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The Law of Unintended Consequences: The 2015 E.U. Insolvency Regulation and Employee Claims in Cross-Border Insolvencies

Joshua W. Eastby*

Abstract

The European Union recently amended its Regulation on insolvency proceedings to implement lessons learned during the previous iteration's lifespan. However, its interaction with the E.U.'s Guarantee Mandate leads to unintended consequences in cross-border insolvencies that can frustrate the animating principles of both laws. This Comment argues for a dynamic approach to Member States' guarantee funds under the Guarantee Mandate that will pay employee claims according to national law, rather than allowing the claim to be governed wholly by the law of the State administering the insolvency proceedings. This change will eliminate the disparate impact that changing substantive law can have on otherwise similarly-situated employees, while at the same time allowing Member States to internalize the costs of the disparate legal regimes, allowing them to more fully realize their national policy choices and allocate the internalized costs to the various stakeholders as they see fit. This change would reduce the costs disparately imposed on employees based solely on where their employer is headquartered, and increase the efficiency of the cross-border insolvency administration process.

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I. INTRODUCTION

Consider the case of a firm that has fallen on hard times. At one point, it was profitable, and the demand for its services was robust. Now, though, whether because of market shocks, mismanagement, or a changing marketplace, the firm is not as financially healthy as it has been in the past. The firm has found itself insolvent—unable to repay its obligations as they become due—and, in fact, has stopped making payments entirely. At this point, some form of legal proceeding would be used either to liquidate the firm, repaying such of its obligations as the firm's assets will permit, or to restructure the firm to get it back on the path to regular operation.[1] In the case of liquidation, the creditors of the firm would file claims seeking payment out of the debtor's remaining assets.[2] Generally, the State in which the insolvency proceeding takes place would provide the governing law, determining, among other things, the order in which claims are prioritized.[3] Because of the high variability in insolvency regimes and fundamental policy choices across States, the initial choice of where to open the insolvency proceedings can have a large effect on the distributional outcome of the insolvency proceedings.[4]

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1 *See, for example*, Council Regulation 2015/848, of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19 (EU), pmbl. (7), (10), art. 1(1) [hereinafter "E.U. Regulation"] (noting that "[b]ankruptcy, proceedings relating to the winding-up of insolvent companies or other legal person, [etc.] . . . should be covered by this Regulation"; and further that "[t]he scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs"). In the United States, the Bankruptcy Code provides a number of methods of relief, including "Chapter 7 (liquidation) . . . [and] Chapter 11 (reorganization)." *See, for example*, Craig Peyton Gaumer & Charles L. Nail, Jr., *Truth or Consequences: The Dilemma of Asserting the Fifth Amendment Privilege Against Self-Incrimination in Bankruptcy Proceedings*, 76 NEB. L. REV. 497, 506 (1997). *See also* 11 U.S.C. §§ 701–84, 1101–74 (2014).

2 *See, for example*, E.U. Regulation, *supra* note 1 art. 45(1)–(3).

3 *See, for example*, *id.* art. 7(1)–(2) ("Save as otherwise provided . . . 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.").

4 *Cf. id.* As an illustrative example of the types of disparate outcomes that result from changing which State's laws apply, see JANIS SARRA, EMPLOYEE AND PENSION CLAIMS DURING COMPANY INSOLVENCY: A COMPARATIVE STUDY OF 62 JURISDICTIONS 3 (2008) [hereinafter SARRA STUDY]. For example, a German employee of a German company will be subject to German law in their employer's insolvency proceedings; German law provides for no preference at any level for employee claims in insolvency. *See id.* at 249–50. Likewise, French law governs the claims of a French company's employees, and French law grants strong protection to employee claims, giving them a super-priority over all other forms of preferential debt. *Id.* at 237–38. However, under the E.U. Regulation, a French employee of a German company would receive no priority, though an identically-situated French employee of a French company would. *Id.*; E.U. Regulation, *supra* note 1 art. 7(1)–(2). Even for States with somewhat similar insolvency regimes (e.g., two States that grant priority to employee claims), the outcome can still vary significantly. For example, Croatia provides a priority for employee claims ahead of all other unsecured claims, but behind secured claims and

Of particular interest in this Comment is the protection employee claims receive in insolvency proceedings. Employees are nearly always afforded some sort of preferential treatment in insolvency proceedings, but the precise details of the legal regimes and the differing limitations imposed by States on employee claims entitled to this preferential treatment result in a wide degree of variance with regards to the outcome of employee claims in insolvency proceedings.[5]
The high degree of variability between national insolvency regimes was recently acutely felt in the highly interconnected markets of the European Union (E.U.). In 2015, the E.U. enacted the E.U. Regulation, which was designed to incorporate some of the lessons learned from implementing its predecessor enacted only fifteen years prior.[6] During the same period, the E.U. enacted the Guarantee Mandate.[7] The E.U. Regulation sought to standardize and streamline the administration of insolvency proceedings, and did so via a regime of mandatory coordination and choice of law rules.[8] Recognizing the necessity of protecting employees when their employers become insolvent, the Guarantee Mandate requires that E.U. Member States establish guarantee funds that provide for a minimum level of payment for employee claims.[9] Member States can set a level of guarantee higher than, but not less than, the minimum.[10]

The unintended consequence[11] of the interaction between these related, but separately-developed, legal regimes, however, is that Member States can

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claims against the estate. SARRA STUDY, at 205. Thus, a French employee of a Croatian company would be in a worse position than a French employee of a French company, whereas a Croatian employee of a French company would receive a windfall.

5 *Id.* at 9–10, 130 (2008) ("[T]he issue of social claims[, i.e., employee claims,] has received considerable public attention in numerous jurisdictions . . . . Globally, there has been recognition that the problems faced by employees on insolvency are somewhat unique, and require special attention in the course of liquidation or restructuring of the financially distressed business."). *See also id.* at 4 (noting that the "World Bank has called for special treatment of employee claims during insolvency, recognizing that workers are a vital part of an enterprise").

6 E.U. Regulation, *supra* note 1 at pmbl. (1). In 2000, the E.U. promulgated the E.C. Regulation, which attempted to streamline the coordination and administration of insolvencies that presented with cross-border issues. Council Regulation 1346/2000, of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC) [hereinafter "E.C. Regulation"].

7 Directive 2008/98/EC, of the European Parliament and of the Council, of 22 October 2008 on the Protection of Employees in the Event of the Insolvency of Their Employer, 2008 O.J. (L 283) 36 [hereinafter "Guarantee Mandate"]. The Guarantee Mandate resulted from a similar process of successive amendments to the original Directive before ultimately being recast in its current form. *Compare* Guarantee Mandate *with* Council Directive 80/987/EEC of 20 October 1980 on the Approximation of the Laws of the Member States Relating to the Protection of Employees in the Event of the Insolvency of Their Employer 1980 O.J. (L 283) 23.

8 *See generally* E.U. Regulation, *supra* note 1.

9 *See* Guarantee Mandate, at pmbl (3), art. 3.

10 *See generally* Guarantee Mandate.

11 *Cf.* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894–904 (1936).

customize their domestic insolvency proceedings in ways that produce negative distributional consequences for employees based on where their employer is headquartered.[12] Member States can choose to have a higher level of guarantee than the Guarantee Mandate requires, and they can elect to have a priority in the insolvency proceeding[13] in addition to the Guarantee Mandate's required level of protection. Thus, so long as their guarantee fund pays at least the minimum required by the Guarantee Mandate, they can customize their insolvency regime according to their national policy choices.[14]

The problem arises when a company headquartered in a non-priority-granting State employs citizens of a priority-granting State.[15] In this situation, employees in a priority-granting State "A" receive differential treatment depending on where their employer is headquartered. An employee of a domestic company will receive the payment from the guarantee fund as well as the priority in the insolvency proceeding, whereas an otherwise identically situated employee working for a company headquartered in a non-priority-granting State "B" would receive the payment from the guarantee fund, but no priority in insolvency.[16]

In cases where the debtor's assets located in the priority-granting Member State "A" are sufficient to satisfy the employees' claims, the difference in applicable law does not affect the employees' recovery. This is not the case, however, in situations where the debtor has assets sufficient to satisfy the secured creditors and with at least some amount left for unsecured creditors. When the unsecured creditors are not paid in full, the change in applicable law between the

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12 *See infra* Section II(D)(1). For analytical clarity, this Comment uses the term "headquartered" as a stand-in for Center of Main Interest ("COMI"). This is not to detract from the interesting analytical questions posed by COMI determinations. *See, for example*, Richard Sheldon, QC, *Introduction* to CROSS BORDER INSOLVENCY 1, 8 (Richard Sheldon, ed., 3d ed. 2011). *See also, for example,* Mark Arnold, *The Insolvency Regulation, in* CROSS BORDER INSOLVENCY 16, 16–97 (Richard Sheldon, ed., 3d ed. 2011) (analyzing the E.C. Regulation, and discussing how the COMI is determined thereunder).

13 The default positioning of employee claims in insolvency is that of the unsecured creditor; unsecured creditors only take from the insolvency distribution to the extent that the claims of secured creditors and claims against the debtor's estate (claims that arose after the commencement of the insolvency proceedings) have been satisfied in full. *See, for example,* Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U CHI. L. REV. 738, 738 & n. 1 (1988) (discussing the origins of the absolute priority rule in American law). Of course, variations of this ordering occur by virtue of national policy choices, but absent an affirmative pronouncement of national law, generally all claims—including employee claims—are unsecured.

