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## Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars

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# BANKRUPTCY SHOPPING: DOMESTIC VENUE RACES AND GLOBAL FORUM WARS

*Anthony J. Casey\**  
*Joshua C. Macey\*\**

## ABSTRACT

*This Article proposes reforms to bankruptcy law's venue rules. These reforms would expand venue choice, reduce opportunistic venue shopping, and account for the rise of global forum shopping. To date, the leading proposals to reform venue selection rules for bankruptcy cases have ignored simpler alternatives that can reduce opportunistic misbehavior while preserving beneficial choice. Moreover, those proposals have focused exclusively on restricting a debtor's choice among venues within the United States while ignoring the increasing availability and convenience of foreign courts as forums for distressed corporate debtors seeking to initiate insolvency proceedings. In this way, the proposals on the table run the risk of failing at their primary goal and at the same time exacerbating international forum shopping and escalating a global forum war.*

*To remedy this, we suggest alternative reforms that account for the availability of foreign forums, reduce opportunities for harmful venue shopping, and preserve the benefits of choice. Rather than restrict a debtor's ability to select a domestic venue, reforms should (1) allow firms to make an ex ante commitment to a procedure for choosing a bankruptcy district, and (2) resolve inconsistencies in substantive bankruptcy law across venues and forums. These reforms would retain beneficial choice while reducing opportunistic shopping of both domestic venues and foreign forums. The precommitment mechanism we propose is preferable to existing proposals even for parties that cannot shop globally, but the availability of foreign forums makes the case even stronger.*

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\* Donald M. Ephraim Professor of Law and Economics, The University of Chicago Law School. The Richard Weil Faculty Research Fund and the Paul H. Leffman Fund provided generous support. Although we do not take a position on the legal outcomes in any specific case, we disclose that one of us (Casey) has worked as a consultant to parties on three matters discussed in this article: the cross-border proceedings related to Syncron Automotive (UK) Ltd. and PizzaExpress Finance 2 PLC, and the chapter 11 proceedings of Caesars Entertainment Operating Company.

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## INTRODUCTION

The United States Bankruptcy Code gives debtors wide discretion to reorganize in the venue of their choice.<sup>1</sup> These lenient venue selection rules long have allowed bankruptcy courts in the District of Delaware and the Southern District of New York to dominate the market for large chapter 11 cases.<sup>2</sup> Recently the Southern District of Texas has also begun to attract a large number of cases, putting it on equal footing with Delaware and the Southern District of New York.<sup>3</sup>

This state of affairs has produced a vigorous debate. On the one side are critics of liberal venue rules who charge that bankruptcy districts are engaged in a “race to the bottom” as judges compete for blockbuster chapter 11 cases to the detriment of local interests, small creditors, and noncontractual claimants.<sup>4</sup> Professor Lynn LoPucki, for example, has said that the ability of debtor firms to so freely choose a venue “undermines the integrity of the bankruptcy system.”<sup>5</sup> Similarly, a prominent bankruptcy attorney asserted that “the effort to find debtor-friendly courts . . . demean[ed] the entire [bankruptcy] system by suggesting that bankruptcy courts are for sale.”<sup>6</sup> For years, the perceptions that

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<sup>1</sup> As a general matter, a debtor can file for bankruptcy in any federal district where it has its “domicile, residence, principal place of business in the United States, or principal assets in the United States” or where an affiliate of the debtor has a pending bankruptcy case. 28 U.S.C.A. § 1408 (West). For cross-border cases filed under chapter 15, the debtor must file in the district of its principal place of business if it has one. *See id.* § 1410. Otherwise, it can file in a district where an action is pending against it in a state or federal case, or if no such district exists, in the district consistent with the interests of justice. *Id.*

<sup>2</sup> While we are not focused on a precise distinction, our discussion relates to the category of large firms that can roughly be thought of as those with more than \$100 million in assets.

<sup>3</sup> Jeffrey P. Fuller, *Analysis: Big Chapter 11 Cases Find Hospitality in Texas Court*, BLOOMBERG L. (Dec. 11, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-big-chapter-11-cases-find-hospitality-in-texas-court>; Mark Curriden, *Chief Judge David Jones: The Man Who Saved the Texas Bankruptcy Practice*, TEX. LAWBOOK (Aug. 23, 2020), <https://texaslawbook.net/chief-judge-david-jones-the-man-who-saved-the-texas-bankruptcy-practice/>.

<sup>4</sup> *See* LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 9–24 (2006); Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 406–11 (2015); Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 161–63 (2013); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a “Race to the Bottom”*, 54 VAND. L. REV. 231, 232–36 (2001); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968–71 (1999).

<sup>5</sup> Jonathan Randles, *Companies Lease Office Space in New York Suburb to Pick Bankruptcy Judge*, WALL ST. J. (Aug. 13, 2020), <https://www.wsj.com/articles/companies-lease-offices-in-new-york-suburb-to-pick-bankruptcy-judge-11597311001> (“The leading bankruptcy lawyers tell the judges what to do,” [Lynn] LoPucki said. “They’re not asking, they’re telling.”).

<sup>6</sup> Eisenberg & LoPucki, *supra* note 4, at 969 n.5. (quoting Minutes of the Nat’l Bankr. Rev. Comm’n Meeting 13 (Feb. 23–24, 1996) (statement of Gerald Munitz), *reprinted in* DEL. STATE BAR ASS’N, REP. OF THE DEL. STATE BAR ASS’N TO THE NAT’L BANKR. REV. COMM’N IN SUPPORT OF MAINTAINING EXISTING VENUE

debtors are abusing the Code's venue selection rules have fueled calls to prevent, or at least curtail, bankruptcy venue<sup>7</sup> shopping.<sup>8</sup>

On the other side are those who counter that competition for cases improves efficiency and predictability as judges develop expertise in overseeing large chapter 11 cases.<sup>9</sup> The National Conference of Bankruptcy Judges responded directly to LoPucki's critique, writing in a 2018 white paper that it "strongly rejects any suggestions by Professor LoPucki that any bankruptcy judges make rulings for reasons other than that which is supported by fact and law."<sup>10</sup> And Judge Drain, who sits in the popular White Plains division in the Southern District of New York, has said that the idea that "judges slant their rulings in order to lure future cases to their courts is an offensive fantasy."<sup>11</sup>

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CHOICES 2 (1996).

<sup>7</sup> The terminology in the academic literature on this topic is fraught with ambiguity and overlap. For clarity, we use "venue shopping" and "forum shopping" to refer to separate and distinct concepts. Venue shopping refers to the choice between different districts within the United States court system. That selection is governed by venue statutes and notably is a choice between courts within one system and not a choice between courts in different legal jurisdictions or systems. Forum shopping refers to the choice between courts in different legal jurisdictions. Thus, forum shopping would include a choice to initiating proceedings in a court in England rather than in the United States. *See infra* pages 487–91.

We also discuss the idea that some venue and forum decisions are driven by the parties' preference for specific judges, others by preferences for specific legal precedent, and still others by preferences for certain procedural rules and norms. Though many people use terms like "judge shopping," we avoid that usage and refer instead to "preferences" for judges, precedents, or procedural rules. Finally, we do not discuss in this article the choice that parties sometimes face between asserting their rights in bankruptcy or nonbankruptcy proceedings.

<sup>8</sup> Lynn LoPucki has expressed concern about bankruptcy venue shopping for more than twenty years. *See Eisenberg & LoPucki, supra* note 4, at 968 (describing "an embarrassing pattern of forum shopping").

<sup>9</sup> *See* Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119, 145–47 (2018) (finding greater predictability of outcomes in Delaware and the Southern District of New York, and no evidence of bias); Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 437–62 (2006); Kenneth Ayotte & David A. Skeel, Jr., *Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy* 12–18 (May 21, 2003) (unpublished manuscript) (on file with University of Pennsylvania Carey Law School); G. Marcus Cole, *Delaware Is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1850–58 (2002); David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 309–15 (2001) [hereinafter Skeel, *What's So Bad About Delaware?*]; Robert K. Rasmussen & Randal S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1357–63 (2000); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 1–5 (1998) [hereinafter Skeel, *Bankruptcy Judges and Bankruptcy Venue*]. Samir Parikh has urged the European Union to adopt lenient forum selection rules to improve efficiency and predictability in European restructuring cases. *See* Samir D. Parikh, *Bankruptcy Tourism and the European Union's Corporate Restructuring Quandary: The Cathedral in Another Light*, 42 U. PA. J. INT'L L. 205, 213–14 (2020).

<sup>10</sup> Nat'l Comm. of Bankr. Judges, *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741, 810 (2019).

<sup>11</sup> Randles, *supra* note 5.

Recently, this debate has taken on practical importance. In the past three years, Congress has introduced multiple bills that would amend the Code to require that a debtor file in the district in which its “principal assets or principal place of business” is located.<sup>12</sup> These amendments would prevent debtors from choosing venue based on their state of incorporation and would eliminate other opportunities for debtors to opt into the venue of their choice. Though these proposals have yet to receive a majority in either the House or Senate, they have attracted bipartisan support,<sup>13</sup> and President Biden has signaled that he is sympathetic to bankruptcy venue reform.<sup>14</sup>

Proposals to eliminate venue shopping, if successful, would effect a sea change in American bankruptcy practice. Instead of being concentrated in New York, Delaware, and Texas, large corporate reorganizations would be distributed more evenly across the country. Districts would become responsible for overseeing corporate reorganizations involving locally headquartered debtors regardless of whether the local bankruptcy judge has experience managing large dollar cases, and even if the jurisdiction has not developed procedures for quickly providing emergency relief.<sup>15</sup>

Rather than take sides in the conventional debate about whether venue shopping is good or bad, this Article suggests reform principles that should appeal to those on both sides. Reforms that retain the benefits of choice while reducing the opportunities for harmful shopping should be favored regardless of one’s view about whether venue shopping is a large problem, a small problem, or no problem at all. Our proposed reforms would do exactly that. Moreover, they address a problem that has largely been ignored in the conventional debate: the rise of global forum shopping as an alternative for debtors seeking to initiate insolvency proceedings.

With regard to global forum shopping, this Article cautions that developments in foreign jurisdictions may limit the effectiveness of these venue

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<sup>12</sup> Bankruptcy Venue Reform Act of 2018, S. 2282, 115th Cong. § 3 (2018). Debtors would also be able to file in a district where a parent entity has a pending bankruptcy case. *See id.*; Bankruptcy Venue Reform Act of 2019, H.R. 4421, 116th Cong. § 3 (2019).

<sup>13</sup> One was co-sponsored by Massachusetts Senator Elizabeth Warren (D) and Texas Senator John Cornyn (R). Bankruptcy Venue Reform Act of 2018, S. 2282, 115th Cong. § 3 (2018).

<sup>14</sup> *See The Biden Plan for Bankruptcy Reform*, <https://joebiden.com/bankruptcyreform/>. Biden’s support for the bill marks a policy reversal, as the President previously opposed efforts to take cases from Delaware and New York. *See Bankruptcy Reform: Before the Senate Comm. on the Judiciary*, 109th Cong. 75 (2005) (statement of then-Senator Joseph R. Biden, Jr., Member, Senate Judiciary Committee).

<sup>15</sup> Nat’l Comm. of Bankr. Judges, *supra* note 10, at 788 (explaining that “the current magnet courts have well-defined procedures assuring that first day motions will be heard and decided promptly, other courts do not—instead addressing the need for emergency relief on an ad hoc basis.”) (internal citation omitted).

reform proposals. Although chapter 11 is often regarded as the gold standard for corporate reorganizations, in recent years, foreign jurisdictions have emerged as convenient forums for distressed debtors.<sup>16</sup> For instance, in many cases, the English scheme of arrangement now represents a viable alternative to the American bankruptcy system, and over the past decade, a number of companies have chosen to use an English scheme of arrangement to restructure their debt instead of chapter 11, with the first United States-headquartered business doing so in 2019.<sup>17</sup> Other jurisdictions have also sought to entice foreign debtors, with insolvency specialists speculating that Singapore, in particular, could become “an international centre for debt restructuring.”<sup>18</sup>

Because American bankruptcy courts freely recognize foreign insolvency proceedings,<sup>19</sup> firms that are directed to file in less favored districts may instead choose to reorganize in a foreign jurisdiction. In this environment, attempts to limit venue selection within the United States will have the opposite of their intended effect, replacing domestic venue shopping with even worse instances of global forum shopping.

