503 In-house Counsel & the Insolvency of Corporate Groups

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Formerly International Legal Director
Comdisco, Inc.

Michel P. Cloes
European Counsel
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Principal, Leader of East Region Restructuring
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Henry C. Pitney
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Overseas Private Investment Corporation

Faculty Biographies

Kathryn A. Chapman
Formerly International Legal Director
Comdisco, Inc.

Michel P. Cloes

Michel Cloes is the Paris-based European Counsel for SNAP ON, INC, a $2.5 billion tools manufacturing company based in Kenosha, Wisconsin.

Mr. Cloes has a wide range of legal management experience in Europe, India & Asia Pacific. He started his career in the United States where he worked for many years. Prior to joining Snap-On, Inc. he was European counsel for Dana Corporation and he was European counsel for Denver-based Gates Corporation.

Prior to that, he was in private practice in Los Angeles, where he also worked for EuroDisneyland Corporation.

Mr. Cloes is a member of the California Bar and the Los Angeles County Bar Associations. He is a former member of the Brussels Bar where he worked in the area of EU competition law for Liedekerke Wolters, Waelbroeck & Kirkpatrick. He is the founding president of ACC Europe and he is a member of ACC's BOD.

Mr. Cloes is co-author of European Union Business Law, West Publishing 1995. He is a frequent speaker on EU-US corporate compliance and corporate social responsibility issues, as well on law department management. He is also president of chief counsel network, a Paris-based law management consulting company.

He holds a J.D. from the faculty of Law at Liège State University, Belgium and a L.L.M. from the University of San Diego School of Law.

Holly Felder Etlin

Holly Felder Etlin is an experienced executive with 25 years of experience providing restructuring and reorganization services to companies and their creditors in the retail, distribution, consumer products, and health care industries. She is also the leader of XRoads Restructuring East Practice Group.

Ms. Etlin has served as, turnaround advisor to Winn Dixie where she assisted management in identifying and executing a strategy to reorganize the company around a "core footprint" of stores, downsizing G&A to fit the footprint and other cost reduction activities, vendor relationships, liquidity management, and business planning. Independent Examiner by the U. S. Trustee, Ms. Etlin conducted a 90 day analysis of the events leading up to the bankruptcy of AmeriServe Food Distribution, a $9 billion food distributor. She investigated alleged misrepresentation to investors in a bond offering, and she produced a 600-page final report for the court, detailing her findings.

She is a former partner at Deloitte Consulting, and served as deloitte's national director of its reorganization services practice. She is the current chairman of the Turnaround Management Association (TMA) and in 2005 she served as TMA President. She is also a certified insolvency and reorganization advisor and a member of the Association of Insolvency and Restructuring Advisors.

Ms. Etlin earned her B.A. from the University of California at Los Angeles.

Henry C. Pitney
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Overseas Private Investment Corporation

503 Insolvency

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INDEX OF TOPICS

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- First shockwave: Internal communication: Who, How and When?
- Second Shockwave: the PR and Poney shows to customers, suppliers, bankers, credit insurers
- Then the Tsunami: "Mars Attacks" revisited by Consultants and Outside Counsel.

And they're staying for dinner!

IMPACT OF CH 11 OVERSEAS
THE $ TRAIL: TREASURY

- Quickly: Focus on Treasury and overseas bank relationships in relation with the DIP Loan

1. Intl Credit Insurers unilaterally end coverage thereby threatening supply chain
2. In turn, local banks cut credit lines : re-negotiate one by one

- Special Issue: Pan-European Cashpooling and InterCompany Loans

IMPACT OF CH 11 OVERSEAS PENSION FUNDS

- Most countries have statutory State-guaranteed funds

1. Europe: UK and Germany are exceptions
2. What if in Deficit ?
3. Deal with conflicted O&D
4. Organize actuarial evaluation
5. Meet with the Fund Trustees
6. Review Options of going to the Regulator for a Deal

EU REGULATION 1346/2000:

- Background and Goal
- The Rule of C.O.M.I and its application
- Case Law : EuroFood Decision (May 2006)

IMPACT OF CH 11 OVERSEAS
Liability of Officers and Directors of Overseas Boards

- From one Day to the Next: O&D are made responsible on a Stand Alone Basis

1. Organize information meetings
2. Switch from 'paper meetings' to formal meetings
3. Intl O&Ds may request separate legal representation
4. Local Auditors question Intercompany loans
5. Personal liability becomes a serious issue
6. Conflict of interests may arise / handle resignations

FRENCH BANKRUPTCY 101

INSOLVENCY *Note other Options: 1. Conciliation, 2. Ad Hoc 3. Safeguard Procedure*

(Cessation des paiements)

Petition for Bankruptcy

Within 1 week to 10 days Ruling deciding (1) the immediate liquidation

Or (2) opening the procedure of rehabilitation

Observation period *(Periode d'observation)*

(from 0 up to 20 months)

Judgment

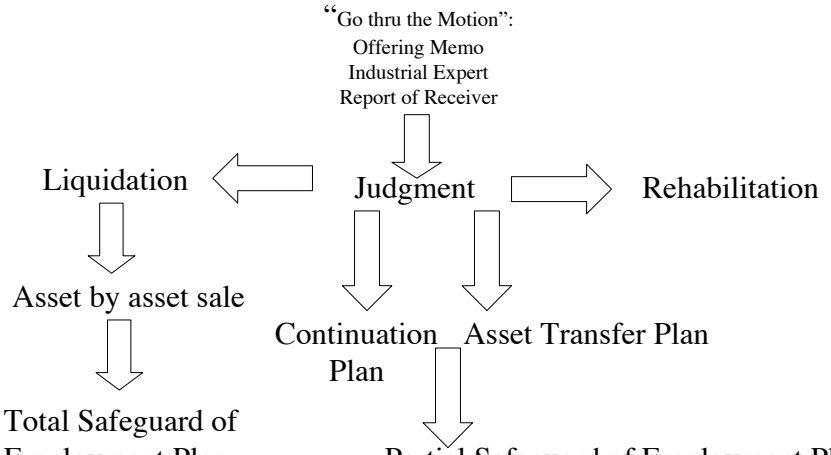
Continuation Plan *(Plan de continuation)*

Asset Transfer Plan *(Plan de Cession)*

Rehabilitation *(redressement Judiciaire)*

Liquidation *(Liquidation judiciaire)*

The Observation Period



Go through the Motions:

- Offering Memorandum Process
- Industrial Expert Process
- Consider all Options with Trustee / Court / Unions
- All along, prevent risks upon exit:

1. Piercing the corporate veil (de facto manager or fraud)
2. Unions law suits
3. Excessive write-offs at US parent
4. Reallocation of equipment, IP and other assets
5. Watch out for Accounting Rules: deferred currency translation loss (75% PPE rule)

End of Observation Period

- Shareholders and managers have no control over the decision to terminate the Observation Period.
- The adopted Plan may be a combination of various solutions.
- In any case, the Lay Off Plan is the sole responsibility of either the Trustee or the Liquidator.

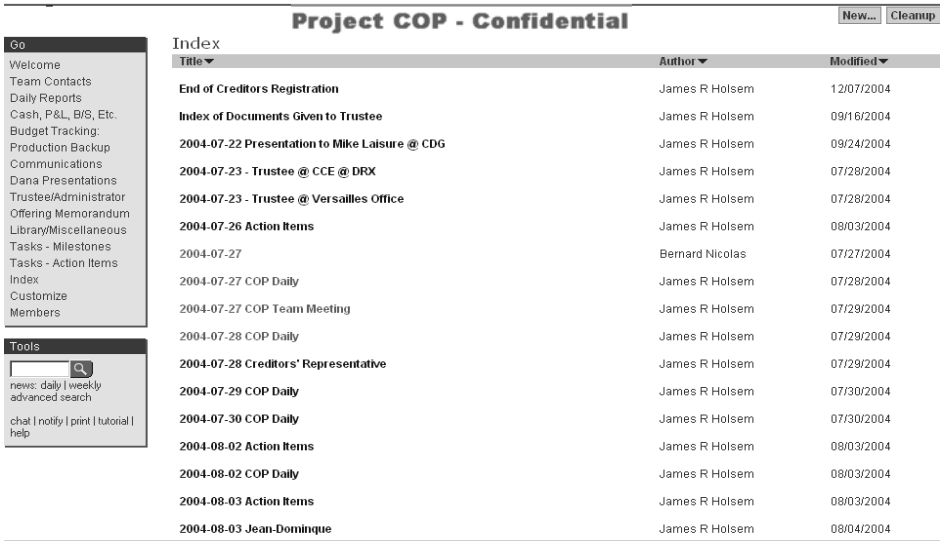
ENVIRONMENTAL REMEDIATION COSTS

Liquidation: Pay on assets – orphan site
Sale or Reorg Plan: To be negotiated
New Concept: Turn Key Liability Buy Out –
Tip: Public Utility Easements

SOIL + GW REMEDIATION: COST ESTIMATE
MEET THE MAYOR EARLY –
HELP THE CITY ATTRACT A NEW BUSINESS OWNER
REFER TO DEAL WITH THE UNIONS
LAND CLASSIFICATION : INDUSTRIAL OR RESIDENTIAL ?
BUILDING DEMOLITION (Often a better choice)

Project Management – In-House Counsel's Office
Very legally-driven field, where customary practices and relationships may assure success. In-House Counsel with astute Project Management skills quickly becomes Key Leader

- Core Team Daily Conference Calls
- Backup Supply Team Weekly Calls
- PR consultant US / Local
- Intranet Web Site (QuickPlace)
  - Daily activity report
  - Action items & milestones
  - E-Storage of Key documents