14 *Id. See also* Guarantee Mandate arts. 2(4), 11.

15 *See* E.U. Regulation, *supra* note 1 art. 7(i) (noting that the Member State of the opening of main proceedings supplies the governing law for priorities and the ranking of claims).

16 *See* Guarantee Mandate art. 9; E.U. Regulation, *supra* note 1 art. 7. The E.U. Regulation provides the general choice of law rule for insolvency proceedings, and the Guarantee Mandate provides for which guarantee fund pays an employee's claim, but it is possible under these provisions for those bodies of law to be different.

two States can lead to a vastly different outcome for employee-claimants that are identically situated but for the State in which their employer is headquartered.[17]

The E.U. Regulation's provision for the law of the State of the primary insolvency proceeding to control the insolvency process can lead to vastly different distributional outcomes for employees in non-main jurisdictions.[18] This counterintuitive treatment of employee claims can operate to defeat the purpose of the policy choices that Member States make as to the proper level of protection due employee claims, expressed via the outlet for national law incorporated into the E.U. Regulation and the Guarantee Mandate.[19] If a Member State determines that employees are entitled to a priority under domestic law, they are no less worthy of that protection simply because their employer is headquartered abroad.[20] As such, harmonizing the goal of the Guarantee Mandate with the procedure and choice of law provisions of the E.U. Regulation can be accomplished by a change in the procedure Member States' guarantee funds follow when satisfying employee claims.

Instead of having the guarantee funds simply pay a fixed amount, leaving the balance of an employee's claim to be satisfied in part, if at all, in the primary

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17 To wit, when an employee in a priority-granting State possesses a residual claim (that is, a claim that is not fully satisfied by the insurance fund and the assets located domestically) against the debtor, and the debtor's assets are subject to an insolvency proceeding in a non-priority State, the balance of the employee's claim will be governed by the non-priority legal regime. This, despite the fact that an identically-situated employee of a domestic company would have the full value of her claim governed by the priority-granting domestic law.

18 *See* E.U. Regulation, *supra* note 1 art. 3(1) ("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."). In the United States, an analogous concept is the "nerve center" test that indicates the proper court for jurisdiction over a corporation. *See, for example*, Hertz Corp. v. Friend, 559 U.S. 77 (2010).

19 Neither the E.U. Regulation nor the Guarantee Mandate operates to prohibit Member States from enacting "hybrid" priority-guarantee regimes, and Member States are likewise able to enact guarantee regimes that provide greater protection for employee claims than the minimum. However, when operating together, these policy choices can be frustrated by an inconsistent change in the applicable law.

20 The two major areas in which employment research is being conducted appear to be temporary relocation of employees (so-called "posted" workers) within the E.U. and labor mobility; quantitative measures of the prevalence of companies employing workers in foreign companies (to staff the companies' operations in that foreign company) does not appear to be an area to which international study has been directed. *Cf, for example,* Roberto Pedersini & Massimo Pallini, *Posted Workers in the European Union*, EURO. FOUND. FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS (Dec. 14, 2010), http://www.eurofound.europa.eu/observatories/eurwork /comparative-information/posted-workers-in-the-european-union; *Labor Mobility Within the E.U.*, EURO. COMM'N (Sept. 25, 2014), http://europa.eu/rapid/press-release_MEMO-14-541_en.htm. There is a wealth of data available on the pertinent economic characteristics of the employee's side of the E.U.'s economic equation, but, alas, there is little data available concerning the employer's side. *See* EMPLOYMENT AND UNEMPLOYMENT (LABOUR FORCE SURVEY), http://ec.europa.eu/ eurostat/web/lfs/data/database (last visited Apr. 13, 2016).

insolvency proceeding, this Comment argues that Member States should employ a dynamic approach to protecting employee claims in insolvency proceedings. Under such an approach, guarantee funds would pay employee claims at the level to which they would be entitled if the insolvency proceeding were being wholly administered in domestic courts and subject to domestic law. The guarantee fund would become subrogated to the employee's claim against the debtor, and the employee could still lodge a claim for any residual amount of their claim that was not paid out of the debtor's local assets and the guarantee fund payments. As a result, the amount of the claim against the debtor would not change, it would just be bifurcated into two sub-types: (1) claims lodged by the guarantee funds, having become subrogated to the original employee claim; and (2) deficiency claims lodged by employees. The guarantee fund lodging the subrogated claim in the primary insolvency proceeding would receive the amount to which the employee would have been entitled, which would defray the payment the fund made to the employee in the first place. This method would protect all employee claims to the fullest extent that Member States deem prudent, fully expressing their chosen policy judgments by eliminating the disparity visited upon employees based solely on where their employer is headquartered.[21]

This procedural change would result in the realization of several benefits that more fully achieve the motivating goals of the E.U. Regulation and the Guarantee Mandate in the first place, gains which form the ultimate focus of this Comment. Member States will more fully realize the policy choices they make as to the appropriate level of protection for employees of insolvent firms, while at the same time fully internalizing the costs of their policy choices rather than imposing externalities on other parties.[22] Finally, Member States will be better able to apportion those costs how they see fit: either spreading them across the national economy as a whole or apportioning the costs by industry according to the Member State's assessment of the riskiness of each industry.[23]

In Section II, this Comment will frame the issue considered herein and set out the relevant changes incorporated in the E.U. Regulation as informed by the Guarantee Mandate. Section III will show that the Guarantee Mandate allows for an important outlet for national policy choices in the E.U.-wide insolvency regime.

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21 This is so because, instead of some subset of employee claims receiving less protection than the Member States had previously determined they warranted, all employee claims would receive the level of protection they would receive under domestic law.

22 *See infra* Section IV(B).

23 *See infra* Section IV(B). As a matter of first impression, it appears that the apportioned approach that takes account of the riskiness of individual industries would be preferable as a means of requiring firms within each industry to internalize (and thus account for) the risk that they will become insolvent and impose costs on their employees, some of the most vulnerable stakeholders in the enterprise. However, this assessment of the optimal means of allocating the costs of guaranteeing employee claims in insolvency is outside the scope of this Comment, and perhaps a valuable subject for future analysis.

The E.U. Regulation and the Guarantee Mandate operate in some cases to increase the protection of employees when firms become insolvent. However, certain elements of the E.U. Member States' national insolvency regimes can, when coupled with the E.U. Regulation's choice of law provisions, lead to employees of companies with foreign headquarters receiving disparate treatment relative to employees of domestic firms. In Section IV the Comment advances that a change in the way the Guarantee Mandate is implemented by Member States is necessary in order to eliminate the disparate effects that the E.U. Regulation's choice of law provisions can have when claims from Member States with one particular approach to protecting employees in insolvency are administered by courts in Member States with differing approaches. It is argued that this change will more effectively express the Member States' policy choices, more fully align the costs of policy choices with their selection and implementation, and increase the gains to efficiency sought by the E.U.'s regulatory scheme in the first instance. Section V briefly concludes.

II. Framing the Problem: The E.U. Regulation and the Guarantee Mandate

This Section will discuss the development of the E.U.-wide insolvency regime consisting of the E.U. Regulation and the Guarantee Mandate, with a brief consideration of the historical origins of these pronouncements, before turning to the interaction between the two laws and the harmful effects that can result from their different approaches to the choice of law problem. Throughout it will be shown that the unique situation of employees in the cross-border insolvency regime justify the revision of Member States' implementation of the Guarantee Mandate in order to mitigate the harsh impacts that changing national laws would otherwise have.

A. Cross-Border Insolvency: A Brief Conceptual History

In a single-State insolvency, the legal differences between States would matter little—it is easy to imagine that a State's insolvency regime would be one of the factors a firm considered when deciding whether to conduct business there—and choice of law issues would not arise.[24] Coordinating the proceedings

24 *See, for example,* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 2 (1991) ("The founders and managers of a firm . . . . choose where to incorporate (states have different legal rules)."). *See also id.* at 5–6 ("Managers in the United States must select the place of incorporation . . . The managers who pick the state of incorporation that is most desirable from the perspective of investors will attract the most money."). Judge Easterbrook and Professor Fischel deal with United States corporate law, but it is a general proposition of a conceptualization of the market for corporate law that the founders of corporations are rational

becomes significantly more complex, however, when more than one body of law is, or could be, applicable. Because insolvency law is primarily a State-level regime, no two insolvency regimes are precisely the same.[25] Differences in national insolvency regimes become important in at least two increasingly common situations.

1. The archetypal cross-border insolvency.

First, in situations where multinational firms have assets located in foreign States, it is not immediately clear what body of law should govern in an eventual insolvency proceeding.[26] Where a firm is headquartered in one State and significant assets exist elsewhere, the law that actually governs the insolvency proceedings in the foreign States could plausibly be the law of the State in which the assets are located[27] or the law of the State of the debtor's headquarters.[28]

Second, a similar situation exists where a business entity has creditors in multiple States. In these situations, the possibility exists that insolvency proceedings may be instituted in any number of viable (if not strictly convenient) fora, including the State of the debtor's headquarters or any of the States in which the creditors are principally located.[29] In both situations, the court reviewing the insolvency petition must determine the law to apply, which can have profound effects on the eventual distribution of assets to the creditors.[30]

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actors, evaluating, among other things, the legal regime under which they would be incorporating. This does not change if the relevant choices for incorporation are States rather than U.S. states.