By ignoring the availability of foreign forums, current venue reform proposals could, perversely, drive opportunistic debtors and creditors to restructure in foreign jurisdictions like England, Singapore, Mexico, and the Netherlands, undermining the purpose of proposed reforms and diminishing America’s influence on corporate bankruptcy law in general. Any solution targeted at reducing opportunistic venue shopping must, therefore, also consider opportunistic forum shopping and treat the questions cohesively.<sup>20</sup>

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<sup>16</sup> See Oscar Couwenberg & Stephen J. Lubben, *Good Old Chapter 11 in a Pre-Insolvency World: The Growth of Global Reorganization Options*, 46 N.C. J. INT’L L. 353 (2021) (noting the rise of global alternatives to chapter 11).

<sup>17</sup> See Simon Thomas & Oonagh Steel, *US-Based Syncreon Chooses English Scheme of Arrangement over Chapter 11 for Financial and Corporate Restructure*, GOODWIN (Sept. 13, 2019), [https://www.goodwinlaw.com/publications/2019/09/09\\_13-us-based-syncreon-chooses-english-scheme](https://www.goodwinlaw.com/publications/2019/09/09_13-us-based-syncreon-chooses-english-scheme).

<sup>18</sup> *Singapore’s Efforts to Become an International Hub for Debt Restructuring*, NORTON ROSE FULBRIGHT (Jan. 2019), <https://www.nortonrosefulbright.com/en/knowledge/publications/8e5a46f4/singapores-efforts-to-become-an-international-hub-for-debt-restructuring>.

<sup>19</sup> Rejection based on the substantive procedural rules of the foreign proceeding are rare. See, e.g., *In re Vitro SAB de C.V.*, 701 F.3d 1031, 1061–62 (5th Cir. 2012) (finding a rare exception). The broad attention and commentary in response to that case underscores the rarity of such outcomes. See, e.g., Maurizio Anglani, *In re Vitro Fifth Circuit Declines to Enforce Mexican Plan and Crafts New Framework for Foreign Debtor Relief*, AM. BANKR. INST., <https://www.abi.org/member-resources/blog/in-re-vitro-fifth-circuit-declines-to-enforce-mexican-plan-of-reorganization> (opining that “*In re Vitro* is a significant case for practitioners involved in cross-border restructuring[s].”).

<sup>20</sup> One might try to independently prohibit global forum shopping. But this is unrealistic for several reasons. First, foreign jurisdictions battling for cases are essentially unconstrained in their ability to attract debtors by changing their substantive law. Second, domestic rules dictating a specific forum for cross-border

To address this, we argue that, rather than limit domestic venue choice, lawmakers should (1) support the development of ex ante commitment to mechanisms for choosing venue and forum; and (2) whenever possible, resolve inconsistencies in substantive law across venues and forums. These are general principles of reform, and the implementation will depend on context. For example, commitment mechanisms look different for venue than they do for forum. But, if designed properly, these measures can reduce the costs of venue and forum shopping without giving up the benefits that come from allowing some choice.

It is worth noting that our approach would unbundle venue choice from unrelated matters such as a firm's state of incorporation or principal place of business. This is a feature, not a bug. By bundling the choice of bankruptcy venue with the debtor's state of incorporation or domicile, the existing rules force debtors to sacrifice optimal choice on one dimension to achieve it on another.<sup>21</sup> This is wasteful. There is no reason to think that optimal venue coincides with domicile or state of incorporation. While the existing reform proposals would unbundle state of incorporation from bankruptcy venue, they leave the other wasteful bundles intact. Our proposal would unbundle everything, allowing venue choice without forcing the debtor to incur wasteful costs of incorporation (or reincorporation) or of moving its domicile or principal assets.

Finally, the merits of our proposal are independent of one's view on the current state of venue shopping. If venue shopping is a real problem, the principles we introduce address that problem. If venue shopping is not a problem, the principles do no harm and even expand the choice set for debtors. Similarly, while the principles address the problem of global forum shopping, the benefits with regard to venue shopping result with or without the availability of foreign forums. The same cannot be said of the status quo or the reforms currently being considered.

This Article proceeds in four parts. Part I summarizes the debate about venue shopping and considers the various costs and benefits of venue choice. Part II describes chapter 15 of the Code and recent developments in cross-border insolvency proceedings. Part III explores the connection between domestic venue reform and global forum shopping and argues that the current reform

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proceedings are difficult to enforce. Third, even when enforceable, such rules impose extreme costs by disrupting the global cross-border insolvency systems.

<sup>21</sup> Our strong intuition is that firms making an incorporation decision focus on the corporate governance rules and accept the venue option as part of that bundle rather than the other way around.



proposals are problematic in a world where parties can opt for a foreign forum if they do not like the domestic option. Part IV introduces the two foundational elements for reforms that would encourage socially productive venue and forum shopping and deter opportunistic shopping and competition.

## I. BANKRUPTCY VENUE SHOPPING

Current bankruptcy law allows a debtor to file bankruptcy in a district where any one of its affiliates is incorporated or where any one of its affiliates has its principal place of business or principal assets.<sup>22</sup> In some cases a debtor can even create or move a small affiliate for the sole purpose of accessing venue.<sup>23</sup>

Critics of bankruptcy venue shopping argue that giving a debtor such broad discretion in choosing venue supports opportunistic behavior. They charge that debtors seek out venue with favorable local rules and bankruptcy judges who are sympathetic to incumbent management and senior creditors at the expense of other stakeholders. Supporters of the current system respond that large chapter 11 filings concentrate in certain districts because judges in those districts have developed expertise in managing mega-cases and because those districts yield predictable and quick outcomes. In other words, venue shopping reflects either a race to the bottom that debases the integrity of the system or a race to the top where debtors file in districts that can most efficiently handle large cases.<sup>24</sup> This Part examines these two ideas.

### A. *History of Bankruptcy Venue Shopping*

Immediately after the Code was passed in 1978,<sup>25</sup> a disproportionate number of large bankruptcy cases were filed in the Southern District of New York.<sup>26</sup> In particular, debtors were drawn to Judge Burton R. Lifland, who was widely perceived to be “pro-debtor” and “pro-reorganization.”<sup>27</sup>

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<sup>22</sup> 28 U.S.C.A. § 1408 (West).

<sup>23</sup> See Nicholas Cordova, *Bankruptcy Venue Reform*, HARV. L. SCH. BANKR. ROUNDTABLE (May 26, 2020), <https://blogs.harvard.edu/bankruptcyroundtable/2020/05/26/bankruptcy-venue-reform/> (describing how the Boy Scouts of America managed to file in Delaware by creating an affiliate seven months before filing).

<sup>24</sup> See *In re Crosby Nat'l Golf Club, LLC*, 534 B.R. 888, 894–95 (Bankr. N.D. Tex. 2015) (arguing that venue shopping proponents' explanations are unconvincing and suggesting that proximity to elite law firms may be a better explanation of Delaware and New York's dominance).

<sup>25</sup> See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11 U.S.C.).

<sup>26</sup> Eisenberg & LoPucki, *supra* note 4, at 983.

<sup>27</sup> Eisenberg & LoPucki, *supra* note 4, at 984.

New York's dominance was short-lived, however, as Delaware emerged as a popular venue in the late 1980s.<sup>28</sup> Delaware bankruptcy judges, particularly Judge Helen Balick and, later, Judge Mary Walrath, implemented practices and issued rulings that drew debtors to Delaware. These included procedural innovations that supported judicial efficiency on important issues such as the use of first-day motions and orders.<sup>29</sup> Judge Walrath, for example, "was widely praised for her ability to decide first-day orders before the end of business on the day after the petition is filed."<sup>30</sup> These rulings are thought to have encouraged debtors to file in Delaware and, by the mid-1990s, a majority of the largest bankruptcy cases were filed in the state.<sup>31</sup>

More recently, the Southern District of Texas has emerged as an attractive alternative to Delaware and New York. Judge David Jones, Chief Judge of the United States Bankruptcy Court for the Southern District of Texas, has been credited with "singlehandedly breath[ing] new life into a Texas business bankruptcy practice that had witnessed nearly all its work shift to Delaware and Manhattan during the previous two decades."<sup>32</sup> Beginning in 2016, Judge Jones introduced a series of reforms that increased transparency and predictability in bankruptcies filed in his district, and since then large corporate debtors have flocked to the Southern District of Texas.<sup>33</sup> A similar story may be playing out in the Eastern District of Virginia, where, as of September 2020, 9% of bankruptcies filed by large publicly traded companies were filed in 2020.<sup>34</sup> As in Texas, commentators have credited the district's efficiency and predictability as a cause of its increased case load.<sup>35</sup>

### *B. A Judicial Race—To the Bottom or to the Top?*

Critics of liberal venue selection rules worry that venue shopping leads to debtor opportunism. And these critics feel strongly about the issue. Texas Senator John Cornyn, for example, reportedly asked one bankruptcy scholar if

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<sup>28</sup> Eisenberg & LoPucki, *supra* note 4, at 983–84.

<sup>29</sup> See Barry E. Adler & Henry N. Butler, *On the "Delawarization of Bankruptcy" Debate*, 52 EMORY L.J. 1309, 1311 (2003).

<sup>30</sup> Cole, *supra* note 9, at 1865.

<sup>31</sup> Adler & Butler, *supra* note 29, at 1311.

<sup>32</sup> See Curriden, *supra* note 3.

<sup>33</sup> See Curriden, *supra* note 3.

<sup>34</sup> See Alex Wolf, *Big-Name Bankruptcies Flock to Two-Judge Court in Virginia*, BLOOMBERG L. (Sept. 15, 2020), <https://news.bloomberglaw.com/bankruptcy-law/big-name-bankruptcies-flock-to-two-judge-court-in-virginia>.

<sup>35</sup> See *id.*

venue shopping “is a cancer on our bankruptcy system.”<sup>36</sup> Such opportunism is thought to occur both because debtors file in districts that are sympathetic to managers, debtors, and senior creditors, and because venue shopping may reflect an attempt to alter substantive outcomes by taking advantage of procedural differences between districts.<sup>37</sup>

Perhaps the most common critique of liberal venue rules is that judges compete for big cases by offering favorable treatment to management and senior creditors at the expense of other stakeholders. This critique is often associated with Professor Lynn LoPucki, who has argued for more than two decades that competition among judges undermines the integrity of the American bankruptcy system.<sup>38</sup> LoPucki and other critics of liberal venue rules worry that competition for cases allows elite law firms with large bankruptcy practices to drive filings to districts that favor incumbent managers.<sup>39</sup> On this view, bankruptcy venue shopping has operated to protect managers who have perpetuated corporate fraud and who seek venues that will privilege their interests over those of other stakeholders.<sup>40</sup>

On the other side of the debate are those who claim the judges are engaged in a race to the top. These proponents of venue shopping argue that competition for cases has led to innovations that have increased judicial efficiency and predictability.<sup>41</sup> In this story, judicial competition for cases encourages judicial experimentation, and judges competing for cases in a system with liberal venue

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<sup>36</sup> Todd Zywicki, *Is Forum Shopping Corrupting Bankruptcy Courts?*, 95 GEO. L.J. 1141, 1142–43 (2006).

<sup>37</sup> As David Skeel has pointed out, while popular venues are often critiqued for being “debtor-friendly,” the nature of this alleged favoritism differs by region. See Skeel, *Bankruptcy Judges and Bankruptcy Venue*, *supra* note 9, at 20. Skeel notes that:

Although critics often suggest that judges in Delaware and New York are debtor friendly in the same way, the two districts actually have established quite different reputations among practitioners—reputations that are amply borne out by their track records in large cases. The New York judges are known for their willingness to repeatedly extend the exclusivity period during which the managers of a large debtor are the only ones who can propose a reorganization plan. Because extended exclusivity reduces the pressure for a debtor’s managers to act quickly, it can encourage long, drawn-out, costly bankruptcy cases. Delaware’s judges, on the other hand, have established precisely the opposite reputation. Rather than lengthy cases, Delaware is known for its speedy confirmation of reorganization plans.

Skeel, *Bankruptcy Judges and Bankruptcy Venue*, *supra* note 9, at 20.

<sup>38</sup> See Eisenberg & LoPucki, *supra* note 4, at 968–69.

<sup>39</sup> Lynn M. LoPucki, Book Summary, *Courting Failure*, 54 BUFF. L. REV. 325, 332–34 (2006) [hereinafter LoPucki, *Courting Failure Book Summary*].

<sup>40</sup> *Id.* at 334 (citing LOPUCKI, *supra* note 4, at 17–18).