Achievements

- Speed: plant closed in 6 months instead of 18
- Reduced Lay-off Costs: legal minimum, plus…
- Legal Certainty: a mixture individual waivers, court orders to secure PCV challenges, foreclosure of third party claims thru the Court process
- Liquidation was avoided thru a shareholder rescue plan. We avoided: bad PR; US. write offs; environmental wasteland; social unrest
- Equipment: court order allowed a wholesale buy-back thru broker by parent Co. !
- Efficient judicial maneuvering in a known poisoned pit…
- Saved jobs in money-making business only – helped create new jobs
- Reduced environmental bill while staying good environmental citizen

Lessons Learned

- Teamwork
- Dedicated project management
- Coordinate and Channel Communication
- Specialized counsel for specialized process
  - But cannot abdicate responsibility and must question soundness of all advice
- Ownership structure of legal entities Pre-Petition is very important

IMPACT OF CH 11 OVERSEAS: ACME's MODEL COMMUNICATION PACKAGE

- In order to preserve the value of the company and to complete its transformation plan designed to resolve the company's existing U.S. legacy issues and the resulting high cost of its U.S operations, on October 8, 2005, ACME Corporation in the U.S. filed voluntary petitions for business reorganization under chapter 11
- ACME is *not* going out of business. ACME filed for chapter 11 protection in order to address legacy issues faced by its U.S. operations
  - ACME's chapter 11 reorganization is well-financed, well-planned and well-organized
  - ACME is committed to achieving competitiveness for ACME's core U.S. operations and the key to accomplishing that goal is reducing legacy and other costs as soon as possible
- ACME is committed to servicing its customers by meeting their quality, scheduling, delivery and production needs in a timely manner. With the authority it has received from the court, ACME expects that the filing should have no impact on customers
- ACME's global management team will continue to manage both the U.S. and global businesses as the court has granted authority to continue the business in the ordinary course and to pay certain pre-filing claims
- ACME expects to complete its U.S.-based restructuring and emerge from Chapter 11 business reorganization in early to mid-2007
- ACME's non-U.S. subsidiaries were *not* included in the filing, will continue their business operations without supervision from the U.S. courts and will not be subject to chapter 11 requirements

No Material Impact on International Operations

- The commencement of the chapter 11 case will not materially impact the ongoing viability of ACME's international subsidiaries, which are
  - Separate legal entities
  - Generally competitive, cash-flow positive
  - Experiencing high growth opportunities
- Chapter 11 allows a business debtor to remain in operation and work out its financial difficulties while existing board and management remain in place
  - Unlike many insolvency proceedings outside the U.S., a chapter 11 case is aimed at the **reorganization** of the debtor. It is **not** a liquidation
  - Most U.S. chapter 11 cases are commenced voluntarily by the filing company
- No administrator or similar overseer is appointed in a chapter 11 case, and the company can carry out ordinary transactions without the approval of any other party.
- Non-U.S. entities are expected to continue **"business as usual"** during chapter 11 case, including
  - Continuing to vigorously seek new business as normal and handle new awards – this should not be impacted by the U.S. chapter 11
  - Payment of outstanding invoices from suppliers and extension of credit to customers
  - Meeting all customer scheduling and delivery commitments

Worldwide Liquidity

- ACME plans to finance its global operations going forward with U.S. $_____ billion in debt facilities plus additional committed and uncommitted financing lines and/or securitization facilities in Asia, Europe and the Americas
- The financing includes $_____billion borrowed from pre-filing revolver and term loan facilities and $____ billion in senior secured debtor-in-possession (DIP) financing from a group of lenders led by ____ Bank.
- The proceeds of the DIP financing, together with cash generated from daily operations and cash on hand, will be used to fund post-filing operating expenses, including its supplier obligations, employee wages, salaries and benefits, new program development, research and development, and engineering
- The overall liquidity available to ACME, including more than $1 billion on hand outside the U.S., which ACME does not plan to repatriate to fund U.S. operations, will support its global operations outside the U.S. and help ensure the continued adequacy of working capital throughout its global business units

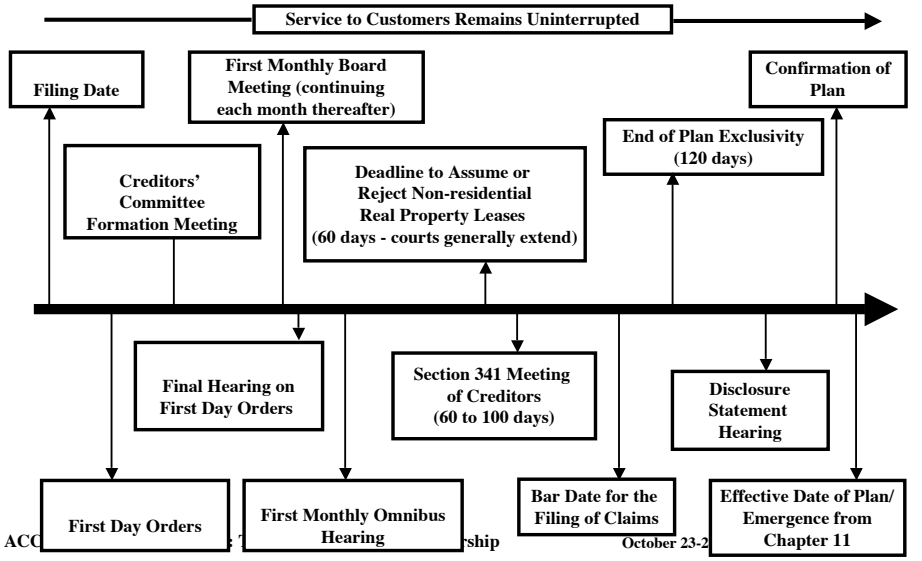
Court Orders

- On _____ , the court entered bridge orders, allowing ACME to continue operations as a debtor-in-possession through its "First Day" hearing
  - The bridge orders covered such topics as essential suppliers, human capital obligations, foreign creditors, administrative expenses, cash management, investment guidelines, customer programs and obligations, shipping and customs and cash collateral
- On _____, ACME had its "First Day" hearing, in which it requested, and was granted, final orders for the above
- These orders will allow ACME to continue its businesses so that there will be no interruption in ACME's service to its customers.
- In particular, the Court ruled that ACME has the *authority* to pay, at its discretion, pre-filing claims of certain of ACME's suppliers that are essential to the uninterrupted functioning of ACME's business operations

Summary

- ACME's global operations, both U.S. and non-U.S., are expected to continue without interruption
  - ACME diligently developed a disciplined plan to execute the filing, including adequate liquidity to run the day to day business operations, and the plan is on target
  - For our customers globally, we expect to continue to meet their scheduling, delivery and production needs in a timely manner
- The bridge orders allowed us to continue making payments to suppliers, employees, and others in order that ACME could continue to service its customers through the "First Day" hearing
- Final orders will allow ACME to continue its operations in the ordinary course on a go-forward basis
- The proceeds of the DIP financing together with cash generated from daily operations and cash on hand will be used to fund post-filing operating expenses, including supplier obligations and employee wages, salaries and benefits
- The fact that we have taken action now, while our liquidity position is strong, to address our U.S. legacy issues and restructure our U.S. operations, should provide customers with a tangible example that ACME is committed to solving even the toughest challenges and transforming itself into a more financially stable and more competitive market leader

Chapter 11 Events and Timeline



[2006] All ER (D) 28 (May)

Re Eurofood IFSC Ltd (Case C-341/04)

Court of Justice of the European Communities (Grand Chamber)

Judges Skouris (President), Jann (Rapporteur), Timmermans, Rosas, Malenovsky (Presidents of Chambers), Puissochet, Schintgen, Colneric, Klucka, Lohmus and Levits

2 May 2006

European community - Judicial cooperation in civil matters - Insolvency proceedings - Reference for preliminary ruling - Interpretation of regulation - Company wholly owned subsidiary of parent company incorporated in another member state - Whether centre of main interests in member state in which parent company registered or member state in which subsidiary incorporated - Council Regulation (EC) 1346/2000, art 3(1).

Article 3(1) of Council Regulation (EC) 1346/2000 provides: 'The courts of the Member States 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.'

Article 2 of Council Regulation (EC) 1346/2000 provides, so far as material, as follows: ' ...(a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A; (b) 'liquidator' shall mean any person or body whose function was to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those person and bodies are listed in Annex C ... '

Article 16 of Council Regulation (EC) 1346/2000 provides, so far as material, as follows: 'the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened ... '

Article 26 of Council Regulation (EC) 1346/2000 provides, so far as material, as follows: 'Any Member State may refuse to recognise insolvency proceedings opened in another Member State of to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.'

The debtor was a company registered in Ireland, with its registered office in Dublin. It was a wholly owned subsidiary of a company incorporated in Italy. The Italian company was admitted to extraordinary administration proceedings by the Italian authorities. Subsequently, an application for compulsory winding-up proceedings was commenced against the debtor in the High Court in Ireland, founded on the contention that the debtor was insolvent. The High Court appointed a provisional liquidator. The debtor was also admitted to the extraordinary administration procedure in Italy. The district court in Italy declared it insolvent, taking the view that its centre of main interests was in Italy, and that it had international jurisdiction to determine whether the debtor was in a state of insolvency. Following that, the High Court in Ireland decided that, according to Irish law, the insolvency proceedings in respect of the debtor had been opened in Ireland. It took the view that the debtor's centre of main interests was in Ireland, and that the proceedings commenced in Ireland were the main proceedings. It also held that the circumstances in which the proceedings had been conducted before the district court in Italy were such as to justify, pursuant to art 26 of Council Regulation (EC) No 1346/2000, the refusal of the Irish courts to recognise decision of that court. It found the debtor insolvent, and made a winding up order. The debtor appealed to the Supreme Court of Ireland, which stayed the proceedings, and referred to the Court of Justice of the European Communities a number of questions for preliminary ruling.