25 *See generally, for example*, José M. Garrido, *No Two Snowflakes the Same: The Distributional Question in International Bankruptcies*, 46 TEX. INT'L L.J. 459 (2011) (discussing the wide variety of differences in policy choices in international insolvency regimes). The E.U. Regulation is one example of attempts made by the international community to respond to the increasingly globalized marketplace, and the issues it poses for a legal regime primarily located at the national level.

26 *See* JAY LAWRENCE WESTBROOK, CHARLES D. BOOTH, CHRISTOPH G. PAULUS & HARRY RAJAK, A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS 227–28 (2010).

27 *See, for example,* Jeremy Goldring, *Priorities and Set-Offs, in* CROSS BORDER INSOLVENCY 515–24, 516. This is termed the *lex situs*. *Id.*

28 *Id.* at 515–16. This is termed the *lex fori*. *Id.*

29 The E.U. Regulation attempts to curtail some of the potential for gamesmanship by providing that, in the case of a legal person, the COMI, and thus the appropriate venue for the main insolvency proceeding, is the place of registered office. *See* E.U. Regulation, *supra* note 1 art. 3(1). It should be noted, however, that this rule can be rebutted, and the *lex situs* still applies in certain specific instances. For example, *lex situs* applies in the case of contracts relating to immovable property and rights subject to registration (e.g., aircraft and ships). *See id.* at arts. 3(1), (11), (14). Indeed, the E.U. Regulation indicates that the prevention of forum shopping by shifting assets between jurisdictions is one of the main motivating factors behind having an E.U.-wide insolvency regime. *See id.* at pmbl.(5).

30 SARRA STUDY, *supra* note 4. It is also useful to note that, generally speaking, parties to a contract have the ability to agree as to which jurisdiction's laws shall govern the rights under that contract. In the E.U., such agreements are allowed for most contracts, excluding certain "consumer contracts." *See* Axel Gehringer, *After* Carnival Cruise *and* Sky Reefer*: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions*, 66 J. AIR L. & COM. 633, 678–79 (2001) (citing

In the above situations, then, the choice of law rule is important primarily because the governing law largely determines the outcome of the insolvency distribution.[31] The fact that insolvency regimes are primarily a matter of national policy choices means that determinations of national social and economic policy, historical developments, and even the basic structure of the national institutions can drastically affect the resulting insolvency regime.[32]

2. Territoriality and universality—two major approaches to cross-border insolvency.

When faced with multi-jurisdictional insolvencies, courts have historically approached this issue in two major ways.[33] The first is to treat the assets in each State as subject to the operation of that State's laws. This "territoriality" doctrine holds that courts of one State have jurisdiction only over those assets located within the State.[34] This necessarily means that a State's court has jurisdiction only over assets located within that State, and thus a creditor seeking satisfaction from all of the debtor's assets must lodge claims in all States in which the debtor's assets are located. [35]

The other major approach has been to treat the assets of the debtor, wherever located, as controlled by the laws of the State administering the insolvency proceedings.[36] This "universality" doctrine holds that the State most competent to administer the insolvency is that in which the firm is headquartered.[37]

As international trade became more complex, and cross-border commerce more prevalent, cross-border insolvencies administered under the "pure" territoriality and "pure" universality doctrines became less practical, and the desire for change prompted various iterations of what eventually became known as the

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Convention Concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters, Sept. 27, 1968, 1262 U.N.T.S. 20747). The Convention Gehringer cites has been updated substantially since its initial conclusion, and the new E.U. regulations governing forum selection clauses are found in various articles of Chapter II of the 2012 recast of the Brussels I Regulation. *See* Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1 (EU).

31 *See* SARRA STUDY, *supra* note 4.

32 *See generally* SARRA STUDY, *supra* note 4, at 3–130. *See also id.* at 126–30 (noting the variety of different policy justifications that lead States to customize their insolvency regime differently along a number of axes ranging from the precise protections afforded employees, the methods of providing funding for those protections, and the extent to which directors and officers of the debtor are held liable for those claims, to name a few).

33 *See, for example,* WESTBROOK, *supra* note 26, at 229–31.

34 *See, for example,* Garrido, *supra* note 25 at 467.

35 *Id.*

36 *Id.* at 468.

37 *Id.* at 471–72.

"modified universalism" doctrine.[38] This approach attempts to accommodate local interests in the insolvency process while still reaping some of the efficiency benefits that centralized insolvency administration can produce.[39] Modified universalism has been the theoretical approach employed most often in the international community's attempts at harmonizing the disparate insolvency regimes of the various States engaged in high volumes of international trade.[40]

B. The Development of the E.U. Regulation

The E.U. Regulation was not the first attempt at harmonizing disparate State laws pertaining to insolvency. The first developments in international insolvency rulemaking were the International Bar Association's Cross-Border Insolvency Concordat, its predecessor, the Model International Insolvency Cooperation Act (MIICA), and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency.[41] The E.U. Regulation embraces the modified universality approach in an attempt to harmonize the insolvency regimes of its Member States while still respecting the sovereignty Member States reserve over areas of national policy.[42]

1. The adoption of the E.U. Regulation.

The E.U. initially incorporated the UNCITRAL Model Law into E.U. law on May 29, 2000.[43] The E.U. sought to establish an E.U.-wide regime designed to promote uniformity and stability among the E.U. Member States.[44]

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38 *Id.*

39 *Id.* at 471 ("'Modified Universalism' is an accepted term . . . that refers to a universalist approach in which some concessions are made to territorial interests for the sake of ensuring the effective functioning of the international insolvency system.").

40 *See generally* E.U. Regulation, *supra* note 1.

41 International Bar Association, Section on Business Law, Committee J-Insolvency and Creditors' Rights, Cross-Border Insolvency Concordat (1996), http://www.ibanet.org/Document/Default.aspx?DocumentUid=2d55e76f-cab1-493d-b0a9-4b4b967b353f; Comm. J, Sec. on Bus. L., Int'l Bar Ass'n., Model International Insolvency Cooperation Act (1988), *reprinted in* Timothy E. Powers, *The Model International Insolvency Co-operation Act: A 21st Century Proposal for International Insolvency Co-operation*, AA-1–AA-16 in AMERICAN BAR ASSOCIATION, MULTINATIONAL COMMERCIAL INSOLVENCY (1993); G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (1998) [Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law].

42 *See, for example,* Garrido, *supra* note 25 at 472.

43 The E.C. Regulation was enacted with the stated goal of creating a scheme that is "binding and directly applicable," "[i]n order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects." E.C. Regulation, *supra* note 6 pmbl. (8).

44 The E.C. Regulation largely followed the Model Law's structure and principles, with the primary difference between the two being "the operative framework of the [E.C. Regulation]; specifically[that] the European Court of Justice (ECJ) has authority to issue [binding rulings], which allows for harmonization on many of the points of law—particularly determination of COMI issues—when the domestic courts applying the [E.C. Regulation] come to inconsistent results." Anthony V.

To that end, the E.U. enacted the E.U. Regulation.[45] The E.U. Regulation was enacted following a 2012 report on the effectiveness of the E.C. Regulation.[46] The majority of the E.U. Regulation's provisions are set to enter into force on June 26, 2017.[47] The most significant changes included in the E.U. Regulation are the addition of provisions dealing with coordinating multi-entity insolvencies, and so-called "undertakings," which allow the primary insolvency administrator to offer informal settlements to creditors in secondary locations in order to streamline the aggregation of the debtor's assets in the primary insolvency proceeding.[48]

Though these added provisions aim to increase the administrative efficiency of cross-border insolvencies, they focus chiefly on streamlining the consolidation of assets into the primary proceeding and handling multi-entity insolvency proceedings more efficiently.[49] They do not squarely address the challenges faced by employee creditors in navigating the disparate insolvency regimes that exist throughout the E.U.

The changes incorporated in the E.U. Regulation are largely intended to address the proliferation of insolvencies with cross-border characteristics. As several commentators have noted, however, the operation of insolvency law is particularly important to one class of creditors—the employees—given their unique position relative to the debtor.[50] It is important to view the changes

Sexton, *Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation*, 12 U. CHI. J. INT'L L. 811, 831–32 (2012).

45 *See generally,* E.U. Regulation, *supra* note 1.

46 *See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings*, COM (2012) 743 final (Dec. 12, 2012).

47 E.U. Regulation, *supra* note 1 art. 92 (noting, however, that certain articles therein will have different effective dates. These articles generally relate to the sharing of information regarding insolvencies within Member States' territories, and are not of particular relevance for present purposes.).

48 *Id.* arts. 36, 56–83.