<sup>41</sup> See, e.g., Skeel, *Bankruptcy Judges and Bankruptcy Venue*, *supra* note 9, at 22–27 (“Rather than lengthy cases, Delaware is known for its speedy confirmation of reorganization plans.”).

rules have an incentive to innovate and make the bankruptcy process more efficient. For example, the emergence of Delaware in the 1990s was reportedly based on the district's convenient first day filing rules.<sup>42</sup> Likewise, Texas became more popular after Judge Jones implemented procedural reforms to increase the efficiency and transparency of filings and created a special two-judge panel to handle large, complex bankruptcy cases.<sup>43</sup>

Whether competition is actually good or bad depends on whether one thinks that the procedural and substantive innovations that drive venue selection are themselves good or bad. For example, judicial competition might be found in some judges' willingness to approve prepackaged or prenegotiated bankruptcy plans. Delaware's popularity as a bankruptcy venue may have been due in part to the district's "reputation for speed,"<sup>44</sup> and, in particular, its willingness to approve such plans.<sup>45</sup> The key question—whether those plans produce net value to the estate—is an empirical one that remains open.

One should also maintain a healthy dose of skepticism about theories of competition—good or bad—that rely on judges changing their rulings in order to attract more cases. The incentives behind such competition are ambiguous. Professor Marcus Cole has emphasized this point, noting that one judge questioned the idea that there is a psychic benefit to a judge who attracts more cases (and more work!) to her court.<sup>46</sup> Additionally, judges strongly deny such competition—at least with regard to substantive decisions<sup>47</sup>—with one calling it an "offensive fantasy."<sup>48</sup> And the evidence in favor of such theories, most of which is anecdotal, is questionable at best.<sup>49</sup>

Even if judges are competing, their motivations might be entirely unrelated to caseloads. Professor Cole suggests a more benign form of "professional"

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<sup>42</sup> Skeel, *Bankruptcy Judges and Bankruptcy Venue*, *supra* note 9, at 21.

<sup>43</sup> Mark Curriden, *Meet the Judge Who Saved the Texas Bankruptcy*, HOUS. CHRONICLE (Sept. 1, 2020, 9:19 AM) <https://www.houstonchronicle.com/business/article/Meet-the-judge-who-saved-the-Texas-bankruptcy-15528320.php>.

<sup>44</sup> Skeel, *Bankruptcy Judges and Bankruptcy Venue*, *supra* note 9, at 27; Eisenberg & LoPucki, *supra* note 4, at 970 (questioning whether Delaware processes cases faster than other districts).

<sup>45</sup> See Skeel, *Bankruptcy Judges and Bankruptcy Venue*, *supra* note 9, at 27.

<sup>46</sup> See Cole, *supra* note 9, at 1876; Zywicki, *supra* note 36, at 1181 (noting that the incentive for judges to compete for more cases "is unclear").

<sup>47</sup> Judges acknowledge that efficient process is a way to attract cases. For example, Chief Judge David Jones in the Southern District of Texas has been fairly explicit that his procedural innovations were motivated in part to attract large cases. See Curriden, *supra* note 38.

<sup>48</sup> Randles, *supra* note 5 (quoting Judge Drain).

<sup>49</sup> See Zywicki, *supra* note 36, at 1167 (noting a lack of evidence that judges' decisions were motivated by a desire to attract subsequent cases).

competition where judges compete not for cases but simply for “satisfaction for the excellent discharge of their duties.”<sup>50</sup> He recounts a representative story of Judge Walrath transferring a case to the Southern District of Texas after noting that the debtor would get better service there because her calendar was full and Texas had created new rules putting its procedures in line with Delaware.<sup>51</sup>

In the end, the question remains unanswered, but the burden for showing that judges are consciously ignoring the law or changing substantive outcomes (for better or worse) to attract cases lies with those making that accusation.

### C. *Debtor’s Choice*

That being said, venue shopping (good or bad) can and will occur even without a deliberate judicial race. Every judge will have a unique approach to cases, and that approach may tend to favor debtors or creditors. Lawyers will look for observable trends, and debtors’ lawyers will take those trends into account when choosing where to file. To suggest otherwise is absurd. None of this requires that the judges compete for—or are even conscious of—venue considerations. It simply reflects the fact that lawyers will choose what they perceive to be the most attractive venues. That can be a good story or a bad story or bit of both.

#### 1. *Debtor’s Choice: The Good Story*

Many have argued that venue choice is driven by debtors’ need for predictability, developed case law, judicial expertise, and speed.<sup>52</sup> These are all desirable attributes of a court system. And they can emerge with or without judicial competition for cases. Indeed, these attributes tend to be self-reinforcing. Judges develop experience by managing large cases, and they implement efficient procedures as they learn what works and what does not. As a result, judges in popular districts are likely to become more experienced simply by virtue of being located in popular districts. Developed case law, too, will attract filings, which in turn will support the further development of case law in the district and further reinforce the expertise of the judges located in the district. Moreover, as a district experiences a larger volume of filings, debtors will have

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<sup>50</sup> Cole, *supra* note 9, at 1848.

<sup>51</sup> Cole, *supra* note 9, at 1856.

<sup>52</sup> See NAT’L CONF. OF BANKR. JUDGES, NCBJ SPECIAL COMMISSION ON VENUE: REPORT ON PROPOSAL FOR REVISION OF THE VENUE STATUTE IN COMMITTEE BANKRUPTCY CASES 68–76 (2018); U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-839, CORPORATE BANKRUPTCY: STAKEHOLDERS HAVE MIXED VIEWS ON ATTORNEYS’ FEE GUIDELINES AND VENUE SELECTION FOR LARGE CHAPTER 11 CASES 22–26 (2015).

a larger set of cases from which to make predictions about how a particular district will approach a certain type of debtor.

Similarly, debtors may use liberal venue rules to avoid local bias. Home venues may be particularly vulnerable to economic disruptions that affect employment in the area. A bankruptcy rule that forces debtors to file in their home venues could put a thumb on the scale of local and regional interests. Local judges may, for example, be skeptical of value-enhancing reorganizations that adversely affect local employment, or they may be influenced by local political pressures.<sup>53</sup> Permitting debtors to file in the venue of their choice may allow debtors to obtain neutral judges whose views are not biased by these local interests.<sup>54</sup>

Again, these benefits can build on each other. As some debtors choose Delaware courts to avoid local biases, the Delaware courts will gain expertise and thus attract more debtors, further increasing their expertise and efficiency and leading Delaware to be the forum of choice for all of these desirable reasons.

## 2. *Debtor's Choice: The Neutral Story*

Debtors' lawyers prefer to know which judge will preside over a bankruptcy filing. When Delaware first gained prominence, it had one judge. Lawyers noted that they liked knowing exactly which judge would hear the case. Later, when it had two judges, that still presented a relative advantage to the Southern District of New York.

In some sense, this attribute is hard to maintain. As venues become more popular, their caseloads grow, and new judges may be appointed or visiting judges may sit by designation. Delaware, for example, has grown from one to eight judges since the 1990s.

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<sup>53</sup> See Zywicki, *supra* note 36, at 1165.

<sup>54</sup> That is perhaps one reason why Delaware is uniquely attractive for debtors seeking to escape local bias when choosing a venue. For most large firms, Delaware is both a proper venue because of incorporation and a venue without local bias because few firms operate their principal business there. There are exceptions, which tend to prove the rule. In one Delaware bankruptcy case the debtor had a major assembly plant in Delaware. The jobs associated with that plant were important to local interests and were likely to be affected by sale proceedings in the case. As if to prove the dangers of local bias, a United States Senator from Delaware and a United States Representative from Delaware issued a press release noting their hope that the bankruptcy proceedings would favor keeping the plant open, criticizing the planned sale procedures, and explaining how they thought the case should proceed. To make sure the views of these powerful Delaware politicians were known to the court, The Delaware Economic Development Authority, a state agency, then attached the press release to a court filing. See Press Release, Tom Carper, Senator, U.S. Senate, Carper, Carney Issue Statement on Fisker's Bankruptcy Court Proceedings (Jan. 9, 2014), <https://www.carper.senate.gov/public/index.cfm/2014/1/carper-carney-issue-statement-on-fisker-s-bankruptcy-court-proceedings>.

But there are ways to maintain predictability in the face of growth. For example, while the Southern District of Texas has five bankruptcy judges, its rise to prominence was facilitated in part by a working order assigning all large chapter 11s to one of two judges. Similarly, the Southern District of New York is subdivided into divisions. And the White Plains division is particularly popular in part because it has a single judge with a known track record lending to predictability.<sup>55</sup>

Obviously, predictability is not the only relevant consideration—no one wants certainty of incompetence—but among equally competent venues, lawyers claim to prefer those in which the judicial assignment is more predictable.<sup>56</sup>

This strikes us as a mostly benign version of venue shopping. All else equal, there is nothing especially remarkable about the number of judges available in a district. Some might argue that predictability allows lawyers to prepare more efficiently while others might argue that it causes lawyers to waste resources tailoring their case to the whims of a particular judge.<sup>57</sup> The phenomenon is self-limiting as a single-judge district or division has a natural limit to its docket. And so the value of this type of venue shopping is likely to be indeterminate.

A related incentive might also be at play. Recent empirical research suggests that corporate bankruptcy cases are run more efficiently when lawyers have connections to the presiding judge.<sup>58</sup> This research focuses on connections

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<sup>55</sup> See Renae Merle & Lenny Bernstein, *Purdue's Choice of NY Bankruptcy Court Part of Common Forum Shopping Strategy, Experts Say*, WASH. POST (Oct. 10, 2019, 6:05 PM), <https://www.washingtonpost.com/business/2019/10/10/purdues-choice-ny-bankruptcy-court-part-common-forum-shopping-strategy-experts-say/>; Dave Zucker, *Why Did Purdue Pharma File for Bankruptcy in Westchester County?*, WESTCHESTER MAG. (Sept. 20, 2019), <https://westchestermagazine.com/life-style/business/why-did-purdue-pharma-file-for-bankruptcy-in-westchester-county/>. In April 2020, this predictability was reduced. Because the case load in White Plains had increased, the court entered a standing order to assign some of the White Plains cases to a second judge sitting in the Manhattan division. See *Modification of Assignment of Cases and Proceedings to the Honorable Sean H. Lane* (Bankr. S.D.N.Y. 2020) (General Order M-547).

<sup>56</sup> See Cole, *supra* note 9, at 1886 (noting that lawyers reported that predictability on which judge they would draw was the primary factor in venue choice and noting the importance of Delaware's having only one judge and then two judges in the 1990s and that lawyers valued predictability about a specific judge they would draw the most); Ryan Messina, *Changing the Bankruptcy Venue Statutes Would Undermine the Effectiveness of the U.S. Corporate Bankruptcy System*, 44 DEL. J. OF CORP. L. ONLINE (2020) ("Purportedly higher fees are offset by the cost-efficient administration of complex cases by experienced jurists and professionals that effectuate predictability and post-restructuring survival.").

<sup>57</sup> At the appellate level, the United States Court of Appeals for the Seventh Circuit worries about lawyers pandering to a specific judge this way. As a result, the litigants are not told which judges will hear their case until the day of argument.

<sup>58</sup> See Vidhan K. Goyal, Josh Madsen & Wei Wang, *Lawyer Networks and Corporate Bankruptcies 1* (Aug. 3, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3666263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666263).

related to clerkships, alumni networks, and prior cases. The results are dramatic: such connections can reduce the duration of the case by around three months.<sup>59</sup> Importantly, these connections do not distort outcomes, and they do not create judicial bias or favoritism. They simply make the process more efficient.<sup>60</sup> To the extent debtors are aware of this effect, they would be foolish not to consider it when choosing a venue (and a lawyer!).

It is difficult to measure the cost and benefits of such forum shopping. On the one hand, shopping for efficient case management is socially useful. On the other hand, if that efficiency is based on social connections, it raises questions about the distributional fairness of the bankruptcy process. Moreover, because these connections include prior case experience before the judge, they are endogenous and self-perpetuating. Overall efficiency might be improved by forcing lawyers to establish broader connections across venues.

### 3. *Debtor's Choice: The Bad Story*

Empirical evidence that popular venues decide cases more swiftly than less popular venues need not be framed as evidence that debtors are selecting efficient venues. It can also support the opposite story, where debtors are choosing speedy venues because those venues fail to give enough consideration to junior claimants. Popular venues might be quick and efficient while also offering an opportunity for debtors to evade regulatory scrutiny, or otherwise extract value from unsophisticated or nonadjusting creditors.

Note that this story requires no misbehavior on the part of judges or lawyers. But it is still problematic. If the substantive outcome of a case turns on the location of the bankruptcy filing, then parties will waste resources fighting over the choice of venue.<sup>61</sup> Moreover, venue shopping of this sort can allow managers to extract value from other stakeholders at the time of filing.