It fell to be determined: (i) where the registered offices of a parent company and its subsidiary were in two different member states, what were the governing factors in determining the subsidiary's 'centre of main interests' for the purposes of art 3(1) Council Regulation (EC) No 1346/2000; (ii) whether art 3 of Council Regulation (EC) No 1346/2000, in combination with art 16, had the effect that a court in a member state other than that in which the registered office of the company was situated and other than that where the company conducted the administration of its interests on a regular basis, but where insolvency proceedings were first opened had the jurisdiction to open the main insolvency proceedings; (iii) whether the decision of a court of a member state on a winding-up petition to appoint a provisional liquidator, before ordering liquidation, constituted a decision opening insolvency proceedings for the purposes of art 16(1) of the Regulation; and (iv) whether a member state was required, under art 17 of the Regulation, to recognise insolvency proceedings opened in another member state where the decision opening those proceedings was handed down in disregard of procedural rules guaranteed in the first member state by the requirements of its public policy.

The court ruled:

(1) Where a debtor was a subsidiary company whose registered office and that of its parent company were situated in two different member states, the presumption laid down in art 3(1) of Council Regulation (EC) No 1346/2000, whereby the centre of main interests of that subsidiary was situated in the member state where its registered office was situated, could be rebutted only if factors which were both objective and ascertainable by third parties enabled it to be established that an actual situation existed which was different from that which location at that registered office was deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the member state in which its registered office was situated. By contrast, where a company carried on its business in the territory of the member state where its registered office was situated, the mere fact that its economic choices were or could be controlled by a parent company in another member state was not enough to rebut the presumption laid down by that regulation.

(2) On a proper interpretation of art 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a member state had to be recognised by the courts of the other member states, without the latter being able to review the jurisdiction of the court of the opening state.

Gasser (Erich) GmbH v MISAT [2005] 1 All ER (Comm) 538, [2005] All ER (EC) 517, [2003] All ER (D) 148 (Dec). applied.

(3) On a proper interpretation of art 16(1) of Regulation No 1346/2000, a decision to open insolvency proceedings for the purposes of that provision was a decision handed down by a court of a member state to which application for such a decision had been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the regulation, where that decision involved the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the regulation. Such divestment implied that the debtor lost the powers of management that he had over his assets.

(4) On a proper construction of art 26 of Regulation No 1346/2000, a member state might refuse to recognise insolvency proceedings opened in another member state where the decision to open the proceedings had been taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoyed.

Krombach v Bamberski [2001] All ER (EC) 584, applied.

Rakesh Rajani Barrister.

Judgment

CASE C-341/04

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (Grand Chamber)

2 MAY 2006

http://www.lexisnexis.com/uk/legal/delivery/PrintDoc.do?fileSize=54578&jobHandle=1... 3/5/2006

JUDGES SKOURIS (PRESIDENT), JANN (RAPPORTEUR), TIMMERMANS, ROSAS and MALENOVSKÝ (PRESIDENTS OF CHAMBERS), PUISSOCHET, SCHINTGEN, COLNERIC, KLUCKA, LÕHMUS and LEVITS

ADVOCATE GENERAL JACOBS

JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) ('the Regulation').

2 The reference was submitted in the context of insolvency proceedings concerning the Irish company Eurofood IFSC Ltd ('Eurofood').

Legal context

Community legislation

3 According to Article 1(1) thereof, the Regulation applies 'to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

4 According to Article 2 of the Regulation, headed 'Definitions':

'For the purposes of this Regulation:

(a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) "liquidator" shall mean 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. Those persons and bodies are listed in Annex C;

...

(e) "judgment" in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

...'

5 Annex A to the Regulation, concerning the insolvency proceedings referred to in Article 2(a) of the Regulation, mentions under Ireland the procedure of 'compulsory winding up by the Court'. By way of liquidators referred to in Article 2(b) of the Regulation, Annex C indicates, in relation to Ireland, the 'provisional liquidator'.

6 Concerning the determination of the court having jurisdiction, Article 3(1) and (2) of the Regulation provide:

'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.

Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State'.

7 Concerning the determination of the law to be applied, Article 4(1) of the Regulation provides:

'Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened ...'.

8 Concerning the recognition of insolvency proceedings, Article 16(1) of the Regulation states:

'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.'

9 Article 17(1) of the Regulation states:

'The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings ...'.

10 However, according to Article 26 of the Regulation:

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

11 According to Article 29(a) of the Regulation, the liquidator in the main proceedings may request the opening of secondary proceedings.

12 Article 38 of the Regulation provides that, where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator, that temporary administrator 'shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings'.

National legislation

13 Section 212 of the Companies Act 1963 ('the Companies Act') confers on the High Court jurisdiction to wind up any company.

14 Section 215 of the Companies Act provides that an application to the court for the winding up of a company is to be by petition presented either by the company or by any creditor or creditors.

15 Section 220 of the Companies Act provides:

'1. Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

2. In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.'

16 Section 226(1) of the Companies Act provides that the court may appoint a provisional liquidator at any time after the presentation of a winding-up petition. The appointment of the liquidator, pursuant to section 225, is otherwise made at the time the winding-up order is made. Pursuant to section 229(1), a provisional liquidator, once appointed, is obliged to 'take into his custody or under his control all the property and things in action to which the company is or appears to be entitled'.

Background and questions referred for a preliminary ruling

17 Eurofood was registered in Ireland in 1997 as a 'company limited by shares' with its registered office in the International Financial Services Centre in Dublin. It is a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the Parmalat group.

18 On 24 December 2003, in accordance with Decree-Law No 347 of 23 December 2003 concerning urgent measures for the industrial restructuring of large insolvent undertakings (GURI No 298 of 24 December 2003, p. 4), Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed Mr Bondi as the extraordinary administrator of that undertaking.

19 On 27 January 2004, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. That application was

based on the contention that that company was insolvent.

20 On the same day the High Court, on the strength of that application, appointed Mr Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf.

21 On 9 February 2004, the Italian Minister for Production Activities admitted Eurofoods to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator.

22 On 10 February 2004, an application was lodged before the Tribunale Civile e Penale di Parma (District Court, Parma) (Italy) for a declaration that Eurofoods was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court in Parma, taking the view that Eurofood's centre of main interests was in Italy, held that it had international jurisdiction to determine whether Eurofoods was in a state of insolvency.

23 By 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America NA, namely 27 January 2004. Taking the view that the centre of main interests of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court in Parma were such as to justify, pursuant to Article 26 of the Regulation, the refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court made an order for winding up and appointed Mr Farrell as the liquidator.

24 Mr Bondi having appealed against that judgment, the Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

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

(4) Where,

(a) the registered offices of a parent company and its subsidiary are in two different Member States,

(b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and

(c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the "centre of main interests", are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

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

25 By order of the President of the Court of Justice of 15 September 2004, the application by the Supreme Court that the accelerated procedure provided for in the first subparagraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

The questions

The fourth question

26 By its fourth question, which should be considered first since it concerns, in general, the system which the Regulation establishes for determining the competence of the courts of the Member States, the national court asks what the determining factor is for identifying the centre of main interests of a subsidiary company, where it and its parent have their respective registered offices in two different Member States.

27 The referring court asks how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.

28 Article 3 of the Regulation makes provision for two types of proceedings. The insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within whose territory the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that they apply to the assets of the debtor situated in all the Member States in which the regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings', are restricted to the assets of the debtor situated in the territory of the latter State.

29 Article 3(1) of the Regulation provides that, in the case of a company, 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.

30 It follows that, in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.

31 The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

32 The scope of that concept is highlighted by the 13th recital of the Regulation, which states that 'the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

33 That definition shows that the centre of main interests 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.

34 It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company 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.

35 That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.

36 By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

37 In those circumstances, the answer to the fourth question must be that, where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both

objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

The third question

38 By its third question, which should be examined second, since it concerns the recognition system established by the Regulation in general, the referring court essentially asks whether, by virtue of Articles 3 and 16 of the Regulation, a court of a Member State, other than the one in which the registered office of the undertaking is situated, and other than the one in which that undertaking conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened, must be regarded as having jurisdiction to open the main insolvency proceedings. The referring court is thus essentially asking whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for.

39 As is shown by the 22nd recital of the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust.

40 It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings [see by analogy, in relation to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (OJ 1978 L 304, p. 36; 'the Brussels Convention'), Case C-116/02 Gasser [2003] ECR I-14693, paragraph 72; Case C-159/02 Turner [2004] ECR I-3565, paragraph 24].

41 It 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, i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process (see paragraph 66 of this judgment).

42 In return, as the 22nd recital of the Regulation makes clear, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction.

43 If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.

44 The answer to the third question must therefore be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

The first question

45 By its first question, the referring court essentially asks whether the decision whereby a court of a Member State, presented with a petition for the liquidation of an insolvent company, appoints, before ordering that liquidation, a provisional liquidator with powers whose legal effect is to deprive the company's directors of the power to act, constitutes a decision opening insolvency proceedings for the purposes of the first subparagraph of Article 16(1) of the Regulation.

46 The wording of Article 1(1) of the Regulation shows that the insolvency proceedings to which it applies must have four characteristics. They must be collective proceedings, based on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator.

47 Those forms of proceedings are listed in Annex A to the Regulation, and the list of liquidators appears in Annex C.

48 The Regulation is designed not to establish uniform proceedings on insolvency, but, as its second recital states, to ensure that 'cross-border insolvency proceedings ... operate efficiently and effectively'. To that end, it lays down rules which, as its third recital indicates, are aimed at securing 'coordination of the measures to be taken regarding an insolvent debtor's assets'.

49 By requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first. As the 22nd recital of the Regulation explains, '[t]he decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision'.

50 However, the Regulation does not define sufficiently precisely what is meant by a 'decision to open insolvency proceedings'.

51 The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one Member State to another. In some Member States, the proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other Member States, certain essential findings, which may be quite time-consuming, must be made before proceedings are opened. Under the national law of certain Member States, the proceedings may be opened 'provisionally' for several months.