49 E.U. Regulation, *supra* note 1 pmbl. (3), (42), (51).

50 *See, for example,* WESTBROOK, *supra* note 26 at 184 (2010) ("There can be little doubt that the overall effect on employees and their families is qualitatively far worse than it is on other creditors."); Janis Sarra, *An Investigation Into Employee Wage and Pension Claims in Insolvency Proceedings Across Multiple Jurisdictions: Preliminary Observations*, 16 J. BANKR. L. & PRAC. 5 Art. 8, 1 (2007) ("Employees are seriously affected by firm financial failure. Wages, vacation pay, expense claims, termination, and severance pay are frequently claims outstanding at the point of commercial insolvency . . . . Employees face information asymmetries; hence they are often the last creditors to know of the company's financial distress and the least able to protect themselves in advance from the losses associated with firm failure."). The unique situation in which employees are placed when their employer becomes insolvent—and their unique characteristics relative to other stakeholders in the insolvency process—warrants the change in implementation argued for here.

incorporated into the E.U. Regulation, and the provisions left unchanged, in light of their effects on the claims of this especially vulnerable subset of creditors.[51]

The E.U. Regulation, as indicated above, seeks to streamline cross-border insolvencies, reduce gamesmanship and forum-shopping, and improve the efficiency of the proceedings.[52] However, in allowing for the application of one State's laws to the vast majority of potential claims against a debtor, the claims of foreign employees can fall through the cracks during the transition from one State to another.[53] Likewise, even under two regimes that grant a priority to employee claims, an employee that has been partially satisfied out of the assets in their home State is likely to not be advantaged by the priority afforded their claims in the main insolvency proceeding, given the high variability of national insolvency regimes and the pari passu rule contained in the E.U. Regulation.[54]

The reason that employee-claimants are still faced with challenges in securing satisfaction of their claims is illustrated by Sections 66 and 72 of the Preamble to the E.U. Regulation.[55] For insolvency proceedings governed by the E.U. Regulation, the Member State opening insolvency proceedings provides the controlling body of law.[56] In certain circumstances, the E.U. Regulation permits challenges to the opening of a main insolvency proceeding.[57] Nevertheless, absent an upheld challenge, the opening of a main insolvency proceeding by a national court can lock in the body of law applicable to the case, having profound effects on the final distribution of the debtor's assets.[58]

Further, though the E.U. Regulation provides for a general choice of law rule, there are certain exceptions that permit other nations' laws to apply, primarily

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51 *See* WESTBROOK, *supra* note 26 at 183–86.

52 *See* note 43 *supra* and accompanying text. *See also, for example,* E.U. Regulation, *supra* note 1 pmbl. (5).

53 WESTBROOK, *supra* note 26 at 192–94.

54 *See* E.U. Regulation art. 23 (Also known as the "hotch pot" rule, the *pari passu* rule provides that creditors that have obtained some payment of their claim in the course of insolvency proceedings "shall share in distributions made in other proceedings only where creditors of the same ranking . . . have . . . obtained an equivalent dividend.").

55 E.U. Regulation, *supra* note 1 pmbl. (66), (72).

56 *Id.* art. 3. *See also id.* art. 7 (delineating the applicable body of law in particular situations, including "the rules governing the distribution of proceeds from the realisation of assets[and] the ranking of claims"). The determination of the appropriate Member State to open proceedings is provided for generally in Article 3 of the E.U. Regulation. *Id.* art. 3.

57 *Id.* arts. 3–5. To wit, the debtor or a creditor may challenge the opening based on a lack of international jurisdiction as defined in Article 3 of the E.U. Regulation, or on other grounds if provided for by national law *Id.* Third parties may also challenge the opening "where national law so provides." *Id.* art. 5(2).

58 *See* notes 3 & 4, *supra* and accompanying text. It is also useful to note that courts presented with a request to open insolvency proceedings are to examine *sua sponte* whether jurisdiction under Article 3 of the E.U. Regulation does in fact exist so as to make opening the proceedings proper thereunder. E.U. Regulation, *supra* note 1 art. 4.

to components of the insolvency case considered uniquely national, and thus properly governed by the law applicable from the origination of the right, including, for example, rights in rem and contracts relating to immovable property.[59] Contracts of employment are likewise governed by the law applicable to the contract, even if it is not the law of the State opening the main insolvency proceeding.[60] However, employee claims brought under these contracts are still governed by the law of the primary insolvency proceeding State, even if the employment contract was governed by a different body of law.[61] This means that, for any given employee in any given E.U. Member State, the law by which their claims for past due wages, pension payments, paid leave, or other such payments is governed could be vastly different than another employee identically-situated save for their employer's headquarters.[62]

a) Consistencies between the E.C. and E.U. Regulations. When analyzing the E.U. Regulation's effect on employee claims, it is first useful to take note of the relevant provisions of the E.C. Regulation that have carried over in more or less the same form to the E.U. Regulation, as these key provisions set the stage for the implementation problems that bear heavily on employee claims in the insolvency administration process.[63]

Section 63 of the E.U. Regulation's Preamble, corresponding with Section 21 of the E.C. Regulation's Preamble, provides that

> [a]ny creditor which has its habitual residence, domicile or registered office in the Union should have the right to lodge its claims in each of the insolvency proceedings pending in the Union relating to the debtor's assets . . . Every creditor should be able to keep what it 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.[64]

This language as implemented in the operative provisions of the E.U. Regulation, makes clear that creditors may assert their claims against the debtor in any other proceeding the debtor is subject to, but they take of those distributions only insofar as other creditors of the same "ranking or category" have already reached the same proportion of satisfaction of their claims (the so-called pari passu or "hotch pot rule").[65]

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59 *Id.* arts. 8, 11.

60 *Id.* pmbl. (72), art. 13.

61 *Id.* pmbl. (72), arts. 7, 13.

62 This flows directly from the choice of law provision of Article 9 of the E.U. Regulation.

63 *Cf.* E.U. Regulation *supra* note 1 at Annex D (noting the correlation between the provisions of the E.U. Regulation and the EC Regulation).

64 *Compare* E.U. Regulation, *supra* note 1 pmbl. (63), *with* E.C. Regulation, *supra* note 6 pmbl. (21).

65 E.U. Regulation, *supra* note 1 arts. 23, 45, 53–55.

The E.U. Regulation likewise contains the same language as the E.C. Regulation regarding the choice of law rules to be applied.[66] The choice of law articles of each Regulation are substantively identical, and both provide that the law of the jurisdiction opening proceedings shall be "the law applicable to insolvency proceedings and their effects."[67] Of particular relevance here, both Regulations provide that the law of the opening jurisdiction shall provide "the rules governing the distribution of proceeds from the realization 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."[68]

Another holdover from the E.C. Regulation is the treatment of employee claims in the explicit terms of the Regulations, adding further context to the Regulations' choice of law provisions.[69] Contracts of employment are excluded from the choice of law provision that consolidates the law governing the insolvency proceedings in most other circumstances.[70] Thus, employment contracts are governed by the body of law that would govern them outside of insolvency "in accordance with the general rules on conflict of laws."[71] Both Regulations, however, provide that "[a]ny other questions relating to the law of insolvency, such as whether the employees' claims are protected by preferential rights and the status such preferential rights may have, should be determined by the law of the Member State in which the insolvency proceedings (main or secondary) have been opened."[72]

b) New additions to the E.U. Regulation. The E.U. Regulation also incorporates several notable departures from the E.C. Regulation's language.[73] One major update is the inclusion of Chapter V.[74] Chapter V addresses the unique issues posed by multi-entity insolvencies, in particular making detailed provision for communication and cooperation between the courts administering the various interrelated proceedings.[75] Chapter V Section 2 in particular sets out the procedures for the institution of group coordination proceedings, and the duties of the coordinator appointed to harmonize the operations of the various proceedings.[76] Specific provision is made for several "tasks and rights" to vest in

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66 *Compare* E.U. Regulation, *supra* note 1 pmbl. (66), *with* E.C. Regulation, *supra* note 6 pmbl. (23)
67 *Compare* E.U. Regulation, *supra* note 1 art. 7(1), *with* E.C. Regulation, *supra* note 6 art. 4(1).
68 *Compare* E.U. Regulation, *supra* note 1 art. 7(2)(i), *with* E.C. Regulation, *supra* note 6 art. 4(2)(i).
69 *Compare* E.C. Regulation, *supra* note 6 art. 4, *with* E.U. Regulation, *supra* note 1 art. 7.
70 *Compare* E.U. Regulation, *supra* note 1 pmbl. (72), *with* E.C. Regulation, *supra* note 6 pmbl. (28).
71 E.U. Regulation, *supra* note 1 pmbl. (72), art. 13(1).
72 E.U. Regulation, *supra* note 1 pmbl. (72). *See also* E.C. Regulation, *supra* note 6 pmbl. (28).
73 *See* E.U. Regulation, *supra* note 1 at Annex D.
74 E.U. Regulation, *supra* note 1 arts. 56–77.
75 *Id.*
76 *Id.* arts. 61–77.

the coordinator, including the right to be heard and participate in any of the proceedings opened in respect to any member of the enterprise group, and the task of "propos[ing] a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies."[77]

The next major change incorporated into the E.U. Regulation is the "undertaking" framework of Article 36.[78] The main insolvency administrator, in order to streamline the insolvency process, is allowed a means by which to attempt to prevent the institution of secondary proceedings.[79] The main insolvency administrator can enter into an agreement with the creditors likely to institute secondary proceedings that, when distributing the assets from the secondary location, the primary insolvency administrator will comply with the "distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State."[80]

