself as a debtor's COMI.²⁴⁰ The recent attempts by the European Union and the United Nations to pass harmonious transnational insolvency laws and regulations appear to have an

235. The ECJ handed down its opinion in the Eurofood case long after the Irish and Italian courts began their battles. See Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813 (Sept. 27, 2005). It would have been difficult to reverse anything that had been done, possibly leading to the "first to file" rule. See LoPucki, *Global and Out of Control?*, *supra* note 53, at 95. For this reason, quicker action is necessary.

236. See Tabb, *supra* note 149, at 23 (noting that the passage of the 1898 Act marked the beginning of the era of permanent federal bankruptcy legislation).

237. See generally *id.* at 23–43 (discussing the history of bankruptcy laws through the Reform Act of 1994).

238. See *supra* Parts III–IV.

239. See, e.g., Martin, *supra* note 187, at 51–52 (noting the bias that still exists in countries where the law has changed but the policy lags behind); see also McAuley, *supra* note 105 (noting that insolvency laws in some European countries have changed, but the business culture is struggling to catch up).

240. See Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, para. 52 (Sept. 27, 2005) (relying on Recitals 16 and 22 of the E.U. Insolvency Regulation).

undertone of universalism.²⁴¹ It would seem simple to harmonize transnational insolvency proceedings as more and more countries are moving toward a reorganization-focused regime.

However, as this Comment has discussed, most countries have developed their insolvency laws for different reasons and based on different policies.²⁴² These differing policies cause countries to have different motivations in hosting a debtor's insolvency proceedings. Rather than abstaining or deferring to another country, a battle over jurisdiction will ensue. Because the E.U. Insolvency Regulation only vaguely defines the COMI and does not provide guidelines by which to determine the true COMI,²⁴³ the ECJ will follow the "first to file" rule and side with the first country to open a valid insolvency proceeding under the E.U. Insolvency Regulation.²⁴⁴ Therefore, one solution is to remove the ambiguity and vagueness from the COMI determination by defining or enumerating what the ECJ meant by "objective and ascertainable" factors. A uniform set of Restatement-like guidelines will give courts some guidance and justification for making COMI determinations. As more opinions and case law discuss sufficiently "objective and ascertainable" criteria, the COMI may become better defined. Appointing an arbitrary panel to make such a determination will remove the influence of differing local policies from the equation.

Just over a hundred years ago, insolvency laws and policies in the United States were arguably in a similar position as the insolvency laws and policies throughout the E.U. member states are now.²⁴⁵ Even after passing the first permanent federal bankruptcy laws in 1898, American bankruptcy jurisprudence

241. See LoPucki, *Global and Out of Control?*, *supra* note 53, at 87.

242. See *supra* Part III; see also Martin, *supra* note 187, at 52.

243. The Recitals of the E.U. Insolvency Regulation do little more than acknowledge that the laws of the initiating state may interfere with transactions in other member states. See E.U. Insolvency Regulation, *supra* note 29, at L160/3.

244. Case C-341/04, *Bondi v. Bank of Am., N.A.*, 2006 E.C.R. I-3813, paras. 92–93 (Sept. 27, 2005) (noting that a proceeding is deemed opened according to national laws, and Irish company law, for example, calls for the opening of a proceeding on the date the petition is presented).

245. See Tabb, *supra* note 149, at 12–13 (noting that states regulated bankruptcy matters freely for most of the first 100 years of American history).

continued to see a great deal of fluctuation and instability.²⁴⁶ Perhaps insolvency laws in E.U. member states are destined to see similar fluctuations and instability. However, as more courts such as the ECJ continue to decide on “objective and ascertainable” factors for determining a debtor’s COMI, such a determination will become more predictable, at which point a harmonious set of laws and policies may develop among member states like Ireland and Italy, and perhaps even the United States.

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246. *See generally id.* at 23–36.

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