52 As the Commission of the European Communities has argued, it is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle laid down in the first subparagraph of Article 16 (1) of the Regulation, be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the Regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period.

53 It is in relation to that objective seeking to ensure the effectiveness of the system established by the Regulation that the concept of 'decision to open insolvency proceedings' must be interpreted.

54 In those circumstances, 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.

55 Contrary to the arguments of Mr Bondi and the Italian Government, that interpretation cannot be invalidated by the fact that the liquidator referred to in Annex C to the Regulation may be a provisionally-appointed liquidator.

56 Both Mr Bondi and the Italian Government acknowledge that, in the main proceedings, the 'provisional liquidator' appointed by the High Court, by decision of 27 January 2004, appears amongst the liquidators mentioned in Annex C to the Regulation in relation to Ireland. They argue, however, that this is a case of a provisional liquidator, in respect of whom the Regulation contains a specific provision. They note that Article 38 of the Regulation empowers the provisional liquidator, defined in the 16th recital as the liquidator 'appointed prior to the opening of the main insolvency proceedings', to apply for preservation measures on the assets of the debtor situated in another Member State for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings. Mr Bondi and the Italian Government infer from that that the appointment of a provisional liquidator cannot open the main insolvency proceedings.

57 In that respect, it should be noted that Article 38 of the Regulation must be read in combination with Article 29, according to which the liquidator in the main proceedings is entitled to request the opening of secondary proceedings in another Member State. That Article 38 thus concerns the situation in which the competent court of a Member State has had main insolvency proceedings brought before it and has appointed a person or body to watch over the debtor's assets on a provisional basis, but has not yet ordered that that debtor be divested or appointed a liquidator referred to in Annex C to the Regulation. In that case, the person or body in question, though not empowered to initiate secondary insolvency proceedings in another Member State, may request that preservation measures be taken over the assets of the debtor situated in that Member State. That is, however, not the case in the main proceedings here, where the High Court has appointed a provisional liquidator referred to in Annex C to the Regulation and ordered that the debtor be divested.

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

The second question

59 In the light of the answer given to the first question, there is no need to reply to the second question.

The fifth question

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

61 Whilst the 22nd recital of the Regulation infers from the principle of mutual trust that 'grounds for non-recognition should be reduced to the minimum necessary', Article 26 provides 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, in particular its fundamental principles or the constitutional rights and liberties of the individual.

62 In the context of the Brussels Convention, the Court of Justice has held that, since it constitutes an obstacle to the achievement of one of the fundamental aims of that Convention, namely to facilitate the free movement of judgments, recourse to the public policy clause contained in Article 27, point 1, of the Convention is reserved for exceptional cases (Case C-7/98 Krombach [2000] ECR I-1935, paragraphs 19 and 21).

63 Considering itself competent to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State, the Court of Justice had held, in the context of the Brussels Convention, that recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (Krombach, paragraphs 23 and 37).

64 That case-law is transposable to the interpretation of Article 26 of the Regulation.

65 In the procedural area, the Court of Justice has expressly recognised the general principle of Community law that everyone is entitled to a fair legal process (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraphs 20 and 21; Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-1, paragraph 17; and Krombach, paragraph 26). That principle is inspired by the fundamental rights which form an integral part of the general principles of Community law which the Court of Justice enforces, drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

66 Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, referred to in the referring court's fifth question, these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.

67 In the light of those considerations, the answer to the fifth question must be that, on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

68 Should occasion arise, it will be for the referring court to establish whether, in the main proceedings, that has been the case with the conduct of the proceedings before the Tribunale civile e penale di Parma. In that respect, it should be observed that the latter court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

2. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

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

4. On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

Language of the case: English.

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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 1346/2000

of 29 May 2000

on insolvency proceedings

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,

Having regard to the opinion of the European Parliament [1],

Having regard to the opinion of the Economic and Social Committee [2],

Whereas:

(1) The European Union has set out the aim of establishing an area of freedom, security and justice.

(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

(5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.

(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.

(7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [3], as amended by the Conventions on Accession to this Convention [4].

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.

(10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened and should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

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

(13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

(14) This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.

(15) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

(16) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.

(17) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary. If the main insolvency proceedings are opened, the territorial proceedings become secondary.

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[1] Opinion delivered on 2 March 2000 (not yet published in the Official Journal).
[2] Opinion delivered on 26 January 2000 (not yet published in the Official Journal).
[3] OJ L 299, 31.12.1972, p. 32.
[4] OJ L 204, 2.8.1975, p. 28; OJ L 304, 30.10.1978, p. 1; OJ L 388, 31.12.1982, p. 1; OJ L 285, 3.10.1989, p. 1; OJ C 15, 15.1.1997, p. 1.

(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

(21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

(22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the *lex situs* in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems [1]. For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.

(29) For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

(30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.

(31) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.

(32) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(33) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

[1] OJ L 166, 11.6.1998, p. 45.

Article 2

Definitions

For the purposes of this Regulation:

(a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) 'liquidator' shall mean 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. Those persons and bodies are listed in Annex C;

(c) 'winding-up proceedings' shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

(d) 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;

(e) 'judgment' in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) 'the time of the opening of proceedings' shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

(g) 'the Member State in which assets are situated' shall mean, in the case of:

— tangible property, the Member State within the territory of which the property is situated,

— property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,

— claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

(h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3

International jurisdiction

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

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 5

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 6

Set-off

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7

Reservation of title

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 8

Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9

Payment systems and financial markets

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Article 10

Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Article 11

Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12

Community patents and trade marks

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Article 13

Detrimental acts

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

— the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

— that law does not allow any means of challenging that act in the relevant case.

Article 14

Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

— an immoveable asset, or

— a ship or an aircraft subject to registration in a public register, or

— securities whose existence presupposes registration in a register laid down by law,

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

Article 15

Effects of insolvency proceedings on lawsuits pending

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

CHAPTER II

RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 18

Powers of the liquidator

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.

3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.

Article 19

Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

Article 20

Return and imputation

1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.

2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Article 21

Publication

1. The liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).

2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

Article 22

Registration in a public register

1. The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.

2. However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.

Article 23

Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24

Honouring of an obligation to a debtor

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

Article 25

Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Article 26 ([1])

Public policy

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

CHAPTER III

SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of proceedings

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

([1]) Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 29

Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

(a) the liquidator in the main proceedings;

(b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Article 30

Advance payment of costs and expenses

Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security.

Article 31

Duty to cooperate and communicate information

1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.

3. The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

Article 32

Exercise of creditors' rights

1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.

2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.

3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

Article 33

Stay of liquidation

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.

2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:

— at the request of the liquidator in the main proceedings,

— of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.

Measures ending secondary insolvency proceedings

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.

3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

Article 35

Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36

Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Conversion of earlier proceedings

The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.

The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Article 38

Preservation measures

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

CHAPTER IV

PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39

Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.

(1) Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

Article 41

Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42

Languages

1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim. Time limits to be observed' in all the official languages of the institutions of the European Union.

2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading 'Lodgement of claim' in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.

CHAPTER V

TRANSITIONAL AND FINAL PROVISIONS

Article 43

Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 44

Relationship to Conventions

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:

(a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;

(b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;

(c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;

(d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;

(e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;

(f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;

(g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;

(h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;

(i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;

(j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;

(k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990.

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.

3. This Regulation shall not apply:

(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.

Article 45

Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 46

Reports

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

Article 47

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 29 May 2000.

For the Council

The President

A. COSTA

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ANNEX A

Insolvency proceedings referred to in Article 2(a)

BELGIË—BELGIQUE

— Het faillissement/La faillite

— Het gerechtelijk akkoord/Le concordat judiciaire

— De collectieve schuldenregeling/Le règlement collectif de dettes

DEUTSCHLAND

— Das Konkursverfahren

— Das gerichtliche Vergleichsverfahren

— Das Gesamtvollstreckungsverfahren

— Das Insolvenzverfahren

ΕΛΛΑΣ

— Πτώχευση

— Η ειδική εκκαθάριση

— Η προσωρινή διαχείριση εταιρίας. Η διοίκηση και η διαχείριση των πιστωτών

— Η υπαγωγή επιχείρησης υπό επίτροπο με σκοπό τη σύναψη συμβιβασμού με τους πιστωτές

ESPAÑA

— Concurso de acreedores

— Quiebra

— Suspensión de pagos

FRANCE

— Liquidation judiciaire

— Redressement judiciaire avec nomination d'un administrateur

IRELAND

— Compulsory winding up by the court

— Bankruptcy

— The administration in bankruptcy of the estate of persons dying insolvent

— Winding-up in bankruptcy of partnerships

— Creditors' voluntary winding up (with confirmation of a Court)

— Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

— Company examinership

ITALIA

— Fallimento

— Concordato preventivo

— Liquidazione coatta amministrativa

— Amministrazione straordinaria

— Amministrazione controllata

LUXEMBOURG

— Faillite

— Gestion contrôlée

— Concordat préventif de faillite (par abandon d'actif)

— Régime spécial de liquidation du notariat

NEDERLAND

— Het faillissement

— De surséance van betaling

— De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

— Das Konkursverfahren

— Das Ausgleichsverfahren

PORTUGAL

— O processo de falência

— Os processos especiais de recuperação de empresa, ou seja:

  — A concordata

  — A reconstituição empresarial

  — A reestruturação financeira

  — A gestão controlada

SUOMI—FINLAND

— Konkurssi/konkurs

— Yrityssaneeraus/företagssanering

SVERIGE

— Konkurs

— Företagsrekonstruktion

UNITED KINGDOM

— Winding up by or subject to the supervision of the court

— Creditors' voluntary winding up (with confirmation by the court)

— Administration

— Voluntary arrangements under insolvency legislation

— Bankruptcy or sequestration

ANNEX B

Winding up proceedings referred to in Article 2(c)