Another innovation found in the E.U. Regulation is the expansion of cooperation and coordination provisions between insolvency administrators and courts in the various jurisdictions in which the debtor has assets.[81] Combined with Chapter IV's information disclosure provisions, this evidences an interest in increasing the opportunities and abilities of the various stakeholders in the insolvency administration to coordinate the insolvency proceedings as efficiently as possible.[82] The E.C. Regulation had somewhat similar language, most notably the provision for the right of "any creditor who has his habitual residence, domicile, or registered office in a Member State" to lodge a claim in any insolvency proceeding governed by the Regulations.[83] However, the E.U. Regulation's Chapter IV provides a more expansive allowance for the right to bring claims, extending the right to "[a]ny foreign creditor."[84] Chapter IV further provides for a standardized form and language accommodations that purport to make it easier for foreign claimants to lodge their claims in other insolvency proceedings.[85]

2. Primary approaches to employee protection.

Though most E.U. Member States afford special protection to employees in insolvency proceedings, the precise methods and procedures can differ widely

77 *Id.* art. 72.
78 *Id.* art. 36.
79 *Id.*
80 *Id.* art. 36.
81 *Id.* arts. 41–44.
82 E.U. Regulation, *supra* note 1 arts. 53–55.
83 *Compare* E.C. Regulation, *supra* note 6 art. 39, *with* E.U. Regulation, *supra* note 1 art. 53.
84 E.U. Regulation, *supra* note 1 art. 53.
85 *See* E.U. Regulation, *supra* note 1 arts. 54(3), 55(1).

from State to State.[86] In the international community generally, there are three major approaches to handling the claims of employees of the debtor firm currently in use. First, some States afford employee claims some manner of priority in the insolvency distribution process.[87] As one commentator noted, "The underlying policy rationale . . . is frequently that employees are considered particularly vulnerable claimants and a statutory priority offers them some limited relief from losses incurred due to their employer's insolvency."[88] The second major approach is to provide for guarantee funds or insurance schemes, which operate to at least partially insulate employees from the full brunt of the employer's insolvency and the detrimental effects it can have on their income.[89] The rationale here, as one commentator notes, "is that such funds guarantee payments to workers when they are most vulnerable and can be far more expeditious than recovery after a bankrupt estate has been liquidated and payments made to creditors."[90] The last major approach is an amalgamation of both approaches. Under the hybrid approaches, some form of creditor priority is combined with some form of guarantee or insurance fund, often with a resulting subrogation of the guarantee fund to the employee's claim in the insolvency proceeding.[91] The rationale behind the hybrid approach is that "both strategies are needed to protect employees and to create the appropriate incentives for director and officer conduct in the period leading up to the business enterprise entering insolvency proceedings."[92]

In one of the few, and most extensive, studies on the subject, Professor Sarra observed that, of the sixty-two States surveyed, the most common schemes were the hybrid system and the preference system, with the hybrid system being employed by twenty-nine of the States surveyed, and the preference system in use by twenty-six States.[93] In contrast, the pure guarantee fund approach, without some form of preference in liquidation, was employed by only five States.[94]

Within these broad categories, States can differ widely in the precise approach taken. For example, as between States in the priority-granting category, the exact ordering of the priority and the types and amounts of the priority can

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86 *See generally* Janis Sarra, *An Investigation into Employee Wage and Pension Claims in Insolvency Proceedings Across Multiple Jurisdictions: Preliminary Observations*, 16 J. BANKR. L. & PRAC. 5 Art. 8 (2007).

87 SARRA STUDY, *supra* note 4 at 9.

88 *Id.*

89 *Id.*

90 *Id.*

91 *See id.* at 9–10.

92 *Id.* at 10.

93 SARRA STUDY, *supra* note 4 at 10–11 & graph 1.

94 *Id.* Of particular interest here, Austria and Germany are among the minority of Member States that have a purely guarantee fund protection scheme, though, as with all comparisons that can be drawn, even within this relatively small subset of the survey, the precise details of the States' approaches vary. *Id.* at 35–41.

differ to a large extent.[95] Likewise, between States with some form of guarantee fund, the exact types of employee claims, the caps imposed on guarantee payments, and other such variables can differ between States.[96]

Another means by which States can differ is in how they fund their guarantee funds.[97] There are two major approaches to funding the guarantee funds: (1) general taxation, spreading the costs throughout the national economy as a whole, and (2) a levy on the business that operate in the State, including, in numerous cases, apportioning the necessary levies "based on the risks inherent in the particular sector or industry."[98]

C. A More Direct Approach to Employee Protection: The Guarantee Mandate

On October 22, 2008, the E.U. enacted the Guarantee Mandate.[99] The Guarantee Mandate requires Member States to provide guarantee funds that ensure a minimum level of protection for employees in the event that their employer becomes insolvent.[100] The Guarantee Mandate permits Member States to set higher levels of protections and to establish (or maintain) a priority for employee claims in addition to guarantee funds.[101] Indeed, the European Court of Justice, albeit operating under the original 1980 Directive, has indicated that Member States are liable for the guarantee of employee claims even if they have not transposed the Directive into their national laws.[102] Thus, the Guarantee Mandate has had the effect of requiring all Member States to have either a "pure guarantee" regime or a "hybrid" guarantee/priority regime for protecting

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95 *Id.* at 18 (noting that "one can construct a matrix of the types of priorities or preferences for wage and related claims," and that such a matrix would include categories like an absolute priority even over secured creditors, priority alongside administrative costs, priority only over unsecured creditors, and even priority divided up by the time frame over which the claims were alleged to have accrued).

96 *Id.* at 34 (noting that a variety of approaches to the guarantee fund are employed, including varying levels of monetary caps (a number of times corresponding "in some measure to the amount of priority granted such claims,") and imposing timeframe limits on how far back claims would be guaranteed).

97 *Id.* at 34, 35.

98 *Id.*

99 *See generally* Guarantee Mandate, *supra* note 7.

100 *See id.* arts. 3, 4.

101 *See id.* art. 11. *See also* Paul M. Secunda, *An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States*, 41 FORDHAM URB. L.J. 867, 903 (2014) ("This directive sets a minimum standard in all E.U. countries . . . but it does not prevent higher protection for employee claims in these situations.").

102 *See* Joined Cases C-6 & C-9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5403 ¶¶ 15, 46.

employee claims, as the "pure priority" regime is no longer permitted under the Guarantee Mandate.[103]

Article 3 of the Guarantee Mandate provides that "Member States shall take measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment . . . including, where provided for by national law, severance pay on termination of employment relationships."[104] Article 4 allows Member States to limit the extent to which the guarantee fund insures employee claims either by time period or amount ceilings.[105] However, any time period is required to be accompanied by a particular reference period depending on the timeframe limit imposed, and any amount ceiling "must not fall below a level which is socially compatible with the social objective of [the] Directive."[106]

The Guarantee Mandate further provides that the two main methods of funding guarantee funds—a tax on the whole economy or a levy on the firms doing business in the Member States—are permissible options for Member States.[107] The Guarantee Mandate further provides, however, that "the assets of the institutions must be independent of the employers' operating capital and be inaccessible to proceedings for insolvency . . . [and] the institutions' liabilities must not depend on whether or not obligations to contribute to financing have been fulfilled."[108]

The Guarantee Mandate also contains specific provisions for cross-border insolvencies.[109] Article 9 provides that the guarantee fund responsible for paying employee claims is that "in the Member State in whose territory they work or habitually work," and further that "[t]he extent of employees' rights shall be determined by the law governing the competent guarantee institution."[110]

At bottom, then, the Guarantee Mandate requires Member States to provide for a minimal level of protection for employee wage claims.[111] The amount and method of calculation of the payments to which employees are entitled are governed by the law of the State in which the employee works, and the employees are protected from a reduction in payments if the funds have not been fully

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103 *See generally* Guarantee Mandate *supra* note 7. Indeed, under the European Court of Justice's precedent, it appears that if Member States are unwilling to implement the Guarantee Mandate, employees and the courts could constructively force them to anyway by holding the Member States liable for the amount of the guarantee payment.

104 *Id.* art. 3.

105 *Id.* art. 4.

106 *Id.* art. 4(3).

107 Guarantee Mandate *supra* note 7 art. 5.

108 *Id.*

109 *Id.* art. 9.

110 *Id.*

111 *Id.* pmbl. (3), art. 4.

implemented or financed.[112] However, the Guarantee Mandate still allows Member States a significant amount of latitude to customize their implementations of the Mandate, including the precise amounts and time periods of payments to guarantee and the method of funding the guarantee fund.[113]

Though a significant step forward in ensuring the protection of employee claims in insolvency—and, indeed, a clear codification of the gravity with which the E.U. views the plight of the employee in cross-border insolvencies—the interaction with the E.U. Regulation's choice of law provisions can nevertheless lead to disparate outcomes for employee claims in cases involving one or more Member States, especially in cases involving fundamentally different approaches to structuring insolvency regimes, but even in cases with differences so slight as differing approaches to priority regimes.[114]

D. Constructing the Framework

Because of the unique positioning of employees in cross-border insolvencies and the emphasis that E.U. law places upon employee protection, the situation of interest here is the following: what happens when a firm is headquartered in a particular E.U. Member State, but conducts business operations in a number of other E.U. Member States before becoming insolvent? If an employee works for the debtor firm in one State, but the assets in that State are insufficient to satisfy the employee's claims, the employee can lodge a claim for the balance in the State where the primary insolvency proceeding is being conducted.[115] However, the precise approaches to protecting employee claims differ widely from State to State.[116] For example, if a French employee of a German company has to lodge a residual wage claim in the primary insolvency proceeding, their claim will receive no priority under the German insolvency regime.[117] However, their next door neighbor, a French employee of a French company, identical in every way but for the nationality of their employer, would receive a priority for their residual wage claim in the primary insolvency proceeding.[118] Thus, even though E.U. Member States have the option to customize their national insolvency regimes according to their view of the appropriate level of protection to afford to employee claims, the structure of the E.U.-wide law in this area means that a subset of the priority-granting State's workforce (those employees working for foreign corporations

112 *Id.* arts. 3–5.