Similarly, debtors might shop for venues to find and take advantage of a particular district's perceived biases. Indeed, some of the more egregious examples of forum shopping involve debtors who have filed outside of Delaware and New York in order—it seems—to exploit regional or local biases in hopes of distorting substantive law.<sup>62</sup>

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<sup>59</sup> *Id.* at 18.

<sup>60</sup> *Id.*

<sup>61</sup> This is all familiar to lawyer and academics. There is a vast literature on the biases and behaviors of judges and the effects those behaviors have on litigation choices in all contexts.

<sup>62</sup> Patriot Coal's attempt to transfer venue from New York to West Virginia seems to have been motivated at least in part by the view that West Virginia would offer a more sympathetic venue for mine workers. *See* Alan



One recent attempt to exploit regional biases was the chapter 11 filing of the National Rifle Association (NRA) in the Northern District of Texas. If one believes the NRA's own statements, the filing appears to be an attempt to find a favorable judge who will allow the company to circumvent New York law. At the time of filing, the NRA issued a press release explaining that the purpose of the bankruptcy was "to exit what it believes is a corrupt political and regulatory environment in New York."<sup>63</sup> The press release further stated that the NRA was "dumping New York."<sup>64</sup>

Lest one doubt that local biases exist, after the filing was announced the Governor of Texas promptly tweeted, "Welcome to Texas—a state that safeguards the 2nd Amendment."<sup>65</sup> Of course, the success of this gambit will turn on the predisposition of a judge who has demonstrated no sign that he will in fact offer a more sympathetic venue.<sup>66</sup>

Scholars have thus criticized bankruptcy venue shopping for giving incumbent managers an outsized advantage, exhibiting pro-reorganization biases, disfavoring junior investors, and disadvantaging nonadjusting and nonconsensual creditors.<sup>67</sup> The recurring theme in all of these criticisms is that the debtor chooses a venue that it believes will further its interests at the expense of other stakeholders.

#### 4. *Debtor's Choice: The Worst Story*

Still, the most problematic aspect of liberal venue shopping has nothing to do with the individual bankruptcy judges or the race to the bottom. Rather it arises from differences in controlling precedent. Debtors that can shop among venues take advantage of differences in local precedents to alter substantive rules and outcomes. This is true for all litigation, but liberal venue rules make it

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Zimmerman, *In Patriot Coal Venue Dust-up, Future Court Decision Framed as 'Justice' vs. 'Convenience'*, S&P GLOB. (Sept. 6, 2012), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/leveraged-loan-news/in-patriot-coal-venue-dust-up-future-court-decision-framed-as-justice-vs-convenience>.

<sup>63</sup> See Press Release, NRA, NRA Leaves New York to Reincorporate in Texas, Announces New Strategic Plan (Jan. 15, 2021), <https://www.nraforward.org/press-release>.

<sup>64</sup> *Id.*

<sup>65</sup> Greg Abbott (@GregAbbott\_TX), TWITTER (Jan. 15, 2021), [https://twitter.com/GregAbbott\\_TX/status/1350191813571784704?s=20](https://twitter.com/GregAbbott_TX/status/1350191813571784704?s=20).

<sup>66</sup> On the first day, the judge criticized the parties for their extreme rhetoric and added, "I would ask that everyone sort of ratchet that part of the case down some, now that we're in bankruptcy court." See Danny Hakim & Mary Williams Walsh, *The N.R.A. Wants to 'Dump' Its Regulators via Bankruptcy. Will It Succeed?*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/business/nra-bankruptcy-new-york.html>.

<sup>67</sup> See LOPUCKI, *supra* note 4, at 97–122.

especially easy for bankruptcy cases. When a debtor has almost unfettered discretion to file in the district of its choice, its lawyers have good reason to seek out the venue with legal precedents that are most helpful to the debtor's case.

The decision of Caesars Entertainment Operating Company (CEOC) to file its (and its affiliates') chapter 11 petition in the Northern District of Illinois is an example of a case where a debtor seems to have chosen a particular venue to take advantage of local precedent—specifically, Seventh Circuit precedent on third-party releases and executory contracts.<sup>68</sup>

When CEOC and its affiliates entered bankruptcy, there were many live disputes among its stakeholders, including claims that CEOC and its creditors had against CEOC's parent company, Caesars Entertainment Company (CEC). CEOC's claims against CEC—which was not a debtor in the bankruptcy—arose from a series of transfers from CEOC to CEC. The creditor claims against CEC related to CEOC debts that had been guaranteed by CEC.

On January 12, 2015, holders of the second lien notes initiated an involuntary bankruptcy proceeding in the District of Delaware.<sup>69</sup> Delaware was a proper venue because CEOC was incorporated there.<sup>70</sup> Three days later, on January 15, CEOC filed a voluntary bankruptcy petition in the Northern District of Illinois.<sup>71</sup> The Northern District of Illinois was also a proper venue because at least one of CEOC's affiliates was incorporated in Illinois and—having filed first—had a pending bankruptcy case in that venue.<sup>72</sup>

Thus, the stage was set for a major venue dispute. CEOC freely admitted to venue shopping.<sup>73</sup> It claimed to have chosen to file in the Northern District of Illinois in part to take advantage of favorable legal precedents in the Seventh Circuit regarding the assumption of executory contracts and third-party releases.<sup>74</sup> The stakes were significant, with the company's CEO testifying that the difference in precedent between the two venues could impact earnings “by as much as \$40 million.”<sup>75</sup>

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<sup>68</sup> Third-party releases release certain non-debtor parties such as officers, directors, or affiliates of the company from liability and guaranties upon confirmation of the plan.

<sup>69</sup> *In re* Caesars Ent. Operating Co., Inc., 808 F.3d 1186, 1190 (7th Cir. 2015).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Of course, to the extent the creditors trying to force the case into Delaware were doing so based on the same differences in precedent, they were also venue shopping. Though their exact motives may have been more complicated. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Such venue shopping is problematic. That is not to say that the precedent in the Seventh Circuit is wrong and the precedent in the Third Circuit is right. Nor even that that the debtors' or creditors' lawyers misbehaved. When there is a choice between two proper venues with different rules, a lawyer should choose the one that favors her client.

Rather, the real problem is that two such venues exist in the first place. Inconsistent substantive law across venues motivates parties to expend resources to fight over where the case should be filed. The CEOC bankruptcy produced just such a fight in the form of costly litigation<sup>76</sup> that could have been avoided if the substantive rules were consistent across venues.

The potential scope of this form of venue shopping is limited in two ways. First, it is unlikely that there is jurisdictional competition with regard to these differences in precedent. Controlling precedent is set by the courts of appeals. Those courts do not decide cases based on the perceived dominance of bankruptcy districts within their circuit.<sup>77</sup> That is fortunate. Jurisdictional competition should be about expertise and efficient case administration—not about the substantive rules that affect creditor recoveries.

Second, the opportunities for such differences in precedent are constrained because bankruptcy courts exist in one unified legal system.<sup>78</sup> Inconsistent rules for third-party releases can (and should) be resolved either by a ruling of the Supreme Court or by an amendment to the Code.<sup>79</sup> Still, differences do persist—in part because the Supreme Court is slow to resolve splits<sup>80</sup>—and do distort incentives for venue choice in certain cases.

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<sup>76</sup> At one point, the two courts held simultaneous hearings. The two courtrooms were full, two judges' resources were being taken up, and dozens of the most expensive lawyers in the country were arguing the venue issues in the same case in two different courtrooms.

<sup>77</sup> It would be quite a stretch to suggest that appeals courts like those in the Second and Third Circuits are deciding cases as part of a race to secure the dominance of the bankruptcy courts in Wilmington, Delaware, and White Plains, New York.

<sup>78</sup> In this way, the bankruptcy venue race is very different from the incorporation race. Each state can choose its own laws of incorporation and governance. And the internal affairs doctrine gives them broad latitude in doing so. Thus, the Delaware legislature and court system can compete with differential substantive corporation law in a way that a bankruptcy judge cannot.

<sup>79</sup> That is not to say that Congress or the Supreme Court should resolve all bankruptcy circuit splits. Inconsistent case law can generate useful information that can inform later policy decisions. We simply point out that this motivation for venue shopping can be easily resolved in many cases without limiting debtor venue choice.

<sup>80</sup> See, e.g., *Mission Prod. Holdings, Inc. v. Tempnology*, 139 U.S. 1652, 1666 (2019) (resolved a decades-old split about the rejection of certain executory contracts); *N.C.P. Mktg. Group, Inc. v. BG Star Prods.*, 556 U.S. 1145, 1147 (2009) (statement of Justice Kennedy) (noting in the context of a cert denial the importance in the future of resolving a longstanding circuit split regarding the assumption of certain executory contracts).

### 5. *Debtor's Choice: The Inefficient Bundling Story*

Waste also arises because current venue rules unnecessarily bundle venue choice with other unrelated matters such as state of incorporation or principal place of business.

There is no reason to think that the quality of a state's incorporation law will be connected to its quality as a restructuring hub. Because the optimal bankruptcy venue does not necessarily correlate to the state with the optimal corporate law, debtors that incorporate in one state to access that state's bankruptcy courts may be accepting a suboptimal state of incorporation to establish the preferred venue. Other debtors may be foregoing access to the best venue in pursuit of the best state for incorporations.<sup>81</sup> Tying venue to incorporation thus bundles two unrelated goods.

One might challenge the idea that the optimal bankruptcy venue is independent of the optimal state of incorporation. After all, in a world with broad venue choice, Delaware still dominates in both categories. The most obvious link between the two would be that if almost all incorporations were concentrated in one state, that state would be available to all of those corporations as a bankruptcy venue, and if the state were small enough, it might also be consistently neutral with regard to hometown bias. That neutrality and availability could attract a critical mass of filings, which in turn could feed into the experience and expertise of the courts in that venue. In that sense, the common state of incorporation would be associated with quality and expertise, which could suggest a reason for bundling it with venue.

But this rationale is circular. In that case, venue expertise derives from the availability of the state of incorporation *because* the two are bundled. Judicial neutrality results only because the choice of state is arbitrary. Starting from first principles, one might assign any arbitrary venue (such as the District of Wyoming) as universally available and achieve the same benefits without bundling the state of incorporation and the bankruptcy venue.

The same unbundling principle applies to the requirements that tie jurisdiction to a firm's principal place of business or the location of its assets. Bundling these decisions with venue rules produces wasteful behavior. For example, under existing rules, firms routinely rent office space in White Plains, New York, in order to file in the White Plains Division of the Southern District

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<sup>81</sup> The latter scenario—where debtors merely accept a prescribed venue as a nonnegotiable add-on to a chosen state of incorporation—is likely the common outcome in reality.

of New York. Liberal venue rules that encourage debtors to rent office space for the sole purpose of accessing a convenient venue should be disfavored. It is entirely possible that White Plains, New York is the ideal bankruptcy venue. But if that is the case, debtors should be allowed to file there without renting local office space.

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The actual story is likely a combination of the scenarios described above. Debtors probably expend resources and choose bundles in part to avoid biases and in part to find them. A debtor will expend resources in some cases to find a venue that will facilitate an efficient resolution for all stakeholders and in some cases to find a venue that allows it to take advantage of other creditors. And sometimes a debtor will shop for favorable substantive precedent. These efforts might waste resources and distort some outcomes while also producing expert judges who administer cases efficiently. Optimal venue selection rules should preserve productive venue choice while eliminating wasteful venue shopping and inefficient bundling.

## II. CHAPTER 15 AND CROSS-BORDER INSOLVENCY

In Part III below, we discuss the connection between global forum shopping and domestic venue reform. But first in this Part, we provide a brief overview of chapter 15 of the Code, which facilitates global forum shopping by providing for the domestic recognition and enforcement of foreign bankruptcy proceedings. We also describe the attractiveness of foreign forums within the global system of cross-border insolvency and discuss the particular challenges to regulating or eliminating global foreign shopping.

### *A. Chapter 15 Recognition of Cross-Border Insolvency Proceedings*

Cross-border insolvency laws deal with proceedings involving debtors with assets in multiple jurisdictions. It has long been recognized that the lack of cross-border coordination makes it difficult to restructure an insolvent or financially distressed debtor with a global presence. Inconsistent judgments, difficulties with enforcement, and other coordination costs are real concerns. The Model Law on Cross-Border Insolvency (Model Law), which was promulgated in 1997 by the United Nations Commission on International Trade Law (UNCITRAL), attempted to address this coordination problem.<sup>82</sup>

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<sup>82</sup> See *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 305–06 (3d Cir. 2013) (discussing the purpose of and policy behind the Model Law).