BELGIË—BELGIQUE

— Het faillissement/La faillite

DEUTSCHLAND

— Das Konkursverfahren

— Das Gesamtvollstreckungsverfahren

— Das Insolvenzverfahren

ΕΛΛΑΣ

— Πτώχευση

— Η ειδική εκκαθάριση

ESPAÑA

— Concurso de acreedores

— Quiebra

— Suspensión de pagos basada en la insolvencia definitiva

FRANCE

— Liquidation judiciaire

IRELAND

— Compulsory winding up

— Bankruptcy

— The administration in bankruptcy of the estate of persons dying insolvent

— Winding-up in bankruptcy of partnerships

— Creditors' voluntary winding up (with confirmation of a court)

— Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution

ITALIA

— Fallimento

— Liquidazione coatta amministrativa

LUXEMBOURG

— Faillite

— Régime spécial de liquidation du notariat

NEDERLAND

— Het faillissement

— De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

— Das Konkursverfahren

PORTUGAL

— O processo de falência

SUOMI—FINLAND

— Konkurssi/konkurs

SVERIGE

— Konkurs

UNITED KINGDOM

— Winding up by or subject to the supervision of the court

— Creditors' voluntary winding up (with confirmation by the court)

— Bankruptcy or sequestration

ANNEX C

Liquidators referred to in Article 2(b)

BELGIË—BELGIQUE

— De curator/Le curateur

— De commissaris inzake opschorting/Le commissaire au sursis

— De schuldbemiddelaar/Le médiateur de dettes

DEUTSCHLAND

— Konkursverwalter

— Vergleichsverwalter

— Sachwalter (nach der Vergleichsordnung)

— Verwalter

— Insolvenzverwalter

— Sachwalter (nach der Insolvenzordnung)

— Treuhänder

— Vorläufiger Insolvenzverwalter

ΕΛΛΑΣ

— Ο σύνδικο

— Ο προσωρινός διαχειριστής. Η διοικούσα επιτροπή των πιστωτών

— Ο ειδικός εκκαθαριστής

— Ο επίτροπος

ESPAÑA

— Depositario-administrador

— Interventor o Interventores

— Síndicos

— Comisario

FRANCE

— Représentant des créanciers

— Mandataire liquidateur

— Administrateur judiciaire

— Commissaire à l'exécution de plan

IRELAND

— Liquidator

— Official Assignee

— Trustee in bankruptcy

— Provisional Liquidator

— Examiner

ITALIA

— Curatore

— Commissario

LUXEMBOURG

— Le curateur

— Le commissaire

— Le liquidateur

— Le conseil de gérance de la section d'assainissement du notariat

NEDERLAND

— De curator in het faillissement

— De bewindvoerder in de surséance van betaling

— De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

— Masseverwalter

— Ausgleichsverwalter

— Sachwalter

— Treuhänder

— Besondere Verwalter

— Vorläufiger Verwalter

— Konkursgericht

PORTUGAL

— Gestor judicial

— Liquidatário judicial

— Comissão de credores

SUOMI—FINLAND

— Pesänhoitaja/boförvaltare

— Selvittäjä/utredare

SVERIGE

— Förvaltare

— God man

— Rekonstruktör

UNITED KINGDOM

— Liquidator

— Supervisor of a voluntary arrangement

— Administrator

— Official Receiver

— Trustee

— Judicial factor

Session 503 – Corporate Counsel and the Insolvency of Corporate Groups

Henry Pitney	**- Overseas Private Investment Corporation**
Holly Etlin	**- XRoads Solutions Group**
Michel Cloes	**- Dana Corporation**
Kathryn Chapman	**- [Corporate Counsel]**

Agenda

- Introduction
  - Assumptions
    - Multinational corporate group
    - Reasonably early warning, no cover ups
    - Cooperative management

Key Issues

- Will you have any choice?
  - Will creditors decide for you?
  - Can they be persuaded to cooperate?
  - Will certain laws compel outcomes?
- Is your group highly interdependent?
  - Inter corporate loans, guarantees, shared management?
- Where are you located?
  - North America
  - Europe

Key Questions

- How bad is the situation? Better or worse than you thought?
- Do you have all the facts?
- How is the cash flow?
- How much debt is there, and who are the debtors?
- Is it one entity, several, or the entire corporate group?

- Do you have one affiliate that is bringing problems to others?
- For a single insolvent affiliate
  - Can you restructure or liquidate it?
  - Is it legally possible to isolate it?
    - Did creditors rely on its credit alone, or did they look to the rest of the corporate group?
    - Did other companies in group benefit from debtor ?
    - How exactly is it bringing problems to the rest of the corporate group?

- What if it is the entire corporate group, or circumstances appear to point to the whole?
- One view: as it was in health, so it should be in insolvency.
- considerations
  - Efficiency
  - Creditors rights
  - Preserving the group

- **Jurisdictions**
  - In North America, what will happen to an interdependent group?
    - Many assume that proceedings in Canada and the US will involve the entire group
  - In Europe, what will happen to an interdependent group?

- **What will make it more efficient?**
  - Recent cases involved trans-Atlantic cooperation (English and US courts)
  - UNCITRAL model law on cross border insolvency

- **Chapter 15**
  - Reflects UNCITRAL model law
  - Some key considerations
    - File at the principal place of business
    - Nationwide stay
    - But may have to seek relief elsewhere as well

- **EU**
  - Impact of EU regulations
  - Approach of various countries
  - Practical management issues

- Employee considerations
- In some jurisdictions, is it the only consideration?

	FORMAL WIND DOWN OR LIQUIDATION	***INFORMAL WIND DOWN AND DISSOLUTION***
ENGLAND	can be "members' voluntary" or "creditors voluntary"	
Who initiates?	Members (shareholders) Members, with Creditors' supervision	no action required other than decision to stop new business and to proceed with the orderly winding down of the business and the dissolution of the Company.
Who is in control?	Liquidator appointed, in both cases	Shareholders remain in control, with employees who remain left with function of collecting the assets and negotiating and paying all outstanding liabilities
What is financial status?	solvent (able to pay debts when due) insolvent (unable)	Company must have sufficient assets to pay its liabilities, with cash to pay them as they fall due
Procedure?	MEMBERS' - resolution passed by 75% majority. CREDITORS' - same, but meeting of Creditors must be held within 14 days of passing the resolution. Liquidator is appointed to take control of Company, to act in best interests of Company, creditors and members, to collect and realize the assets of the Company to ensure that all liabilities are settled, and after that is done, to distribute the excess to shareholders.	dissolve the Company and make an application to the Registrar of Companies for the dissolution which is served on creditors, shareholders, employees and the managers or any trustee of any employee pension fund. Registrar is then to advertise the proposed striking off in the London Gazette and invite objections. Several months later, the Company will actually be struck off the register and confirmation will be received from the Registrar. Another notice of dissolution will be published in the London Gazette.
Distributions?	Assets are distributed in accordance with detailed rules and procedures which give different degrees of control to shareholders and creditors, depending on the type of liquidation. Once the process has been completed the Company is dissolved	As there must be cash available to pay debts as they fall due in order to informally wind down and dissolve the Company, there must be money available, whether from existing business, from existing reserves or receipt of intra-group indebtedness
Employees?	AS PART OF A MEMBERS VOLUNTARY LIQUIDATION, EMPLOYEES WILL BE MADE REDUNDANT AT SOME POINT. DEPENDING ON THE COMPANY'S POLICY, REDUNDANCY PAYMENTS IN THE EVENT OF TERMINATION MAY BE ONE WEEK PAY (CALCULATED BY REFERENCE TO SALARY PLUS THE VALUE OF ALLOWANCES AND BENEFITS) FOR EACH COMPLETE OR PART PERIOD OF 6 MONTHS EMPLOYMENT, RISING TO 1.5 WEEK'S PAY FOR EACH PERIOD OF 6 MONTHS CONTINUOUS EMPLOYMENT WHERE THE EMPLOYEE IS AGED 41 TO 49, RISING TO 2.5 WEEK'S PAY FOR EACH PERIOD OF 6 MONTHS CONTINUOUS EMPLOYMENT WHERE THE EMPLOYEE IS AGED 50-60: SUBJECT TO A MINIMUM PAYMENT OF 4 WEEK'S PAY AND A MAXIMUM PAYMENT OF 78 WEEK'S PAY, PLUS PAYMENT IN LIEU OF CONTRACTUAL OR STATUTORY (WHICHEVER IS GREATER) NOTICE	EMPLOYEES – AS PART OF AN INFORMAL WINDING DOWN, EMPLOYEES WILL AGAIN, AT SOME STAGE, BE MADE REDUNDANT, HOWEVER THERE IS GREATER FLEXIBILITY IN THE TIMING OF THESE REDUNDANCIES THAN IN A MVL

	FORMAL WIND DOWN OR LIQUIDATION	***INFORMAL WIND DOWN AND DISSOLUTION***
Advantage?	MVL - complete shareholder control over process, since creditors are paid in full	ability to control timing and amounts of payments to creditors
Disadvantage?	cost of liquidator and advisers	any creditors not previously provided for would have to be paid or Company may be forced into liquidation
GERMANY Who initiates?	Shareholders	If the Company has sufficient assets to pay its liabilities and has immediate access to the cash to pay these liabilities as they fall due, another option is the orderly wind-down of the business followed by liquidation
Who is in control?	Liquidator is appointed (can be managing director)	management
What is financial status?	Company must be solvent	Company must be solvent