113 *Id.* arts. 4–5.

114 *See, generally*, SARRA STUDY, *supra* note 4.

115 *See* E.U. Regulation, *supra* note 1 art. 45 ("Any creditor may lodge its claim in the main insolvency proceedings and in any secondary insolvency proceedings.").

116 SARRA STUDY, *supra* note 4, at 9–10.

117 *Id.* at 237–38, 249–50.

118 *Id.* at 237–38.

headquartered in non-priority-granting States) is not receiving the level of protection that State has determined is necessary. Moreover, the determinant of this disparate outcome is simply where the employer is headquartered.[119]

1. The detrimental interaction between the E.U. Regulation and the Guarantee Mandate.

In order to develop a solution to this disparate treatment, it is important to ask precisely what provisions of the E.U. Regulation and the Guarantee Mandate operate to this effect.

The Guarantee Mandate allows Member States to determine how strongly to protect employees of insolvent companies.[120] It also permits them to determine the particular types of claims, time periods, and monetary amounts of claims to guarantee.[121] Though allowing for an important outlet for Member States' national policy choices regarding the proper amount of protection for employee claims, the Guarantee Mandate nevertheless imports national law into the E.U.-wide insolvency regime in a way that effectively creates another exception to the choice of law provisions of the E.U. Regulation.[122] The choice of law rule, then, strips priority regimes from priority-granting States, and applies the priority where it is not recognized at domestic law. The pari passu rule further interferes with the recoveries employees realize.[123]

2. Concluding thoughts on the current state of the E.U. insolvency regime.

Neither the E.U. Regulation nor the Guarantee Mandate alone can address the problems created by the interaction between the two enactments. As such, it is useful to draw some conclusions about the current state of affairs before proceeding to consider the solution advanced here.

First, the E.U. Regulation's provision for undertakings will not affect cases in which there are sufficient assets located in the secondary jurisdiction to satisfy

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119 This outcome obtains because the choice of law provisions in the E.U. Regulation, Article 7 are activated by the jurisdictional provisions of Article 3, which establishes that the debtor's COMI is determinative of the proper location for the institution of primary insolvency proceedings. E.U. Regulation, *supra* note 1 arts. 3, 7.

120 Guarantee Mandate, *supra* note 7 arts. 2(4), 11.

121 *Id.* arts. 3–8.

122 In a world in which the law of the jurisdiction opening the main insolvency proceeding governs (with the exceptions created by the E.U. Regulation), providing for a guarantee fund governed by the law of the Member State in which the employee works creates *sub silentio* a new exception to the E.U. Regulation as to the amount guaranteed by the guarantee fund and as to those employees whose claims are partially satisfied thereby.

123 *See* E.U. Regulation *supra* note 1 art. 23.

all claims in that jurisdiction.[124] Allowing for a more streamlined distribution of assets located in the secondary jurisdiction benefits the insolvency proceeding as a whole, and to the extent that it leads to a faster satisfaction of employee claims, it is a useful tool for that purpose.[125] However, where the secondary jurisdiction does not contain enough assets to satisfy all claims, the secondary jurisdiction's claimants must lodge their claims in the primary insolvency proceeding, thereby inviting the disparate outcomes discussed here.[126]

Second, the E.U. Regulation's provision for cross-jurisdictional cooperation between insolvency practitioners and courts could be useful in providing more equitable treatment to the employee claims in the several insolvency proceedings.[127] To the extent the various courts and insolvency practitioners can conclude inter-jurisdictional agreements dealing with the administration of the insolvency proceedings, the E.U. Regulation may resolve disparities in treatment of employee claims between local employees and foreign employees. However, to the extent transaction costs or other barriers to negotiation leave employee claims out of the E.U. Regulation's coordination provisions, that such forms of coordination are permitted will not produce any beneficial change in the status and treatment of employee claims.

Third, providing special procedures for administering multi-entity cross-border insolvencies is not likely to benefit employees in any significant way.[128] The only real benefits that employees might realize out of these changes to the E.U. Regulation are the marginal benefits that all claimants (and the debtor) will realize from having an insolvency proceeding that is administered more efficiently, at a lower cost, more expediently, or any combination of the three. Though the efficiency gains might have real, tangible benefits for all parties to the insolvency, they do not squarely address the problems that uniquely and disproportionately affect employee claimants, and cannot, in any event, eliminate the disparate effect of the E.U. Regulation's interaction with the Guarantee Mandate.[129]

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124 Where assets in the secondary jurisdiction are sufficient to satisfy the claims in that jurisdiction, the law of the primary jurisdiction will not come into play as to those claims in that jurisdiction. Following the conclusion of the distribution in the secondary jurisdiction, whether by secondary proceeding or by undertaking, the assets can get folded into the main insolvency proceeding. *Id.* arts. 41, 49. This situation is outside the scope of this Comment.

125 The whole point of the inclusion of the undertaking language was to increase the efficiency of the insolvency administration, so to the extent it accomplishes its stated goal, the benefits definitionally accrue to all those with a stake in the conclusion of the insolvency proceedings by virtue of the faster satisfaction of claims in secondary jurisdictions, and the minimization of delays in the primary insolvency proceedings.

126 *See* E.U. Regulation *supra* note 1 art. 45.

127 *See id.* arts. 41, 42.

128 *Id.* arts. 56–77.

129 *Cf. id.*

To be sure, the Guarantee Mandate's requirement that Member States satisfy certain minimum levels of employee claims for employees working in their territory likely makes employees better off than they would be in situations without such a guarantee fund. This is true both because of the guarantee of a certain minimum level of satisfaction of their claims and because of the expediency of the payment.[130] Nevertheless, the Guarantee Mandate does not displace the E.U. Regulation's choice of law provisions regarding employee claims in insolvency proceedings.[131] As such, the Guarantee Mandate has the effect of making employees in priority-granting States worse off if they work for a foreign company headquartered in a State that grants no priority than if they worked for a domestic company.[132]

Indeed, the component of the current legal regime that will arguably be most useful to employees in cross-border insolvencies is the change that is the least ambitious. Information asymmetry is a significant barrier to employee-claimants lodging claims in other insolvency proceedings in which the debtor's assets are distributed.[133] By providing greater information in a more useful, usable, and standardized form, the E.U. Regulation's expanded information disclosure and notification provisions may operate to reduce the information asymmetry under which employee claimants often labor, if not prior to their employer entering insolvency, then at least during the insolvency proceedings.[134] If employee-claimants are better informed of their rights under E.U. law and the existence of insolvency proceedings in other Member States, they are better placed to assert their rights in the proper forum.

As shown here, the changes incorporated into the E.U. Regulation, though likely to provide gains to the efficiency of insolvency administrations as a whole, will not address the disparate treatment employee-claimants face when they seek to have their claims satisfied in a jurisdiction with different priority schemes for employee claims.[135] As such, a change in the way Member States discharge their obligations under the current legal regime is necessary to eliminate the conflict between the E.U. Regulation and the Guarantee Mandate's incorporation of

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130 *See, generally*, Guarantee Mandate, *supra* note 7.

131 *Cf., generally*, *id. See, also*, E.U. Regulation, *supra* note 1 art. 7.

132 The dynamic nature of the choice of law provisions of the E.U. Regulation, coupled with the static provision and implementation of the Guarantee Mandate has the effect of failing to account for the loss of priority in this subset of cross-border cases. *Compare* E.U. Regulation, *supra* note 1 art. 7, *with* Guarantee Mandate, *supra* note 7 art. 9.

133 SARRA STUDY *supra* note 4, at 4 (Employees "are often the last creditors to know of the company's financial distress and the least able to protect themselves in advance from the losses associated with firm failure.").

134 *See id.*

135 *See supra* Section II(B)(1)(b).

different bodies of law that produces unintended consequences for the very class of claimants these regulations were meant to protect.