The Model Law provides generally applicable norms for cross-border insolvency proceedings and seeks to promote resolution of multinational bankruptcy proceedings in a single process. Without such rules, debtors would have to file in a number of jurisdictions simultaneously. That creates a costly and unwieldy process for debtors and creditors with multiple and, at times, conflicting proceedings in different countries. The idea behind the Model Law is to provide a process for an initial court to administer the main proceeding and other jurisdictions to recognize (and enforce) that.<sup>83</sup> In this way, the Model Law seeks to eliminate the territorialism in cross-border insolvency proceedings.<sup>84</sup> For that to work, the recognizing jurisdictions should, as United States courts generally do, liberally grant recognition to and enforce the initial main jurisdiction's foreign proceedings without demanding consistency with the recognizing jurisdiction's own local procedural or substantive laws.

By most accounts, the Model Law has been a mild success.<sup>85</sup> Currently fifty-two jurisdictions have adopted laws based in some form on the Model Law.<sup>86</sup>

Chapter 15 of the Code is based on the Model Law and represents the United States' approach to resolving cross-border insolvencies. Under chapter 15, courts in the United States freely recognize and enforce foreign insolvency proceedings of companies that have assets that are located in more than one country.<sup>87</sup> By its own terms, chapter 15 was enacted to "provide effective mechanisms for dealing with cases of cross-border insolvency."<sup>88</sup> It provides for the recognition and enforcement of a foreign proceeding when a petition is filed by a representative of the debtor and certain statutory requirements are met.

Relevant to our inquiry is the recognition of "foreign main proceedings."<sup>89</sup> Chapter 15 recognition of a foreign main proceeding provides an affirmative

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<sup>83</sup> *In re Stripes US Holdings Inc.* [2018] EWHC (CHD) 3098 [54] (Eng.).

<sup>84</sup> *See id.*

<sup>85</sup> *See* Wai Yee Wan & Gerard McCormack, *Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNICTRAL*, 36 EMORY BANKR. DEV. J. 59, 61–62 (2020) ("The Model Law has achieved moderate success internationally, with major common law jurisdictions including the United Kingdom (UK), the United States (US), Australia, and more recently Singapore, having changed their domestic laws on cross-border insolvency cooperation based on the Model Law provisions." (internal citations omitted)).

<sup>86</sup> *See* U.N. Comm'n on Int'l Trade L., *Status: UNICTRAL Model Law on Cross-Border Insolvency* (1997), <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-borderinsolvency/status>.

<sup>87</sup> *See* 11 U.S.C. § 1501 (2019).

<sup>88</sup> *Id.* § 1501.

<sup>89</sup> *See id.* § 1520. "Nonmain" proceedings have less of a connection with the foreign jurisdiction—they require an "establishment" rather than a center of main interests—and receive a lesser degree of relief in chapter 15. *Id.* § 1517(b).

mechanism for the debtor to enforce the terms of the foreign proceeding. Perhaps most importantly, it triggers the automatic stay “with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States.”<sup>90</sup> Further, the debtor can seek additional injunctions barring creditors in the United States from taking actions that are inconsistent with the foreign proceeding.<sup>91</sup>

Chapter 15 provides a mechanism for a debtor to seek the affirmative assistance of the court in enforcing a judgment obtained in a foreign proceeding.<sup>92</sup> This assistance includes the automatic stay provisions, the issuing of necessary orders, and the granting of preemptive injunctions. As a result, a debtor can quickly use chapter 15 to secure a broad order that implements the terms of the foreign proceeding in the United States. In this way, it has the same effective domestic scope as a plan of reorganization resulting from chapter 11 proceedings.

Importantly, bankruptcy courts in the United States will enforce broad provisions of foreign proceedings *according to the foreign jurisdiction’s rules*. This is true even when those provisions have significant effects on non-debtors and even when the United States court would not itself have approved a plan with such provisions had the case been initially brought before it under chapter 11. As one court noted, “principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the [Foreign] Orders, even if those provisions could not be entered in a plenary chapter 11 case.”<sup>93</sup> Thus, chapter 15 can expand the debtors’ substantive rights as compared to chapter 11.

To obtain chapter 15 recognition, the debtor’s representative must comply with certain filing procedures, but substantively there are two key requirements. First, the foreign proceeding must be:

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<sup>90</sup> *Id.* § 1520(a)(1).

<sup>91</sup> For example, available relief includes “staying the commencement or continuation of an individual action or proceeding concerning the debtor’s assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a).” *Id.* § 1521(a)(1).

<sup>92</sup> In the absence of chapter 15, defensive recognition of a foreign proceeding was and is still possible. Under general principles of comity, state and federal courts in the United States give preclusive effect to judgments of a foreign court. The difference is that comity would generally be a shield invoked only after a creditor took actions that violated the foreign proceedings. This has some value, but without chapter 15, enforcement of the foreign proceeding might require years of litigation across multiple jurisdictions.

<sup>93</sup> *In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010); see *In re Avanti Commc’ns Grp. PLC*, 582 B.R. 603, 618 (Bankr. S.D.N.Y. 2018); *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1041–46 (5th Cir. 2012).

a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.<sup>94</sup>

Second, the foreign proceeding must qualify as a “main” proceeding, which is defined as a proceeding that is “pending in the country where the debtor has the center of its main interests.”<sup>95</sup> The Code does not define center of main interests (COMI), though section 1516(c) stipulates that, “[i]n the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be” the debtor’s COMI.<sup>96</sup>

When determining the debtor’s COMI for purposes of chapter 15, courts have considered the location of the firm’s headquarters, employees, assets, creditors, and which jurisdiction’s law would apply in most disputes.<sup>97</sup> Crucially, though, courts have held that the relevant time to determine the location of the debtor’s COMI is the *moment of the chapter 15 petition*.<sup>98</sup> Thus, a court will recognize a foreign main proceeding even when a debtor initiated the foreign proceedings before it took whatever steps were necessary to make sure that its COMI was located in that jurisdiction.<sup>99</sup> The prevailing view is that the COMI must simply be in the relevant foreign jurisdiction by the time the debtor files its chapter 15 petition. This occurred, for example, when the Bankruptcy Court of the Southern District of New York approved, and the Second Circuit affirmed, a foreign main proceeding in the British Virgin Islands

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<sup>94</sup> 11 U.S.C. § 101(23). This requirement is based on the substance rather than the technical form of the proceeding. Courts look to the function of the proceeding not its statutory source or the precise financial position of the debtor. Thus, for example, the fact that an English scheme of arrangement is not formally an insolvency proceeding is irrelevant as long as it is a collective proceeding aimed at reorganization. *See, e.g., In re Avanti Commc’ns Grp. PLC*, 582 B.R. 603, 613–14 (Bankr. S.D.N.Y. 2018). Indeed, United States courts routinely recognize schemes of arrangement and similar proceedings under this definition because they adjust the debts of a class of creditors. While some scholars have argued for a narrower approach that excludes schemes as not “fully collective,” no United States court has adopted such an approach. *See* Horst Eidenmueller, *What Is an Insolvency Proceeding?* 3 (Euro. Corp. Governance Inst., Working Paper No. 335/2016, 2016).

<sup>95</sup> 11 U.S.C. § 1502(4). A nonmain proceeding is still entitled to recognition but the available enforcement assistance is less powerful. For example, the automatic stay does not apply.

<sup>96</sup> *Id.* § 1516(c).

<sup>97</sup> *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), *aff’d*, 371 B.R. 10 (S.D.N.Y. 2007); *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 137 (2d Cir. 2013).

<sup>98</sup> *In re Fairfield Sentry Ltd.*, 714 F.3d at 137.

<sup>99</sup> There are cases where the change in COMI was deemed to be bad faith, but these turn on whether the change was actually carried out. *In re O’Reilly*, 598 B.R. 784, 805 (Bankr. W.D. Pa. 2019).



to liquidate an investment fund whose collapse was triggered by the Bernie Madoff scandal.<sup>100</sup>

### *B. Establishing Jurisdiction in the Foreign Forum*

Of course, chapter 15 recognition, and thus international forum shopping, are possible only if alternative forums are accessible to debtors. While chapter 11 has long been seen as the gold standard for large corporate reorganizations, foreign jurisdictions increasingly permit debtors to restructure in their courts with only limited connections to the jurisdiction. England, for example, simply requires that a company possess a “sufficient connection” to England in order for English courts to have jurisdiction to oversee the scheme.<sup>101</sup> English courts have found a sufficient connection when the company’s COMI<sup>102</sup> is in England,<sup>103</sup> but also in broader circumstances such as when the company has assets in England, when the company carries on activities in England, when England is the location for restructuring negotiations, or when the debt instrument is governed by English law.

It is relatively easy for a firm to establish these connections. One option is to simply relocate its COMI by moving the firm’s office and other affairs to England. This occurred successfully in the Magyar Telecom, New World Resources, and VCG schemes.<sup>104</sup> Another option is to amend the governing law and jurisdiction clauses in the contract.<sup>105</sup> A more surprising option is to cause

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<sup>100</sup> *See id.*

<sup>101</sup> In the matter of Rodenstock GmbH [2011] EWHC (ChD) 1104 (Eng.); In the matter of Tele Columbus GmbH [2010] EWHC (Ch) 1944 (Eng.); *Re La Seda De Barcelona SA* [2010] EWHC (Ch) 1364 (Eng.).

<sup>102</sup> As a clarification: There are two points of inquiry about COMI. First the issuing court will determine it as described here. Then the United States bankruptcy court will determine it for purposes chapter 15 recognition, as described above. In each instance the court will apply its own law, though the tests are similar.

<sup>103</sup> *Re Heron International NV* [1994] 1 BCLC 667 (Eng.) (accepting jurisdiction on the basis that the company had assets in England); *Re Rodenstock GmbH* [2011] EWHC (Ch) 1104 (Eng.) (accepting jurisdiction on the ground that liability was governed by English law); *Re Vietnam Shipbuilding Indus. Grp.* [2013] EWHC (Ch) 2476 (Eng.) (finding a “sufficient connection” on the ground that the debtor’s liabilities were governed by English law); *Re APCOA Parking Holdings LmbH and Ors* [2014] EWHC 3849 (Eng.) (finding a sufficient connection after an overseas company took steps to ensure that its governing liabilities would be subject to English law in order to avail itself of a scheme). The COMI inquiry, which is used to establish jurisdiction in the European Union, is not completely synonymous with the substantial connection test. *See Re Noble Grp. Ltd* [2018] EWHC (Ch) 3092 (Eng.) (discussing the relationship between COMI and the substantial connection test).

<sup>104</sup> *See Tom Young, DTEK Shifts High-Yield Restructuring Options*, INT. FIN. L. REV. (May 19, 2015), <https://www.iflr.com/article/b1lsq9843c6xw7/dtek-shifts-high-yield-restructuring-options>; *Re Magyar Telecom BV*, [2013] EWHC (Ch) 3800 (Eng.).

<sup>105</sup> *See Re APCOA Parking Holdings GmbH and others* [2014] EWHC (Ch) 3849. The *APCOA* court did warn against decisions to change the law when the new choice of law “appears entirely alien to the parties’ previous arrangements and/or with which the parties had no previous connection” or is otherwise a “step too far.” *Id.*

an affiliate entity registered in England—one that may have been acquired or created for this purpose—to become a co-obligor on the relevant debt instruments.<sup>106</sup> The contracts often allow a new entity to voluntarily become an co-obligor on the underlying debt obligations.<sup>107</sup> Having done so, the new entity—with its COMI in England creating the necessary jurisdiction connection—can seek sanction for the scheme, the terms of which can affect the obligations of all parties to the relevant debts instruments.

Singapore, too, is willing to exercise jurisdiction even when the debtor has only a small connection to the country. Like England, Singapore will find jurisdiction when the firm's COMI is in Singapore, when it carries on business in Singapore, when it is registered as a foreign company in Singapore, when it selected Singapore law to govern loan transactions, or when it submitted to Singapore jurisdiction.<sup>108</sup> We should note that there is nothing exceptional about these approaches, and that courts in the United States have long been willing to exercise jurisdiction even when a firm has only a small connection to the United States.<sup>109</sup>

### C. *The Attractiveness of Foreign Forums*

On their own, but especially with the possibility of broad and liberal chapter 15 recognition, foreign courts have become increasingly attractive forums to restructure debt even for firms with large presences in the United States.<sup>110</sup> England, in particular, has emerged as a convenient forum, and Singapore has also taken steps to attract multinational corporations.<sup>111</sup> That is not to say that these foreign forums are perfect substitutes for the American bankruptcy

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<sup>106</sup> *Re Codere Finance (UK) Ltd* [2015] EWHC (Ch) 3778 (Eng.).