	FORMAL WIND DOWN OR LIQUIDATION	***INFORMAL WIND DOWN AND DISSOLUTION***
Procedure?	Shareholders adopt resolution. All contractual parties notified that the Company will no longer perform any of its contractual obligations. Liquidator collects and realizes assets of the Company and uses proceeds to satisfy liabilities of the Company as far as possible. If assets not enough to satisfy liabilities, shareholders would have to provide further funding - if no funding is forthcoming, Liquidator would have to file for insolvency proceedings. Once process is completed, Company is deregistered from the commercial registry.(Administratively, publication of the liquidation commencement and minimum time requirement until registration is about 2 years)	Company performs contractual obligations for minimum terms but ceases to solicit new contracts and would gradually terminate all business operations with the objective of minimizing damage claims and ongoing costs.
Distributions?	Any surplus is distributed to the shareholders.	
Employees?	EMPLOYEES: COMPANY MUST TAKE INTO ACCOUNT THE FOLLOWING COST FACTORS i) SALARIES MUST BE PAID CONTINUOUSLY EVEN DURING THE NOTICE PERIOD WHICH IS BETWEEN ONE AND SIX MONTHS, AND ii) ALTHOUGH NOT STATUTORILY REQUIRED, SEVERANCE PAYMENTS (CALCULATED WITH ONE MONTHLY SALARY PER YEAR OF EMPLOYMENT) MIGHT HAVE TO BE MADE (COSTS COULD SUBSTANTIALLY INCREASE IF EMPLOYEES ELECTED A WORKS COUNCIL, WHICH MAY HAPPEN AT ANY TIME.)	EMPLOYEES – IN A RUN-OFF, THE TOTAL NUMBER OF PERSONNEL WOULD BE GRADUALLY REDUCED. THIS WILL NOT LEGALLY AFFECT THE COSTS FOR THE LAYOFFS PER EMPLOYEE, HOWEVER, THE GRADUAL TERMINATION OF CERTAIN EMPLOYEES INCREASES THE RISK OF LITIGATION IN WHICH EMPLOYEES CHALLENGE THE SOCIAL QUALIFICATION OF THEIR TERMINATIONS. THUS, INCREASED SEVERANCE AMOUNTS MAY BE REQUIRED TO LAY OFF EMPLOYEES THROUGH SETTLEMENT AGREEMENTS

	FORMAL WIND DOWN OR LIQUIDATION	INFORMAL WIND DOWN AND DISSOLUTION
Advantage?	as this option would lead inevitably to the insolvency of the Company, this option would lead to favorable settlements with major contractual parties	higher flexibility than in insolvency, Company still in control of operations, damage claims could be prevented/mitigated
Disadvantage?	Costs would include administrative costs for the liquidation period	long time line, given the nature of Company's business

	FORMAL WIND DOWN OR LIQUIDATION	INFORMAL WIND DOWN AND DISSOLUTION
FRANCE		
Who initiates?	shareholders decision	Company attempts to reduce exposure arising from liquidation by postponing the wind down of the Company until terms of ongoing contracts expire, thereby gradually phasing out its activity.
Who is in control?	Liquidator appointed by shareholders, does not need to have any pre-existing relationship with Company	
What is financial status?	must be solvent	
Procedure?	several liquidators, specific publicity for notifying third parties of the wind-up, decision fixing the scope of Liquidator's duties during his term, and certain closure formalities (including the passing of liquidation accounts.) Under French Law, Company is first dissolved and subsequently liquidated. Dissolution is effective as of the shareholders' decision to wind-up, but the liquidation could be settled only to the extent all outstanding assets have been realized to satisfy outstanding liabilities. Liquidator not authorized to pursue on-going business or engage in new business failing the express consent of the shareholders.	Company ceases to solicit new contracts and would gradually terminate all business operations,
Distributions?	Liquidator collects, realizes assets and distributes proceeds of sale to satisfy, to the fullest extent possible, the liabilities of the Company. Any possible surplus is distributed among the shareholders.	objective being to avoid claims and reduce costs and maximize recovery for creditors

	FORMAL WIND DOWN OR LIQUIDATION	***INFORMAL WIND DOWN AND DISSOLUTION***
Employees?	To terminate employment contracts, Liquidator must follow a number of strict legal rules. Employer has the obligation to attempt to relocate the concerned personnel within the group. If that is not possible, employer who is severing more than 50 employees has to put in place a "social plan". Plan and economic brief must be brought to the attention of the statutory auditors and the members of the workers' council. Employer is required to facilitate the obtaining of new employment positions for the employees dismissed. Dept of Labor must first be given notice of the proposed dismissal and allowed to comment. Plan must be discussed with the workers' council. After initial meeting, workers' council reps are expected to give workers' opinion. Can ask for more information and call a second meeting, give an opinion, or refuse to give an opinion after the first or the second meeting. After first two meetings, new meeting is set up to appoint an expert who must deliver a report on the social plan within 22 days, then a new meeting with the reps can take place to discuss the report and the social plan and a final meeting is convened.	must still respect French law obligations with regard to employees' severance, however it is likely that employees would quit over a wind down period which would reduce the severance costs.
Advantage?	Fastest procedure which would involve savings on wages and interest payments due over the liquidation period	Potential liabilities arising from liquidation can be mitigated by postponing the winding down of the Company until the term of on-going contracts. As a result, Company would face no or little claims from clients, suppliers and real estate lessors . This option would extract the greatest value from the business.
Disadvantage?	Value of assets must be sufficient to meet creditors' claims, if not judicial insolvency proceedings will ensue	May take longer and additional capital funding may be necessary to pursue activity until the term of the agreements

FILING FOR INSOLVENCY	***SALE OF BUSINESS***
A compulsory liquidation is commenced by a Creditor.	
Court makes an order for the compulsory liquidation of the Company and the Official Receiver will become the Liquidator. He remains in that position until the creditors of the Company decide to appoint an insolvency practitioner of their choice. Liquidator is empowered to manage the Company.	
Company is unable to pay its debts as they fall due.	
Compulsory liquidation is imposed on the Company by a court order, after a creditor of the Company presents a petition to the High Court listing one of seven grounds, the most common of which is inability of the Company to pay debts as they fall due.	
Similar to a members' voluntary liquidation or a creditors' voluntary liquidation, the purpose of a compulsory liquidation is to realize the companies' assets for the benefit of creditors and shareholders	
EMPLOYEES – REDUNDANCY PAYMENTS WILL BE MADE AS PER MVL or CVL	Undertakings (Protection of Employment) Regulations 1981, also known as TUPE. The Regulations were enacted to give effect to the EC Required Rights Directive 77/187 and are intended to protect the employees' employment in the event that the undertaking where they work is transferred by the employer to a new owner. Where TUPE applies the transfer of the undertaking will not terminate the employee's contract although an employee has the right to elect not to transfer. In these circumstances the employee's employment ends by operation of law and a claim can not be made. There will not be a dismissal simply because there is a transfer.

FILING FOR INSOLVENCY	SALE OF BUSINESS
	In a TUPE situation, the employee will transfer with the undertaking and will be employed by the new owner and is entitled to have is employment and the terms protected as that with his original employer. If there are any dismissals, whether actual or constructive and, whether before or after the transfer, and, if those dismissals are connected with the transfer, and they may be automatically unfair unless, there is an economic, technical or organisational ("eto") reason. Liabilities for employment claims generally pass from the transferor to the transferee.
expenses greater, triggers insolvency clauses, shareholders lose control of liquidation	
once a Company is over-indebted or illiquid, although the law provides for a grace period of three weeks during which the crisis can be cured (can only be used if a solution to the Company's financial problems is likely)	
first, preliminary insolvency administrator to assess whether insolvency proceedings should be instituted, then appointment of insolvency receiver	
Company is forced to file for insolvency if it is either over-indebted or illiquid. German law also provides the opportunity to file if illiquidity is merely imminent. Indebtedness exists if liabilities exceed assets. Illiquidity exists if Company is no longer able to pay its debts as they fall due. Requirements for the application of the insolvency test are very stringent Management of a German Company is obliged to review the over-indebtedness situation continuously, as the personal risks for the managing directors are considerable if the filing insolvency is delayed. Managing directors face criminal penalties as well as the liability for any damages of creditors resulting from the delay	

FILING FOR INSOLVENCY	SALE OF BUSINESS
of receiver four to eight weeks after filing. Court determines a time period for the registration of creditors' claims two weeks to three months after filing. Creditors' meeting to ascertain the claims registered between three weeks and five months after filing. Wind-down of operations and sale of the estate by the receiver and distribution of remaining cash to creditors. Final creditors' meeting, termination of insolvency proceedings: deregistration of the Company usually 6 months and 18 months after the proceedings are opened.	
distribution of remaining cash to creditors	
EMPLOYEES - RECEIVER MAY TERMINATE EMPLOYEES UPON THE SHORTER NOTICE OF (A) APPLICABLE CONTRACTUAL OR STATUTORY NOTICE PERIOD, OR (B) THREE MONTHS PER THE END OF A CALENDAR MONTH. CLAIMS BY EMPLOYEES ARE TREATED AS CLAIMS AGAINST THE BANKRUPT'S ESTATE. EMPLOYEES HAVE NO FURTHER CLAIMS AGAINST THE SHAREHOLDERS.	Are employees protected in the event of a sale or purchase of a business? Yes. In general, transfer of business does not constitute a ground for dismissal. Nevertheless, pursuant to the jurisprudence of the Federal Labor Court ("Bundesarbeitsgericht") a so-called dismissal in accordance with the buyer's plan is permitted. Hence, the seller of a business is entitled to give notice if the business plan of the potential buyer provides for a smaller number of employees currently working in the business. Given that the potential buyer wants to reduce the staff for urgent operational reasons in the sense of Art. 1 § 2 (S.1) Act on the Protection against unfair Dismissal in the moment he takes the business over such dismissal is justified. However, to do so there has to be a concept or a reorganization plan. It does not suffice if the buyer only asks for a reduction of staff. (continued below)

FILING FOR INSOLVENCY	SALE OF BUSINESS
	If so, what rights do employees have and what can they do about it? Pursuant to Art. 613a Civil Code the new employer assumes any right and obligation of his predecessor. Any provision resulting from a collective or operational work agreement becomes part of the employment contract and may not be amended to the detriment of the employee until after one year of the transfer of business. What does the employer have to do in the event of a sale or purchase of a business, which includes employees? Given that all employment relationships are transferred to the buyer by law the employer does not have to do anything to that end.
no further costs for shareholders except for outstanding guarantees and comfort letters that can be enforced in the Bankruptcy proceedings	
operations controlled by receiver, group inter-Company receivables are lost, no value through a prospective sale can be created for creditors of parent/shareholder as all proceeds will be distributed to creditors of German Company, first	
	Pursuant to Art. 613a Civil Code the new employer assumes any right and obligation of his predecessor. Any provision resulting from a collective or operational work agreement becomes part of the employment contract and may not be amended to the detriment of the employee until after one year of the transfer of business.