III. Advancing the Solution

As noted above, the cornerstone of the entire Regulation, the lex fori provision, directly imports the vast majority of a State's insolvency law into the Regulation's framework.[136] As a result, the law governing the distribution of the debtor's assets, in most situations and as to most claims, will be that of the State administering the main insolvency proceedings.[137] With the incorporation of Article 36's "undertakings" provision, the number of cases in which secondary proceedings are instituted will likely drop since an undertaking can accomplish the same result more efficiently and at lower cost.[138]

The high degree of variability among E.U. Member States' insolvency regimes can lead to perverse outcomes when the primary insolvency proceeding is incorporating the claims of foreign employees into a trans-national system that relies as heavily upon national law as does the E.U. Regulation. For employees going from insolvency proceedings in a priority regime to insolvency proceedings in a guarantee regime, lodging the balance of their claims in the guarantee regime proceeding can be all but futile by virtue of the pari passu rule and lack of priority afforded in those proceedings.[139]

The solution, then, is to adjust the operation of national law in this context in order to eliminate the respective inconsistencies. Rather than have an employee's claim be governed by multiple different bodies of law, the inconsistency (and thus the disparate treatment of similarly-situated employees) can be eliminated by changing the way Member States implement the Guarantee Mandate. Paying employees' claims as if national law applied to their claim, rather than making a fixed payment and leaving the balance to be lodged in the main insolvency proceeding, will minimize the detrimental effects of the changing legal regime upon the employee-claimants.[140]

A. The Proposed Adjustment From the Employee's Perspective

The efficient and equitable outcome is to provide for payment of employee claims in two stages: first, at the outset of the debtor's insolvency, at the minimum level provided by the Guarantee Mandate. This ensures the goals of the Guarantee Mandate are not abrogated in the hunt for precision in determining the proper

136 *See* E.U. Regulation, *supra* note 1 art. 7.
137 *See id.* art. 3.
138 *See id.* art. 36.
139 *Cf. id.* art. 23.
140 Guarantee Mandate, *supra* note 7 art. 9.

amounts of claims. The second payment should take place after the primary insolvency proceedings have had sufficient time to ascertain the scope of the debtor's affairs. Given the E.U. Regulation's provision for expanded information sharing and coordination among jurisdictions, the proposed change in implementation is a simple matter for the guarantee fund or other competent authority in the secondary jurisdiction to accomplish.[141] They will be able to access the available information on the debtor, ascertain the extent of the debtor's assets, and determine what the distribution would be if the entirety of the debtor's assets were governed by the secondary jurisdiction's laws, as opposed to the primary jurisdiction.[142] Upon making this determination, employees would receive the second payment, representing the difference between the amount of the first payment and the amount it is determined the employee would have received had the domestic law applied to all of the assets.[143] States' guarantee funds do not need to wait until the conclusion of the primary insolvency proceedings to make the second payment, or even to determine the appropriate value of the second payment, as the information sufficient to make the simulated distribution determination is available prior to the confirmation of insolvency plans.[144]

The result of the dynamic approach argued for here is not a regime in which foreign employee claims are never brought in primary insolvency proceedings. The operation of this dynamic approach would have the guarantee fund pay the amount the employee could have received in a domestic insolvency proceeding, which still very likely would not equal the full value of the claim the employee has against the debtor. The difference, however, is the employee is not deciding whether to lodge a claim in the primary insolvency proceeding or to accept only the bare minimum guaranteed by the Guarantee Mandate. The employee instead is deciding whether or not to lodge that claim and go to the expense of seeing the primary insolvency proceeding through to the end. It may very well be that more employees decide that taking what they could have received in a domestic proceeding is better than going to the extra expense of raising the claims in foreign courts.

B. The Proposed Adjustment from the Guarantee Fund's Perspective

The dynamic approach to satisfying employee claims would have justifications and effects in two chronological segments: (1) before the insolvency and guarantee fund payment, and (2) after the guarantee fund payment is made.

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141 E.U. Regulation, *supra* note 1 arts. 41–45, 53–55.

142 *Id.*

143 *See* Guarantee Mandate, *supra* note 7 art. 4. The Guarantee Mandate does not set out a minimum required amount of the guarantee fund payments, but rather provides that the limits "must not fall below a level which is socially compatible with the social objective of this Directive." *Id.*

144 *Cf.* E.U. Regulation, *supra* note 1 arts. 53–55.

1. Ex post: during the insolvency proceeding.

Operating in tandem with the two stage payment of employee claims is the guarantee fund's role in the primary insolvency proceeding. Upon paying employee claims, the guarantee funds become subrogated to those claims against the debtor, thus acquiring the right to pursue those claims against the debtor to recoup the costs of paying the employees in the first place.[145] In this context, the claims the guarantee fund can bring against the debtor correlate evenly with the payments made to the employees: absent the guarantee fund, the total amount of claims against the debtor are not increasing or decreasing. Thus, for a debtor that employed 100 employees in a given State, that State's guarantee fund could represent the claims of all 100 in the main insolvency proceeding following its payment of those employees' claims. For a debtor that owed one employee in a given State $100 in back wages, that State's guarantee fund would have a $100 claim against the debtor. Likewise, if the guarantee fund in the latter example paid only $50 to the employee, the guarantee fund would have a $50 claim, and the employee would have her residual $50 claim, for a total amount claimed against the debtor of $100.

It will be noted, and correctly so, that a regime in which a guarantee fund raises the entirety, or even a significant portion, of an employee's claim in the main insolvency proceeding is a regime in which the guarantee fund is not likely to receive full satisfaction on that claim. The mere fact that the debtor is insolvent will tell even the most casual observer, however, that insolvent firms do not have enough assets to satisfy all of their obligations.

The important question to ask, instead, is how this situation compares to the alternative. Under the approach advanced here, the employee is paid the amount they would have received under a domestic insolvency proceeding. This change necessarily means that the guarantee fund accepts the difference between what the employee would receive in a domestic proceeding and what an employee would receive in the primary insolvency proceeding as a loss on that particular "transaction." This loss gets passed on to the funders of the guarantee fund in the form of higher required contributions.[146]

The status quo alternative to this application of the Guarantee Mandate is that the employee is paid whatever fixed amount the Member State sets, and the employee raises the balance of the claim in the primary insolvency proceeding.[147]

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145 *See* SARRA STUDY, *supra* note 4, at 32, 43–44.

146 Given that the fund is government operated and its sole business is paying employee claims arising out of insolvency, it definitionally falls to the funders of the guarantee fund, be they taxpayers or firms, to absorb any losses occasioned by payments to employees that are higher than the distributions received on account of the subrogated claims. *Cf.* SARRA STUDY, *supra* note 4, at 34–35.

147 *See* E.U. Regulation, *supra* note 1 art. 45.

The guarantee fund likewise raises a claim in the primary insolvency proceeding for the amount of the subrogated claim.[148] Under the static approach currently employed, the only risk to the guarantee fund is that it receives less from the insolvency proceeding than the bare minimum payment level required by the Guarantee Fund.

As this comparison indicates, the difference between the current legal regime and the one argued for here is that the guarantee fund assumes a higher risk of loss from a lack of assets to go around in the insolvency proceeding. This argument's motivating fact, however, is that this risk of loss is not created out of thin air. It is assumed from the employees that bear it under the current state of the law. To be clear, the risk of insufficient assets existing to satisfy employee claims is currently borne by the employees themselves. Under the dynamic approach, the guarantee firm bears a greater segment of this risk, and is thus able to allocate that risk as a national policy choice. Put another way, the Guarantee Mandate and the E.U. Regulation, because of an imperfect harmonization in their provisions governing which bodies of law apply in certain cases, pass a great deal of the risk of insolvency onto employees in certain cases (those with cross-border implications), but not in other cases (those governed by purely domestic law).

2. Ex ante: funding the guarantee fund.

The means by which the guarantee fund compensates for the increased expected losses it would assume under the approach argued for here is precisely the same as the means by which it gathers funds currently. The guarantee fund will either gather funds from the tax base at large, spreading the risks of business insolvency across the national economy as a whole, or from levies on the business that operate in the State, spreading the risks among the firms that bear some likelihood of creating the problem the Guarantee Mandate seeks to prevent in the first place. This latter method of funding also permits the guarantee funds to allocate risk according to perceptions of the riskiness of the business endeavors, levying higher assessments against those firms that are perceived to be more likely to enter insolvency in the first place, thereby more fully tailoring the costs of the insolvency protections to those more likely to create them.[149]

C. Concluding Thoughts on the Proposed Adjustment

The current state of the legal regime governing E.U. cross-border insolvencies places a large portion of the risk of loss arising out of insolvency on

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148 *See* SARRA STUDY, *supra* note 4, at 32, 43–44; E.U. Regulation, *supra* note 1 art. 45.

149 SARRA STUDY, *supra* note 4, at 34–35 ("In numerous jurisdictions, the guarantee fund is sector- or industry-funded, with premiums paid by corporations and other business enterprises, based on the risks inherent in the particular sector or industry.").

employees. Espousing a general principle that employee claims are worthy of special protections in the insolvency process, the Guarantee Mandate has set a minimum level at which employee claims must be satisfied.[150] However, when switching between multiple applicable bodies of law, the Guarantee Mandate and E.U. Regulation do not require Member States and their guarantee funds to internalize the risk inherent in switching from a legal regime in which an employee claim is afforded a priority (and thus under which employees would presumably recover more) to a legal regime in which employee claims do not receive a priority (and thus are expected to recover less, up to and including nothing).[151] Instead, the employee-claimants that must bring their claims in the primary insolvency proceeding bear the majority of the risk that the change in applicable law will render their claim there moot.[152] In addition to causing the employees' expected losses from the insolvency of their employer to be higher than if the insolvency were governed purely by domestic law, which necessarily means that the employees are receiving disparate treatment relative to an identically-situated employee of a domestic firm, the Member States' policy judgment that employee claims deserve the protection of both a guarantee fund and a priority in the insolvency proceedings is being frustrated.