<sup>107</sup> *Id.*

<sup>108</sup> *Re Zetta Jet Pte Ltd and Ors (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53.

<sup>109</sup> *Id.* at 18.

<sup>110</sup> See Couwenberg & Lubben, *supra* note 16, at 386–87. There is a lengthy literature on the desirability of international forum shopping. See Lucian Arye Bebchuk & Andrew T. Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 777–78 (1999); Douglas G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931, 937–38 (1994); Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 704 (1999); Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 2 (1997); Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 512–13 (1991); John E. Pottow, *The Myth (And Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785, 786 (2007); Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2208 (2000); Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2292–93 (2000).

<sup>111</sup> Couwenberg & Lubben, *supra* note 16, at 362–74 (describing the emergence of proceedings in England, the Netherlands, and Singapore as alternatives to chapter 11).

process. Consider, for example, the difference between chapter 11 and the English scheme of arrangement.

Chapter 11 is a proceeding designed to allow financially distressed companies to restructure their operations. Its salient features are the automatic stay, the ability to cram down plans over the objections of some stakeholders, the ability to reject burdensome contracts, the role for existing management, the ability to discharge debts that arose before the confirmation date, and the ability to sell property free and clear of liens, claims, and encumbrances.

The system in England is different. Its formal insolvency law allows debtors to restructure either through a formal administration or a Company Voluntary Arrangement (CVA).<sup>112</sup> Those options are no less cumbersome or more attractive to debtors than chapter 11. Administration is a formal process where a court-appointed trustee takes control of the company in order to facilitate a recovery by going concern sale or liquidation. A CVA, on the other hand, allows directors to retain some amount of control over the process, but it is available only to small firms, cannot bind secured creditors, and requires that 75% of voting creditors by value agree to the plan. Both options have proven unpopular—administration because it is controlled by a trustee from the get-go and CVA because it applies only to small firms and does not bind secured creditors.

But England offers debtors another more streamlined option—the scheme of arrangement—to restructure their financial debts, and this option has become very popular. While schemes are not technically insolvency proceedings—they are authorized under Part 26 of the Companies Act 2006 and available to solvent and insolvent debtors alike—they do offer a flexible way for debtors to restructure debts and are frequently used by financially distressed firms.<sup>113</sup> Unlike chapter 11, there is relatively little judicial oversight of schemes of arrangement, and they move to resolution quickly. Thus, some of the attractive features of chapter 11 like the automatic stay do not immediately kick in.<sup>114</sup> A scheme does, however, allow a company to restructure its debt if the proposed scheme receives support from (a) a majority in number of each class of creditors

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<sup>112</sup> Insolvency Act of 1986, c. 45 (Eng.), <https://www.legislation.gov.uk/ukpga/1986/45/contents>.

<sup>113</sup> There are examples in which large non-English companies have used a scheme of arrangements. *See, e.g., Re Rodenstock GmbH* [2011] EWHC (Ch) 1104 [1]–[3] (Eng.); *Primacon Holding GmbH & Anor v. A Grp. of the Senior Lenders & Credit Agricole* [2012] EWHC (Ch) 164 [1]–[2] (Eng.); *Re NEF Telecom Co BV* [2012] EWHC (Comm.) 2944 [1], [5] (Eng.); *Re Cortefiel SA* [2012] EWHC (Ch) 2998 [3], [5] (Eng.); *Re Seat Pagine Gialle SpA* [2012] EWHC (Ch) 3686 [1]–[2] (Eng.).

<sup>114</sup> Debtors can, however, request that the court approve a stay. *See Re Vietnam Shipbuilding Indus. Grp.* [2013] EWHC (Ch) 1146 [1] (Eng.).

that are present and voting, and (b) 75% in value of the debt held by the creditors of each class present and voting. A debtor cannot cram down a scheme when a class fails to secure the required votes, but a successful scheme binds all creditors of the restructured obligations, regardless of whether they voted for or against the scheme.

Schemes contain attractive features from the perspective of debtors and creditors. As long as the voting thresholds are met, claims of secured creditors or bond holders can be reduced or written off without the unanimous consent of that class of creditors. In addition, the voting thresholds enumerated in the statute override thresholds in contractual agreements. That means that, even if a contract requires unanimous consent to adjust the terms of the contract, a debtor need only secure agreement from 75% (by value) in order to renegotiate terms. These provisions reduce the holdout problem, and they facilitate negotiations even when some creditors do not agree to go along.

While not a perfect substitute for chapter 11, schemes are appealing to debtors who want to restructure their debt obligations because they can be negotiated in advance and often at lower costs than traditional chapter 11 reorganizations. In the past decade, the number of distressed firms restructuring in England has increased dramatically such that the scheme is now perceived to be a viable alternative to chapter 11 for some debtors who want to restructure their contractual obligations quickly.<sup>115</sup>

New developments from 2020 are likely to further increase the desirability of England as a forum. The Company Insolvency Act of 2020 has expanded the relief available to debtors. In particular, it implemented a new insolvency proceeding (referred to as a Restructuring Plan) that essentially adds a right of cross-class cramdown<sup>116</sup> to the scheme of arrangement. The new law also provides for a twenty-day moratorium at the outset of the case.<sup>117</sup>

These developments suggest that England may be willing to adopt additional tools that would make it an even more convenient venue for financially

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<sup>115</sup> *The Rise and Rise of the English Scheme of Arrangement*, ALLEN & OVERY (Dec. 21, 2015), <https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-rise-and-rise-of-the-english-scheme-of-arrangement>.

<sup>116</sup> The cramdown rules require that one class vote in favor of the restructuring plan and that every other class does no worse than it would have done under the “relevant alternative.” Of note, the law does not appear to require that the plan comply with absolute priority. *See In re United Marine*, 197 B.R. 942, 948 (Bankr. S.D. Fla. 1996).

<sup>117</sup> Corporate Insolvency and Governance Act 2020, A9 c. 3; 13c, c. 3, (Eng.), <https://www.legislation.gov.uk/ukpga/2020/12/enacted>.

distressed debtors.<sup>118</sup> And this willingness to change the law to attract debtors is not limited to England. For example, Spain, the Netherlands, and Germany are trying to develop “credible alternatives” in response to the popularity of the English scheme.<sup>119</sup>

Mexico and Canada have also developed attractive reorganization laws, but Singapore in particular has instituted and continues to update an extremely convenient set of rules for financially distressed firms, combining features of chapter 11 with the advantages of schemes.<sup>120</sup> As noted, debtors can reorganize in Singapore if they have a “substantial connection” to the country. As in England, that threshold can be met if a company has substantial assets in Singapore, conducts business in the country, or possesses assets that are governed by Singaporean law.<sup>121</sup>

Singapore has also made substantive reforms that make it appealing to distressed debtors. Singaporean law, for example, provides super-priority to debtor-in-possession financing, a global moratorium on debt collection efforts that resembles the Code’s automatic stay, a cramdown mechanism, and procedures for approving prepackaged schemes.<sup>122</sup>

Again, these foreign jurisdictions do not offer perfect substitutes for chapter 11, and debtors in some types of cases might be more likely than in others to forum shop. The English scheme, for example, is generally a useful tool for resolving intra-class holdout problems and is commonly used to facilitate restructurings involving financial creditors. It is less useful for a debtor seeking a full operational reorganization or one seeking to restructure labor contracts or discharge environmental obligations. This may limit the flight of American debtors seeking to restructure in England.

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<sup>118</sup> United States Courts have already recognized plans under the new statute. *See, e.g.*, Order Granting Recognition and Related Relief at 5, *In re Virgin Atlantic Airways Ltd.* (Bankr. S.D.N.Y. Sept. 3, 2020) (No. 20-11804); Provisional Relief Order at 3–4, *In re Virgin Atlantic Airways Ltd.* (Bankr. S.D.N.Y. Aug. 17, 2020) (No. 20-11804); Order Granting Related Relief at 3–5, *In re PizzaExpress Financing 2 PLC* (Bankr. S.D. Tex. Oct. 5, 2020) (No. 4:20bk34868).

<sup>119</sup> *See The Rise and Rise of the English Scheme of Arrangement*, ALLEN & OVERY (Dec. 21, 2015), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/the-rise-and-rise-of-the-english-scheme-of-arrangement>; Couwenberg & Lubben, *supra* note 16, at 366–74 (noting the emergence of Dutch and Singaporean options in addition to English proceedings).

<sup>120</sup> *See* Gerard McComack & Wai Yee Wan, *Transporting Chapter 11 of the U.S. Bankruptcy Code into Singapore’s Insolvency Laws: Opportunities and Challenges*, 1 J. OF CORP. L. STUD. 69, 81 (2017).

<sup>121</sup> *Re Zetta Jet Pte Ltd and Ors* (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53.

<sup>122</sup> In another move that will make Singapore a more attractive forum, the Singapore Supreme Court recently approved the use of roll-ups in debtor in possession financing. *See Re Design Studio Grp. Ltd and Other Matters* [2020] SGHC 148 [1], [6]. We discuss roll-ups more, *infra* Part III.

But one cannot count on that always being true. The addition of cross-class cramdown provisions in 2020 will make England an attractive forum for a broader set of debtors. And as England—or Singapore, the Netherlands, or some other jurisdiction—continues to innovate, it will attract more cases. The judges in that jurisdiction, like those in Delaware in the 1990s, will then become more experienced and predictable. This is likely to draw even more cases and encourage even further innovation across broader dimensions. And so on.

In the end, the increasing convenience of global bankruptcy forums, combined with the chapter 15's liberal recognition of foreign proceedings, suggests that debtors that are dissatisfied with the American bankruptcy process may find it relatively straightforward to reorganize in forums outside of the United States. The availability of those forums is likely to increase, and while some countries will race to the top, it is reasonable to expect others to race to the bottom with by with laws that transfer value to managers and provide opportunities for debtor opportunism.

#### *D. Forum Reform*

One might respond to global forum shopping with proposals to eliminate or reduce debtors' access to foreign jurisdictions.<sup>123</sup> But that approach faces several challenges that are not present when regulating domestic venue. First, it would be difficult to enforce domestic rules that dictated a specific forum for a cross-border proceeding. Second, and more importantly, even when enforceable, such rules would impose extreme costs by disrupting the global cross-border insolvency systems.

A domestic law attempting to cut off debtors' forum shopping opportunities might take various forms. A law instructing certain debtors to file domestically alone would be ineffective. As long as foreign jurisdictions welcome debtors and chapter 15 remains in effect, nothing would have changed. A solution then requires at least a change to chapter 15's recognition rules. Perhaps this change could take the form of a full repeal or an amendment to limit the cases that are entitled to recognition. For example, an amendment to the definition of COMI could provide an 'American COMI' for any debtor with significant assets and

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<sup>123</sup> LoPucki himself has suggested that international forum shopping could recreate the same problems as domestic venue shopping, but, to our knowledge, none of the advocates of bankruptcy venue reform has considered how the availability of foreign venues would interact with domestic venue reforms. See LoPucki, *supra* note 110, at 728; cf. *In re Agrokor d.d.*, 591 B.R. 163, 167 (Bankr. S.D.N.Y. 2018) (explaining the English Gibbs rule, which attempts to limit access to non-English forums by prohibiting recognition in England of foreign proceedings that affect any debt governed by English law).

affiliates in the United States. Such debtors could not qualify for foreign main proceedings, thus limiting the relief available under chapter 15.

Still, that would not fully eliminate the accessibility of foreign forums. Even before and without chapter 15, state and federal courts in the United States have applied general principles of comity to recognize and enforce foreign proceedings. And they have stated that such comity is especially appropriate for foreign insolvency proceedings. This recognition is usually defensive in nature. The debtor can point to the foreign proceedings in litigation after a creditor has taken action that violates those proceedings. This is less attractive than the preemptive injunctions available through chapter 15, but debtors do still pursue this avenue of relief in some cases.<sup>124</sup> Thus, a repeal of chapter 15 or a new definition of COMI would make recognition harder to secure but would not eliminate the possibility altogether. Elimination would require an extreme rule altogether prohibiting state and federal courts from recognizing certain foreign judgments.

Additionally, such laws, if enforceable, could push some debtors to shift assets abroad to avoid the law's reach. Prohibiting recognition would do little to deter international foreign shopping if multinational corporations simply moved their headquarters and assets abroad to take advantage of more convenient restructuring forums. Those moves might be rare given the costs of moving assets, but firms have undertaken similar avoidance strategies in other contexts such as tax structuring.