FILING FOR INSOLVENCY	SALE OF BUSINESS
Company must file upon the inability to meet its debts as they fall due, i.e. the Company is unable to satisfy outstanding liabilities with available assets (cessation des paiements).	
chance to survive upon reorganization, it would appoint a receiver responsible for identifying the origin and magnitude of its difficulties for a period of up to one year, following which the court could either elect to (i) liquidate the Company if continuation in business proves impossible or (ii) reorganize the Company pursuant to a plan (plan de redressement). Shareholders surrender control to the Court.	What does the employer have to do in the event of a sale or purchase of a business, which includes employees?
can be quickly applied. A Company may be technically solvent while in a state of "cessation des paiements" if it has valuable fixed assets on its balance sheet.	
Company files, within 15 days from the cessation of paiements, Court sets date on which Company effectively became unable to meet its obligations as they became due, which date shall not be more than 18 months prior to the Court decision commencing insolvency proceedings. Certain payments made during that period are subject to cancellation by the Court.	Given that all employment relationships are transferred to the buyer by law the employer does not have to do anything to that end.
Assets are distributed for the benefit of the stakeholders of the entity. French bankruptcy courts are less concerned with protecting the bankrupt entity's shareholders than they are with preserving employment whenever possible.	

FILING FOR INSOLVENCY	SALE OF BUSINESS
Generally, French bankruptcy courts attempt to ensure that the bankrupt entity continues in business so as among other things, to preserve employment whenever possible. Otherwise, same procedure as in "Formal Wind-down"	In the event of a sale of a business, the purchaser has the obligation to take over the employment contracts in course of execution. A dismissal made on the occasion of a sale of business is deprived of effects. In the event of a violation of that rule, the dismissed employee can claim to the author of the dismissal the payment of the dismissal allowances and compensation. The new employer has nothing particular to do but must refrain from making dismissals that would not be grounded upon a personal or economic cause.
As an exception to the general rule, there are circumstances where shareholders can be held directly responsible for liabilities of the bankrupt entity, for example, when they become involved in the management.	

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Session 503 – Corporate Counsel and the Insolvency of Corporate Groups

Kathryn Chapman - Consulting Counsel,
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CASE STUDY OF COMDISCO, INC.,
A GLOBAL TECHNOLOGY COMPANY

POINTS TO COVER

- **GENERAL BACKGROUND ON INSOLVENCY ISSUES ESPECIALLY FOR A MULTINATIONAL COMPANY.**
- **ATTEMPTS BY DIFFERENT INTERNATIONAL GROUPS TO COME UP WITH FORMAL PROCEDURES FOR DEALING WITH CROSS-BORDER INSOLVENCIES.**
- **EXAMPLES OF SUBSTANTIVE LEGAL DIFFERENCES AMONG DIFFERENT LEGAL SYSTEMS WITH RESPECT TO INSOLVENCY FROM MY OWN EXPERIENCE.**
- **SUMMARY OF THE FACTS SURROUNDING THE CHAPTER 11 FILING BY MY COMPANY, AND, FINALLY**
- **ANALYSIS WE MADE OF THE MAJOR JURISDICTIONS WHERE WE HAD LARGE SUBSIDIARIES, WHICH GIVES SOME POINTS THAT SHOULD BE REVIEWED IF EVER YOU FIND YOURSELF IN THE SITUATION OF PENDING INSOLVENCY OF YOUR MULTINATIONAL COMPANY**.

GENERAL BACKGROUND ON INSOLVENCY (AND HOW IT RELATES TO CROSS-BORDER INSOLVENCY OF A MULTINATIONAL)

What law governs an insolvency and what difference does it make?

Approaches adopted by countries to insolvency vary

- with respect to divergent legal traditions
- with respect to different public policy concerns
- with respect to different societal values

Unless the financial difficulties of a multinational are resolved in a central forum, the risk exists that results of insolvency proceedings can be unpredictable and unfair. The principal place of business of the multinational may be in the US, it may have a contract to provide services to a German company in Germany and it may have assets in France – each of those countries might handle the issues of insolvency differently, whether as to the time at which a filing of bankruptcy may be made, who can make it or what the rules for voidable preferences might be. Delays and conflicts due to these differences may prevent the successful restructuring of a multinational.

The specific issues that arise with cross-border insolvency are:

- Applicable law and competent forum

  1. Lex loci contractus (law of the country where transaction occurred)
  2. Lex situs (law of the country with subject matter jurisdiction)
  3. Lex domicili (law of the country where either the creditor or the debtor is located)
  4. Lex concursus (law of the country where the insolvency proceedings occur)

- Whether one jurisdiction will recognize and enforce the decisions of another jurisdiction

Different Frameworks for Handling Cross-Border Insolvencies

Schemes for Cross-Border Insolvencies tend to address these issues in two general ways

Territoriality Principle –

local court takes the assets located in its geographic jurisdiction

distributes them only to those creditors who come to the court to present their claims

Universality Principle –

single forum administers all the debtor's assets

makes distributions to creditors, wherever they are located and in accordance with the forum state's substantive bankruptcy law

all other jurisdictions are obligated to assist the court with principal jurisdiction and to recognize and enforce its orders

Problems with the different frameworks:

TERRITORIALITY –

1. separate proceedings may be undertaken in each jurisdiction where debtor's assets are located, with the cost of such proceedings diminishing the amounts available to the creditors
2. will be inefficiencies and duplication, due to the multiple proceedings
3. debtors and creditors can take advantage of differing laws regarding voidable preferences.

UNIVERSALITY –

1. different countries must agree to recognize foreign judgments
2. must cooperate with the primary jurisdiction.

Efforts have been made to come up with laws or conventions which address problems raised by cross-border insolvencies

BILATERAL AGREEMENTS AND REGIONAL AGREEMENTS BETWEEN NEIGHBORING STATES HAVE BEEN EFFECTIVE TO THE EXTENT THE COUNTRIES SHARE THE SAME INTERNAL MARKET AND SOCIETAL VALUES, SUCH AS THE

Havana Convention of 1928 (Bolivia, Brazil, Costa Rica, Cuba, Chile Ecuador, El Salvador, Guatemala, Haiti, Honduras Nicaragua, Panama, Peru, Dominican Republic and Venezuela)

Nordic Bankruptcy Convention of 1933 (Iceland, Norway, Sweden, Finland and Denmark).

Modern attempts to give framework to multinational insolvencies focus on dealing with judicial cooperation, in particular with recognition of foreign judgments and orders

UNCITRAL MODEL LAW
- United Nations Commission for International Trade Law Model Law on Cross Border Insolvency
- Intergovernmental working group prepared draft in 1995, adopted in 1999
- Model laws are implemented into national legislation of each country, not binding per se
- US adopted into Chapter 15 of Bankruptcy code in 2005
- Does not provide guidelines pertaining to conflicts of laws, deals only with judicial cooperation during ancillary proceedings once primary proceeding has started

EUROPEAN COUNCIL REGULATION 1346 ON INSOLVENCY PROCEEDINGS
- Directly applicable to all Member States of EU except Denmark, effective 2002
- Adopts universality principle
- Complex set of conflict-of-law rules, which resolve which country has jurisdiction over primary and secondary proceedings
- Uniform procedure fro recognition of foreign judgments

Objectives of most insolvency laws

1. allocation of risk among participants
2. in a predictable, equitable and transparent manner
3. to protect and maximize value for the benefit of all stakeholders and the economy in general

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DIFFERENCES IN SUBSTANTIVE INSOLVENCY LAW

Jurisdiction over the matter

Liquidation versus rehabilitation (management and control of the enterprise – can the debtor remain in control?)

Illiquidity versus insolvency (timing of when insolvency proceeding may/must be commenced)

Corporate governance and insolvency – what are the personal liabilities of management for failing to commence proceedings?

Who initiates the proceeding?

ACC Association of Corporate Counsel

Jurisdiction over the matter

Different countries might assert jurisdiction over the insolvency proceedings under different theories:

- Law of the creditor's country of residence
- Law of the debtor's country of residence
- Law of the country where the transaction occurred
- Law of the country with subject matter jurisdiction over the assets

Liquidation versus Rehabilitation

- in the U.S. a legal entity can access Chapter 11 bankruptcy proceedings without being insolvent
- Chapter 11 proceedings often leave debtors in possession – same management
- in most European jurisdictions a company has to be either insolvent or close to insolvency to be eligible to enter insolvency proceedings
- insolvency regimes in Europe usually displace existing management upon the beginning of insolvency proceedings with an administrator or trustee

Illiquidity versus insolvency (timing of when insolvency proceeding may/must be commenced)

- France –
  Company must file for bankruptcy upon the inability to meet its debts as they fall due, that is, the value of liquid assets is less than outstanding current liabilities ("cessation des paiements").

  May be technically solvent while in a state of "cessation of paiements", if it has valuable fixed assets on its balance sheet.

- Germany –
  Either the liabilities exceed the assets of the company (if there is not prospect of continuing the company as a going concern the assets are valued at liquidation value, otherwise they may be valued at going concern value) "balance sheet insolvency", or

  the company is unable to pay its debts as they become due. "cash flow insolvency"

- Netherlands –
  Balance sheet insolvency is irrelevant, a debtor can be declared bankrupt if he "has ceased to pay his debts".