Because of this counter-intuitive and idiosyncratic treatment of a subset of creditors widely recognized to be especially vulnerable in insolvency proceedings, a new approach is warranted. It is argued that an approach to implementing Member States' obligations under the Guarantee Mandate, under which the guarantee funds pay employee claims as they would have been paid under a purely domestic insolvency proceeding, rectifies the disparate treatment employee claims are currently receiving. In addition, this change to the Guarantee Mandate would have secondary benefits that accrue not just to employees but also to the other stakeholders in the debtor's estate and gains to efficiency overall.

IV. IMPLICATIONS OF A CHANGED IMPLEMENTATION OF THE GUARANTEE MANDATE

There are four major implications that flow from changing the way Member States implement the Guarantee Mandate: (1) employee claims are satisfied more quickly and uniformly; (2) Member States will better internalize the costs of their policy choices; (3) several gains to efficiency will result; and (4) Member States will have incentives to shift towards more harmonized insolvency regimes.

150 Guarantee Mandate, *supra* note 7 pmbl. 3.

151 *See, generally*, *id.*; E.U. Regulation, *supra* note 1.

152 The employees still are not bearing the full measure of the risk, given that the guarantee fund will be subrogated to some small part of the employees' claim. Thus, in the situation where the employee is expected to receive nothing from the insolvency proceeding, it is equally the case that the guarantee fund would likewise receive nothing.

A. Employee Claim Satisfaction

As mentioned previously, the front-loaded implementation of the claim payment regime would have the effect of satisfying employee claims sooner than the current legal regime. As well, because the new method of implementation would result in the application of the law generally applicable to the employee outside of insolvency, the change in applicable law in insolvency contemplated by the E.U. Regulation will not result in structural discrimination against the claims of employees of a foreign firm. Rather, the employees' rational expectation of equal treatment with otherwise identically situated employees will be vindicated by a regime that pays claims according to how they would be paid at domestic law, rather than applying a fragmented patchwork of two different bodies of law.

B. Member States' Internalization of the Costs of the Chosen Employee Protection Scheme

Under a regime that places greater costs upon the guarantee funds, the necessity for recouping those expected costs is correspondingly higher, and will fall to either the taxpayers writ large or the firms operating within the Member State.[153] This is yet another avenue for national policy preferences to express themselves in the international legal regime. From the outset the Member States make a policy determination as to the proper way to spread the risks that insolvency creates for vulnerable creditors. The new legal rule would merely allow Member States to more accurately assess those risks and spread them around according to their relative judgment as to the appropriate distribution of risks.

The Member States place certain amounts of risk on the employees by limiting the value, timeframe, and types of claims that the guarantee funds will make. The current legal regime creates an unbounded outlet for the balance of the risk, however, by not compensating for the lack of priority that employee-claimants will receive in primary insolvency proceedings. The approach argued for here better accounts for this risk by requiring Member States to capture it, internalize it, and then distribute it throughout the various relevant stakeholders as it deems fit.

C. Gains to Efficiency in the Administration of Cross-Border Insolvency Proceedings

In addition to the benefits that this change in implementation would produce, this change in approach would produce efficiency gains for E.U. courts administering cross-border insolvencies. These gains would manifest themselves primarily in two ways.

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153 *See* SARRA STUDY, *supra* note 4, at 34–35.

1. Increased efficiency caused by the subrogation of employee claims to the Member States' guarantee funds.

First, where guarantee funds pay employee claims according to domestic law, the logical conclusion is that employees' claims will become aggregated in the guarantee funds. The guarantee funds can then represent all of the aggregated claims at once. As a result, where an insolvency proceeding could become clogged with a large number of employees all vying to be heard in the court of the main insolvency proceeding, the competent insolvency administrator would instead be dealing primarily with a sophisticated repeat player that can represent the aggregated employee claims to the extent it has already paid them. This can further the E.U. Regulation's stated goal of streamlining insolvency administrations independent of the necessity to pay employee claims, given that they have already been satisfied in large part in the first instance by the guarantee fund.[154]

2. The Member States' guarantee funds, not foreign courts, can apply domestic law.

Under the regime argued for here, the E.U. Regulation's information sharing protocols permit domestic entities, be they courts or the guarantee funds themselves, to determine the appropriate amount of payments to employees in insolvency proceedings. Where the main insolvency proceeding is currently required to parse national law to the extent it is imported into the legal regime, this task can be passed off in large part to the guarantee funds of the Member State in which the claims originated. In addition to the fact that this change allows for a disaggregation of the legal questions the court in the main insolvency proceeding decides, a domestic entity deciding domestic law reduces the likelihood of errors, and the magnitude of the costs of those errors. Likewise, the repeat player status of the guarantee funds allows insolvency proceedings to take advantage of legal specialization by domestic entities in divining and applying their own bodies of law, further increasing the efficiency of the proceedings as a whole.

D. This Change in Implementation of the Guarantee Mandate Can Affect the Incentives of Member States in Selecting National Legal Regimes

The natural corollary to the acknowledgement that this change allows Member States to more fully internalize the costs of their policy choices is that this might induce a change in national policy by the Member States. The logical effect of changing from a regime in which a claim is governed by no priority to one in which it is governed by a priority is that the claim is more likely to be satisfied more fully than before. If guarantee funds are now paying out more

[154] *See* E.U. Regulation, *supra* note 1 pmbl. (3).

claims at higher rates than before, it might be the case that Member States, rather than increase the taxes on either businesses or the citizens, change their behavior.[155] In such a case, the natural shift would be away from the use of a priority in insolvency distributions and toward a "pure" guarantee regime. It is not definitionally inefficient for parties to maintain a "hybrid" regime after the passage of the Guarantee Mandate. However, given that the Guarantee Mandate requires guarantee funds, to the extent that the "hybrid" regime requires additional procedures to harmonize it with the E.U. Regulation's choice of law rules and the various legal regimes of the Member States, a legal rule that shifts Member States away from "hybrid" regimes and towards "pure" guarantee regimes might tend to increase the efficiency of the E.U.-wide insolvency regime as a whole.[156]

V. CONCLUSION

When cross-border insolvencies bring together two separate bodies of law, each authoritative in its sphere, and each with fundamentally different approaches to protecting employees during the insolvency process, the unintended consequence is that employees are not provided with the same protections as similarly situated employees of domestic firms.

In considering this issue, it is clear that the E.U. Regulation makes improvements over the E.C. Regulation in several areas of relevance to the issue of employee claims. The increased requirements for information disclosure are likely to work to reduce the information asymmetry under which foreign employees operate and consequently the number of claims that are not lodged in the foreign proceeding because the employees are unaware of their right to do so. As well, the ability of the primary insolvency administrator to offer "undertakings" to creditors in secondary jurisdictions in order to avoid the institution of secondary insolvency proceedings and the provisions of Chapter V providing specifically for streamlining multi-entity insolvencies are likely to increase the

155 *Cf.* SARRA STUDY *supra* note 4, at 34–35. If the two major options for funding the guarantee funds are either (1) tax the businesses (with the ability to customize the tax's application across different industries); or (2) spread the cost across the entire national economy (either via a dedicated tax for the guarantee fund or by funding the guarantee fund out of the State's general fund—in either event the result being the same), States faced with the choice of raising taxes in two generally unpopular ways might, instead, change the structure of their insolvency regime, instead protecting employees only with a guarantee fund, rather than with a hybrid approach.

156 This "net gain" to efficiency flows logically from the conclusion that Member States are not likely to eliminate employee protections because of a changed implementation of the Guarantee Mandate, but the change in implementation is likely to have an effect on the "drift" of insolvency regimes within the European Union by virtue of the new incentives the changed implementation provides. Thus, wholly independent of the fact that, under this dynamic approach, all employees in a given State would receive the benefits of the State's policy choices, all employees—indeed, all stakeholders in the insolvency—could expect to benefit by virtue of the increasingly streamlined administration of cross-border insolvencies.

efficiency of insolvency administration in its entirety, thus allowing for efficiency gains to accrue to all creditors, including the debtor's employees.

However, the conjunction of the lack of specific provision for employee claims beyond simply allowing for the lex fori to control and the provisions of the Guarantee Mandate making the lex situs authoritative means that the wide range of differences between the insolvency regimes of the different E.U. Member States can limit the recovery employees receive. The national law governing guarantee funds controls the employee's recovery from the fund, but the lex fori controls the employee's recovery in the insolvency proceeding. The result is that employees identically situated but for the headquarters of their employer would secure different recoveries.

However, the provisions of the Guarantee Mandate and the E.U. Regulation for integrating national law lead to a solution that can eliminate the disparities between similarly-situated employees with regard to the satisfaction of employee claims in insolvency proceedings. A slight change in the way Member States implement the Guarantee Mandate can lead to the fuller expression of Member States' policy choices regarding employee protection in insolvency. Likewise, it can improve the outcomes for employees of companies headquartered abroad as a general matter as well as relative to their similarly situated counterparts that work for domestic companies. Finally, if Member States change the way they implement the Guarantee Mandate as outlined here, the resulting legal regime can further the goals of the E.U.-wide regulations in increasing the efficiency of the administration of cross-border insolvencies as a whole.