Most troubling, however, is that a broad nonrecognition rule could upend the entire emerging global system of cross-border insolvency.<sup>125</sup> Other jurisdictions might respond with strategic retaliatory measures. Each country would have an incentive to require that multinational firms use that country's bankruptcy processes to restructure any assets located within its jurisdiction. Corporations that are active in multiple countries would be forced to go through multiple bankruptcy processes with conflicting results whenever they are in financial

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<sup>124</sup> See *Barclays Bank PLC v. Kemsley*, 992 N.Y.S.2d 602, 607 (N.Y. Sup. Ct. 2014) (state court recognizing a foreign proceeding under general principles of comity after a bankruptcy judge had rejected recognition because the foreign case was neither a foreign main nor foreign nonmain proceeding); *EMA GARP Fund v. Banro Corp.*, 18 Civ. 1986 (KPF), 2019 U.S. Dist. LEXIS 27387, at \*19 (S.D.N.Y. Feb. 21, 2019) (granting recognition under general principles of comity in the absence of any chapter 15 proceeding).

<sup>125</sup> See Pottow, *supra* note 110, at 787 (arguing that a territorialist approach to cross-border insolvencies would undermine predictability and encourage "inter-system arbitrage between territorialist and universalist courts"); LoPucki, *Courting Failure Book Summary*, *supra* note 39, at 336–37; Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 160–61 (2005); Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2217 (2000).

distress—precisely the outcome the Model Law was trying to avoid. Attempts of this sort to limit international forum shopping could therefore make cross-border insolvencies less efficient and strike a major blow to global financial markets, defeating the core purpose of the Model Law.

An alternative approach, which we advocate below, is to address forum reform along with venue reform through substantive amendments and precommitment mechanisms.

### III. THE INTERACTION BETWEEN GLOBAL FORUM SHOPPING, DOMESTIC VENUE SHOPPING, AND CURRENT REFORM PROPOSALS

Domestic venue rules look different in a world where parties can opt for a foreign forum if they don't like the prescribed domestic venue. Reforms that restrict a debtor's domestic choice will replace the venue race—to the extent one exists—with a much costlier global forum war. The result will not be a redistribution of cases among districts in the United States, but rather the dissemination of cases to foreign jurisdictions that more openly and directly compete for cases with debtor-friendly procedural and substantive rules. Such limitations would in some cases push debtors to restructure in places like England, Singapore, Canada, or Mexico. And as those jurisdictions see the opportunity, they will take more aggressive steps to attract debtors.<sup>126</sup> In this way, venue reform runs the risk of trading mild venue shopping for much more significant forum shopping.

Reform proposals to limit a debtor's choice of domestic venue ignore this problem. Consider, for example, debtors who choose venue based on judicial expertise and predictability. Those debtors may view access to that expertise and predictability as the most attractive feature of chapter 11. Cutting off access to

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<sup>126</sup> This is not a merely theoretical conjecture. Consider the Irish response to Brexit. The United Kingdom's move to exit the European Union was a rare example of a jurisdiction taking action that limits the attractiveness of its own insolvency courts. Obviously, larger political forces were at play, but Brexit reduced the enforceability of United Kingdom schemes throughout Europe. The opportunity this move creates for other jurisdictions was not lost on Irish insolvency lawyers. The American Bankruptcy Institute's Thirteenth International Insolvency & Restructuring Symposium was entitled, "Dublin – Open for Business," and included several articles by Irish lawyers that included the following headlines and quotes about the effect of Brexit on Irish schemes of arrangement: "Barry Cahir Sees a Big Future for Ireland's Scheme"; "Meanwhile the Irish Scheme offers a genuine alternative. 'We need to tell our foreign colleagues about that,' said [Jane] Marshall."; "McAteer Sings the Praises of the Irish Scheme"; "[With Brexit] lawyers in Dublin are pushing Irish Schemes as a viable alternative." Symposium, 13th International Insolvency & Restructuring Symposium: Dublin – Open for Business, AM. BANKR. INST. (Oct. 19–20, 2017). One should expect a similar reaction from forums around the world if the United States limits domestic venue choice. It is hardly a stretch to imagine headlines touting the availability of foreign jurisdictions that replicate the lost benefits of Delaware or New York.



judges that specialize in large chapter 11 cases would make chapter 11—which is generally more costly than foreign proceedings—less attractive. At some point, those costs will not be worth it. The same debtor who was willing to bear those costs in the Southern District of New York may not be willing to do so in a less predictable venue.

For other debtors who choose venue based on differences in legal precedent, reforms that reduce venue options will just push them to the global system. A debtor who cannot access the favored law in Delaware may seek it in the Netherlands. And while domestic venues are constrained in their ability to change legal precedents, foreign forums are not. While Delaware cannot unilaterally adopt a different bankruptcy code than California, the Netherlands certainly can.<sup>127</sup>

As a concrete example, consider the issue of roll-ups in debtor-in-possession financing. A roll-up is a special provision in a post-petition financing transaction that can convey a priority benefit to certain creditors.<sup>128</sup> Roll-ups are important to debtors who are negotiating with sophisticated creditors to secure crucial post-petition financing. But they are also controversial because they provide opportunities for abuse.<sup>129</sup>

Different venues in the United States take different approaches to allowing roll-ups. Approaches abroad differ as well, and in a recent case, the Singapore Supreme Court, citing authority from the Southern District of New York, approved the use of roll-ups in debtor-in-possession financing.<sup>130</sup>

This presents a situation where well-intentioned domestic venue reform could backfire. To the extent that a debtor would choose a venue in order to secure favorable law on this topic, that represents the worst form of forum shopping. But attempts to solve the problem by restricting venue choice will push the debtor abroad. If the debtor is told that it cannot shop for the domestic venue that favors roll-ups, it might instead shop for the foreign forum that does.

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<sup>127</sup> In this way, international bankruptcy forum shopping looks more like the domestic incorporation races, where each state can create its own corporations' laws. *See supra* note 110.

<sup>128</sup> With a roll-up, a post-petition loan from a creditor is conditioned upon using some of the new funds to pay off pre-petition loans held by that same creditor. The result is that the pre-petition loan is rolled into the post-petition loan and receives special payment priority. Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Opens the Creditors' Bargain*, 99 VA. L. REV. 1235, 1246–47 (2013).

<sup>129</sup> See AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11 77–78 (2014); Cliff White, Director, U.S. Trustee Program, Remarks Before The Delaware Bankruptcy American Inn of Court (2018) (transcript available at <https://www.justice.gov/ust/speech/remarks-director-cliff-white-delaware-bankruptcy-american-inn-court>).

<sup>130</sup> *Re Design Studio Group Ltd and Other Matters* [2020] SGHC 148 [4].

If the debtor is denied access to the Southern District of New York, it can go to Singapore—instead of the less favored United States venue that was prescribed—to secure the same substantive outcome that would have been available in New York.

And while Singapore is one of the most sophisticated and efficient forums for insolvency proceedings in the world, that may not be true of the next forum to enter the fray. Sensing an opportunity to attract debtors in light of restrictive venue rules, another jurisdiction may attempt to do so with substantive rules that directly transfer value to the debtor's managers. The costs of that scenario could be high: jurisdictions will waste resources on attracting debtors; debtors will waste resources on establishing jurisdictional connections; creditors will waste resources trying to prevent the debtor from making those connections; and creditors will raise the ex ante cost of capital in anticipation of ex poste value transfers.

Apart from these direct costs of global forum shopping, the shift described above could also have wide ranging indirect costs. For instance, proposals limiting a debtor's choice of venue but not forum will have a disproportionate impact on small businesses. Because smaller firms are less likely to have access to foreign forums, they will have less opportunity to file abroad. A small firm might be stuck in its local district while a large, multinational firm can shop among various forums, thus providing an additional competitive advantage to large firms.<sup>131</sup>

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<sup>131</sup> Other indirect effects of venue reform and its interactions with other bankruptcy laws may also be worth considering. For instance, venue reform with regard to chapter 11 may have implications with regard to individual chapter 13 cases. Large corporate cases take up a judge's time and require different judicial skills and expertise than individual cases. Time spent deciding large corporate cases is time not spent on chapter 13 cases. And the expertise gained is not fully transferable. In some districts that is not a major concern. In Delaware there are not many chapter 13 cases. And even the Southern District of New York has a relatively low number of chapter 13 cases. Chicago and Atlanta present entirely different stories. In 2019, the District of Delaware (DD) had 860 chapter 13 cases while the Northern District of Illinois (NDIL) had 15,718 and the Northern District of Georgia (NDG) had 14,172. *See* AM. BANKR. INST., DECEMBER 2019 BANKRUPTCY STATISTICS – STATE AND DISTRICT (database updated 2020), <https://www.abi.org/newsroom/bankruptcy-statistics?page=4>. These three jurisdictions have roughly the same number of judges (DD and NDG have eight judgeships and NDIL has eleven). With significant venue reform moving cases out of Delaware and into courts like the Northern District of Illinois, Delaware would no doubt lose judgeships and the Northern District of Illinois will need to gain them. But more fundamentally the nature of the caseloads and the necessary expertise to decide those cases would dramatically shift for all courts.

#### IV. ALTERNATIVE REFORMS FOR BANKRUPTCY VENUE AND FORUM SHOPPING

In our view, optimal venue reform should be based on two principles. First, for those instances where parties are forum shopping to take advantage of inconsistent substantive law—such as that which occurred in CEOC—the most direct reform available is to eliminate the inconsistency by amending the substantive provisions of the Code.<sup>132</sup> A second, more comprehensive reform would facilitate ex ante commitment to mechanisms for choosing venue and forum. This would likely involve the debtor selecting a default venue and establishing creditor voting rules to alter the default. These principles should guide all venue reform—even when foreign forums are unavailable—but they gain special importance when global forum shopping is part of the equation.

Because the principles are equally applicable to domestic venue and international forum choices, we suggest that similar reforms be implemented with regard to foreign forums in tandem with any domestic venue reforms.

##### *A. Amend Substantive Bankruptcy Law*

The first idea is straightforward and has been discussed by others,<sup>133</sup> so we deal with it quickly. As noted above, a particularly problematic form of venue shopping occurs when debtors shop for favorable legal precedent. This problem can be resolved without forcing debtors to file in their home districts. If debtors seek out bankruptcy courts that have legal precedents that favor a particular class of claimants, then reforms should directly amend the substantive provisions of the Code that permit such outcomes. For example, if inconsistent law on third-party releases drives debtors to the Northern District of Illinois and creditors with an involuntary petition to Delaware, as in the CEOC bankruptcy, then the simplest legislative venue reform is to amend the Code to clarify the law on third-party releases. Alternatively, where a circuit split leads to strategic filings, the Supreme Court can also step in to resolve the split.

Such reforms are particularly important when it comes to nonadjusting creditors, such as tort victims. Debtors and sophisticated creditors might collude to choose venues that transfer value from nonadjusting creditors to other

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<sup>132</sup> This is the legislative solution. A judicial version of this is for the Supreme Court of the United States to definitively resolve circuit splits and open questions of law. See Karen M. Gebbia, *Certiorari and the Bankruptcy Code: The Statutory Interpretation Cases*, 90 AM. BANKR. L.J. 503, 510 (2016).

<sup>133</sup> See, e.g., Rasmussen & Thomas, *supra* note 9, at 1358; Zywicki, *supra* note 36, at 1189.

stakeholders.<sup>134</sup> Regardless of how infrequent this problem is, the precommitment solutions discussed below cannot mitigate the harm for nonadjusting creditors because those solutions rely on markets and therefore fail to constrain behavior harming creditors who do not engage in market interactions with the debtor or the other stakeholders. Legislatures and courts should therefore make it a first priority to clearly and quickly resolve inconsistencies that affect the substantive rights of nonadjusting creditors.<sup>135</sup>

One objection to this focus on resolving substantive inconsistencies might be that it is unrealistic—that circuit splits are inevitable. The response to this objection turns on one’s faith in the Supreme Court and in Congress. While Congress and the Supreme Court may not always resolve such splits, that does not mean they categorically refuse to do so.<sup>136</sup> In fact, the Supreme Court has granted certiorari to resolve circuit splits in a number of bankruptcy cases in the past few years.<sup>137</sup> Congress, too, has repeatedly amended the Code. In fact, amendments to the Code in 2005 specifically addressed several of the practices that LoPucki had identified as driving venue shopping.<sup>138</sup> On the other hand, several substantive splits have remained unresolved for years and, in some cases, decades.