Illiquidity versus insolvency (timing of when insolvency proceeding may/must be commenced, cont.

- Mexico –
  mixed standard –
  company is insolvent if it incurs a generalized default of its payment obligations to two or more creditors and
  (i) of these obligations, those that are at least 30 days past due represent at least 35% of the debtors obligations as of the bankruptcy petition date, and
  (ii) the debtor lacks sufficient assets to satisfy at least 80% of the obligations that came due on the petition date.

- England –
  either cash flow or
  balance sheet insolvency.
  In the case of a US corporation, with a subsidiary in the UK, the UK company's cash flow and balance sheet positions have to be considered from a UK (as opposed to a US) point of view. For example, an insolvent company cannot continue trading on the basis that its parent is solvent unless it is getting the requisite financial support from its parent.

Corporate governance and insolvency – what are the personal liabilities of management for failing to commence proceedings?

Germany –

Management of company is obliged to review the over-indebtedness situation continuously.

Personal risks for the managing directors are considerable if the filing for insolvency is delayed.

They face criminal penalties as well as the liability for any damages of creditors resulting from the delay.

France –

Failure to file for bankruptcy can cause the personal bankruptcy of the managers, notwithstanding other sanctions.

As a result, management in France has a strong incentive to prevent insolvent trading and may initiate an insolvency filing without the consent of the corporate parent.

England –

Under English law, directors (which may include as "shadow directors" persons other than those registered as directors at Companies House who have effective control of the company) are treated as responsible for the company's conduct and activities.
Directors can be held personally liable for allowing the company to continue trading when they knew or ought to have known that there was "no reasonable prospect" of the UK Company avoiding insolvency.
Any director who knowingly allows a company to continue trading with the intent to defraud its creditors can be held personally liable to pay compensation, director can also be guilty of a criminal offense.

Who initiates the proceeding?

Debtor or creditor?

- England – either
- France – debtor
- Germany – debtor

Pro-Debtor or pro-creditor bias?

- Not always clear what this means
- Secured creditors could benefit from liquidation versus a reorganization or rehabilitation procedure, but unsecured creditors might benefit more from a reorganization.
- Does Pro-debtor really favor the management of a debtor company, by allowing it to retain control of the company?
- Or does insolvency law allow the enterprise to survive and the employees to keep their jobs while the managers are replaced by a trustee or receiver and eventually a new owner.

CASE STUDY – Comdisco Strategy re: Global Insolvency

1. Efforts were focused on keeping the foreign subsidiaries viable so as not to expose the assets of the multinational to the vagaries of foreign insolvency regimes
2. Did not want to fall into involuntary insolvency proceedings in those jurisdictions because parent company which is the main shareholder will invariably lose control over a subsidiary in such proceedings
3. Administrator or trustee will usually not align the interests of the insolvent corporation with those of a corporate group but will focus on achieving the aims set forth in the local insolvency regime, such as preservation of employment, repayment of creditors, etc.

BACKGROUND

- Comdisco, founded in 1969 and incorporated in Delaware in 1971
- Originally focused on the procurement and placement of new and used computer equipment, principally mainframe and related peripherals
- Comdisco's leasing business soon became a formidable competitor in the marketplace
- Comdisco gradually broadened its market breadth and began offering various technology services to its customers worldwide to help maximize their technology functionality, predictability and availability
- In an effort to synergize Comdisco's familiarity with the high-technology market and the highly lucrative capital markets, Comdisco elected to pursue venture investing
- In February of 1999, Comdisco purchased a DSL company to leverage its internet and telecommunications experience
- Due to certain transactions and Company's and its affiliates' liquidity problems, Company was forced to file for Chapter 11 bankruptcy protection on July16, 2001

GLOBAL PROFILE

- At the time of the filing, Company had approximately **24 active subsidiaries outside of the United States** (there were more entities, but those were the result of various transactions and tax driven restructuring in the past).
- Of these, we had employees and offices located in:

  Austria, Germany, France, UK, Spain, Switzerland, The Netherlands, Canada, Australia, Japan, Singapore, Taiwan
- We had companies, with no employees or offices in the following countries:

  Czech Republic, Brazil, Belgium, Hong Kong, Ireland, Italy, Mexico, New Zealand Poland, Sweden

Some of the events leading to our problems:

- Purchase of DSL company - for cash price of $53 million, expansion by providing cash in excess of $500 million from 2/99-10/00. Due to difficulties such as lack of provisioning and significant valuation changes in the telecommunications, DSL company was not able to reach profitability.
- Ventures – venture leases, venture debt and direct equity financing to privately held venture capital backed companies, diversified across many sectors, including networking , optical networking, software, communications, internet-based another industries but, by their nature, high risk. Invested $1.8 billion from October '98 through September, 2000. Market downturn of '01 in the technology sector resulted in substantial decrease in revenue. As a result, the group had a pretax loss of $49 million for the nine months ended June 20, 2001, compared to the pretax earnings of $178 million for the nine month period ended June 30, 2000.

PROBLEMS, CONT.

- Liquidity problems – as a result of the foregoing losses, the cash reserves, overall financial performance and financial condition were negatively impacted. The Debt rating of the company was downgraded below investment grade and Comdisco lost access to the commercial paper market. In order to retire commercial paper obligations and other scheduled debt maturities and to finance operations, Company borrowed the remaining availability under the pre-petition credit agreements, approximately $880 million in April, 2001.
- Capital Structure – another fundamental challenge faced by Comdisco was the tenor of its debt structure, involving relatively short-term debt maturities over several years and longer term lease and financing obligations associated with its principal business products. So, while operations generally generated sufficient cash to meet working capital needs, without access to commercial paper market, Comdisco could not generate sufficient cash to retire all of the debt maturities scheduled to be repaid during 2001 and 2002.

Pre-petition Restructuring Efforts

- CEO resigned in December, 2000. New CEO appointed in March 2001. New Chief Legal Counsel appointed in June of 2001.
- Began strategic review of each of the company's operations. Used an investment bank, and a management consulting company to evaluate business initiatives, capital restructuring and/or the sale of all or a portion of the company's businesses.
- Comdisco, as a result of this process, decided to explore opportunities to sell the company's businesses as a whole. Investment bank recommended several parties that would have an interest and the financial wherewithal to consummate a transaction of this magnitude. After conducting due diligence, company only received expression of interest for portions of company's businesses. Therefore, Comdisco determined to maximize the value through the separate sale of various business segments.
- Those sales, however, were not capable of being consummated quickly enough to provide Comdisco with sufficient liquidity to fulfill their immediate financial obligations and finance operations. Having already drawn down on pre-petition credit agreement, the ensuing combination of events and factors set forth above placed certain debt obligations of Comdisco at risk of default and placed Comdisco and its properties at risk of remedial action by creditors.

Chapter 11 Filing

- As a result of these events, Comdisco concluded that the commencement of the Chapter 11 cases was in the best interest of all stakeholders to protect the Estates from the risk of remedial action by certain creditors and because it would be difficult, outside of reorganization proceedings, for Comdisco and its affiliated Debtors to withstand the downturn in the economic environment then occurring.
- On July 16, 2001 parent Comdisco and 50 domestic affiliates filed a voluntary petition in the Bankruptcy Court for reorganization relief under chapter 11 of the Bankruptcy Code of the US.
- No foreign entities filed for local protection in their respective jurisdictions, but careful review of local insolvency requirements, director obligations and employee rights was required at several junctures, in order to maintain the foreign businesses which were viable in a position to be sold. Given the nature of our business, which included long term contracts to supply equipment or services, foreign customers had to be assured that the companies would survive to provide the goods and services under the terms of their contracts.

Subsidiaries sold or wound down

- In April of 2002 a sale of approximately $794 million of assets, including the assumption of $258 million of secured debt, was paid for the sale of certain assets including some owned by larger foreign subsidiaries. Throughout the rest of 2002 and 2003 leasing subsidiaries in Australia, Switzerland, Austria, France and Germany were sold (for roughly $500mn). Parts of portfolio located in the Netherlands, UK, Belgium and elsewhere were sold as well. Remaining subsidiaries were wound down and employees let go.
- Company is still "monetizing its assets" – October, 2006.

Issues to consider in Global Insolvency

- While the foreign entities might be owned by the parent company, it is likely that they had either been acquired as "independent" companies, or had been built by foreign management teams, so that while the local management people felt they had strong businesses, those businesses had benefited from the financial strength of the parent.
- Resentment can occur, where the foreign managers feel the US is at fault for their problems, and the US management feel that the foreign assets belonged to the parent company in the US.
- LOCAL DIRECTORS HAVE PERSONAL LIABILITY IN MANY JURISDICTIONS AND CAN NOT ALWAYS AGREE TO REPAYMENT OF INTERCOMPANY DEBT OR TO ALLOCATIONS OF PURCHASE PRICES TO SUBS IN SALE OF GLOBAL BUSINESS
- Once the support from the parent is in jeopardy, (such as in the form of parent guaranties) a fine line has to be walked to maximize the benefit to stakeholders while maintaining the foreign subs in business so as to sell them when the opportunities arose.
- If one is to try to sell on-going businesses, how can one maintain existing customers and acquire new customers in foreign countries after the difficult financial situation of the Company becomes public notice in the foreign countries?

Alternatives were considered for the major foreign subsidiaries

-
- formal wind-down or liquidation
- informal wind-down and dissolution
- insolvency proceeding
- sale of ongoing business

Under each alternative, disadvantages and advantages of options were considered, with respect to these issues:

- Equipment/lease contracts with key customers
- Real Estate
- Employees
- Inter-company debt
- Taxation
- Administrative costs
- Director liability
- Bank relations

In a separate attachment, I have included some of the answers we received as we researched different jurisdictions where we had the largest operations. In the interest of space, I have only included the particular issue of employee rights under each of the options (sale of company, informal or formal wind-down, or insolvency)

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