The real question is whether these solutions are more or less achievable than the alternative venue reform. After all, it may be easier for Congress to regularly amend provisions of the Code dealing with vendor orders, third-party releases, and executory contracts than it is to reach a political compromise on meaningful and successful venue reform.<sup>139</sup> Those substantive provisions of the Code are

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<sup>134</sup> This is also relevant when bankruptcy law alters non-bankruptcy entitlements. See Anthony J. Casey & Joshua C. Macey, *The Hertz Maneuver (and the Limits of Bankruptcy Law)*, 2020 U. CHI. L. REV. ONLINE \*1, \*14–15 (2020).

<sup>135</sup> One of us has recently suggested one way to protect nonadjusting creditors. See Vincent S. J. Buccola & Joshua C. Macey, *Claim Durability and Bankruptcy’s Tort Problem*, 38 YALE J. ON REGUL. 766, 770, 795–809 (2021) (proposing a “super-durability norm” that would produce similar effects to a super-priority rule for tort claimants); Joshua C. Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Limits of Chapter 11*, 71 STAN. L. REV. 879, 888 (2019) (analyzing the nonadjusting creditor problem in the context of coal mine bankruptcies). We discuss this again in the global forum context. See *infra* page 505–07.

<sup>136</sup> Whether they reach the substantively right outcomes is another matter.

<sup>137</sup> See, e.g., *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 982 (2017); *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 714 (2020); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656 (2020); *City of Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021).

<sup>138</sup> Zywicki, *supra* note 36, at 1192–94 (discussing various amendments of this nature). There is considerable debate about whether the amendments were appropriate or successful. Our point is simply that Congress was able to legislate with respect to the relevant substantive issues.

<sup>139</sup> Here we are talking about resolving substantive inconsistencies as a reform to reduce domestic venue shopping. To the extent such substantive measures also create or eliminate inconsistencies between the United States and foreign forums, they can reduce or increase certain types of global forum shopping. These ancillary

hardly salient topics, and intricacies of corporate bankruptcy law do not usually get politicians and voters worked up. The same cannot be said of venue reform. The local and regional interests in venue are strong and they cross party lines in unusual ways. Professional associations, judges, and others will be sure their voices are heard. These battle lines have been drawn for quite some time. This in part explains why venue reform has seen so little action despite so many calls for reform over the last two decades.

In the end, we are left to guess at whether case law, substantive legislation, or venue legislation is most feasible. The main point of our project here is to lay out principles and tools for ideal venue and forum rules rather than prescribe the political means of implementing them.<sup>140</sup>

### *B. Precommitment to a Choice Mechanism*

Many existing venue reforms would eliminate both good and bad venue shopping. Forcing debtors to file in their local districts will prevent opportunistic venue shopping designed to skirt regulatory obligations and benefit incumbent management, but it will also prevent debtors from availing themselves of judges who have experience resolving large and complicated cases or avoiding local biases that distort cases.<sup>141</sup>

A superior approach is to develop tools that allow parties to retain the benefits of choice while eliminating the incentives for opportunistic shopping. Allowing debtors to precommit to a mechanism for choosing venue would accomplish this goal. The idea builds on the work of Professors Robert Rasmussen and Randall Thomas.<sup>142</sup> In 2000, they proposed allowing a debtor to

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effects should be considered in evaluating reforms.

<sup>140</sup> Any attempt to temper the principles based on judgments of institutional feasibility quickly complicates things and may run into an inside/outside fallacy. See generally Eric Posner & Adrian Vermeule, *Inside or Outside the System 2* (Uni. of Chi., Working Paper No. 422, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2232153](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232153) (describing the inside/outside fallacy as occurring “when the theorist equivocates between the external standpoint of an analyst of the constitutional order, such as political scientist, and the internal standpoint of an actor within the system, such as a judge . . .”).

<sup>141</sup> LoPucki has acknowledged this issue, stating:

One problem with requiring companies to file in their local bankruptcy courts is that few of those local courts would have much expertise in the reorganization of large public companies. To put the same point another way, the big-case expertise of the American bankruptcy courts would be spread among so many judges that few or none could develop substantial expertise.

LOPUCKI, *supra* note 4, at 252–53. LoPucki therefore proposes the establishment of specialized courts to resolve the largest cases. See LOPUCKI, *supra* note 4, at 252–53. This might make judges experienced, but it would eliminate any benefits of competition.

<sup>142</sup> Rasmussen & Thomas, *supra* note 9, at 1357.

precommit to a specific venue in its corporate charter.<sup>143</sup> Rasmussen and Thomas argued that ex ante timing was key and that precommitting to a venue prior to distress, “when the firm seeks capital in the financial markets,” would give managers “an incentive to select the venue which promises to maximize the value of the firm as a whole.”<sup>144</sup>

This proposal has clear advantages over the current system. If firms can precommit to a bankruptcy venue, then other stakeholders will push them to choose efficient venues and will pay a premium (in the form of reduced capital costs) to firms that do. That preserves good venue competition because ex ante (before their litigation positions are set) stakeholders who can bargain freely will collectively prefer efficient venues with expert judges that maximize the value of the estate.<sup>145</sup>

There are, however, several drawbacks to their proposal. The first is rigidity. Sometimes the situations of the stakeholders change. And many stakeholders enter their relationship with the debtor at different points in time. Moreover, an ex ante choice leads to uncertainty as a particular venue can become more or less attractive after a firm has precommitted to that venue. To the extent the parties negotiated a venue choice based on the expertise of a particular judge or the efficiency track record of a particular venue, that decision may become outdated. Judges may retire or districts may become backlogged. New precedents may make a formerly attractive venue inconvenient. In short, as the world changes and venues compete for excellence, new choices will become optimal. When any of these things are true, the debtor and the stakeholders might all prefer to negotiate to a new venue choice.

Rasmussen and Thomas foresee this objection and propose that the debtor be allowed to change venue commitment by amending its charter with the consent of a majority of its creditors and shareholders.<sup>146</sup> The problem with that proposal is that it creates an arbitrarily high bar that would make it extremely

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<sup>143</sup> Rasmussen & Thomas, *supra* note 9, at 1357.

<sup>144</sup> Rasmussen & Thomas, *supra* note 9, at 1397.

<sup>145</sup> The market nature of the solution assumes ex ante bargaining is possible. To the extent that the parties cannot adequately bargain to a suitable contract over venue, the solution might fail. See Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1719 (2020). But there are reasons to think that bargaining and contracting will be sufficient here. First, the options are discrete and easily defined. Second, breach is easily observable and verifiable. Third, the bargaining need not be perfect. It need only do better than the alternative venue rules. We are comparing this bargain to a system where a debtor has unfettered ex post choice or a system where the legislature dictates an arbitrary venue. Finally, if ex ante agreements cannot be completely drawn, the parties might precommit to a mechanism that allows a neutral outsider to select or oversee the selection of a bankruptcy venue.

<sup>146</sup> Rasmussen & Thomas, *supra* note 9, at 1403.

difficult to change from the originally chosen venue. Each group—management, creditors, and shareholders—would have an effective veto over amendment.

The idea seems to be that there is value in making the *ex ante* negotiated venue into a sticky default. But this can create problems of its own. Sticky defaults create veto rights that provide opportunities for strategic hold out. For instance, out-of-the-money shareholders would likely object to any attempt to switch to an efficient forum without some payoff. Additionally, management may collude with a majority of creditors and shareholders to extract value from the minority.

Perhaps the voting rule Rasmussen and Thomas propose is sensible. But there is no reason to think it is optimal. It might be better to give the vote exclusively to the creditors. Rasmussen and Thomas reject this idea because creditors have the wrong incentives at the time of filing. But the same is true of shareholders and managers.<sup>147</sup> And even if the rule Rasmussen and Thomas propose is optimal in some cases, stakeholders and firms are heterogenous. They have different preferences and characteristics and face different circumstances, all of which might be relevant in determining the optimal voting rule. A voting rule may be appropriate in one situation or for one firm but not in another. Because of these differences, it is likely that the optimal system would allow for different choice mechanisms tailored to a specific firm.

Recognizing this, the precommitment to a default venue becomes less important than choosing the right voting rule or choice mechanism to alter the original choice. But it is difficult for lawmakers to identify the perfect choice mechanism, and no one rule can fully eliminate the threat of self-interested action at the time of filing.

Thus, unlike Rasmussen and Thomas, who would allow parties to precommit to a venue, we would allow parties to precommit to a mechanism for choosing (and later amending the choice of) venue. Just as the *ex ante* market players can efficiently assess the value of venue options, those market players might also better assess potential hold-up threats associated with locking in a venue choice.

In this way, debtors would stipulate to venue-choice rules in their charter (or some other public document). They might choose a default rule subject to majority voting or supermajority voting; they might set their initial choice in stone; or they might opt for the status quo in which debtors are given wide discretion to choose the venue. The point is that the debtor precommits to the

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<sup>147</sup> Rasmussen & Thomas, *supra* note 9, at 1403–06

rule, and because the commitment is public, the creditors will price that rule into their contracts with the firm pushing debtors to choose the efficient rule.

As for amendment, the debtor would also select the voting rules for amending the choice rule. Thus, the debtor could grant its board of directors the right to choose venue but also provide that the rule can be amended by a supermajority of one class of creditors. Or the debtor could provide that a majority of creditors must vote on venue and that a majority of the same creditors has the right to amend the rule. The point is that the rules are entirely determined by the debtor *ex ante*.

The rationale underlying the Rasmussen and Thomas proposal is even more compelling under this approach. A debtor that precommits to a selection mechanism is not forced to lock into a venue that may become inconvenient if, for example, judges retire or circuit precedent changes. And that debtor can be expected to allocate the voting rights to minimize the likelihood of *ex post* value destroying hold-up because doing so will lower its cost of capital.<sup>148</sup> Because creditors will pay a premium for an efficient venue selection mechanism, firms will have a financial incentive to select a process that discourages opportunism and holdup.

This proposal would preserve the benefits of venue choice while providing a market check on opportunistic venue shopping. It gives parties more flexibility than Rasmussen's and Thomas's proposal and more flexibility than the status quo and existing reform proposals. That flexibility will become even more important as global forums become more convenient because—as we have noted throughout—measures that limit flexibility run the risk of pushing debtors to the global market for bankruptcy forums. That result is exactly the opposite of the result intended with venue reform.

### *C. Similar Reforms for Global Forum Shopping*

#### *1. Precommitment*

On its own, the precommitment mechanism we propose is superior to other venue reform proposals. This is true regardless of whether venue shopping is a large or small problem or no problem at all, and regardless whether or not debtors are in a position to shop for foreign forums. It would be preferable, though, if foreign jurisdictions adopted similar reforms with regard to the choice

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<sup>148</sup> Nonadjusting creditors such as tort victims remain a problem for this proposal, as they do for most bankruptcy design problems.



of global forum. The logic is the same, although the specific enforcement measures and effects are different in nuanced ways. We turn to global forum reform now.

Indeed, if global forum shopping is not taken into account, the reforms discussed above might drive some debtors to file abroad to avoid the effects of the mechanisms they chose *ex post*. As with venue, this choice could be good or bad. The good version would be that they reject the domestic venue to which their precommitment points in favor of a more efficient foreign forum.. The bad version is that the managers make a unilateral *ex post* move to seek the global forum that is most favorable to management's interests. The latter is more likely given the unilateral nature of the decision.

But the problem can be mitigated by allowing the parties to also agree to include foreign forums in their choice mechanism. In this way, their choice mechanism would point to both the appropriate venue(s) and the appropriate forum(s),<sup>149</sup> and it could include terms for amending the choice process for venue or forum or both.

The enforcement of such a provision will, however, look very different for global forums than it does for a domestic venue. In a perfect world, all global jurisdictions would enforce these forum-choice provisions on the same terms. But enforcement is more difficult when forums apply—as they likely will—different standards of enforcement. The easiest choices to enforce would be those pointing outside the United States. Bankruptcy law could simply require dismissal of any chapter 11 case that by the terms of the choice mechanism should have been filed in a foreign forum.

Things are more complicated when the provision points to the United States or excludes one foreign forum in favor of another. The difficulty is that even if the forum choice were enforceable under United States law, a court in an excluded jurisdiction might ignore the precommitment and take the case. Under the current rules for recognition of foreign proceedings—under both chapter 15 and general rules of comity—the judgments and orders of that court would likely be entitled to recognition and enforcement in a subsequent proceeding in the United States. This is true despite the fact that the issuing forum ignored a contract that was otherwise enforceable under United States law.

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<sup>149</sup> Such provisions could give debtors the choice among several venues and several forums.

To solve this, United States courts could refuse to recognize any judgment issued in violation of the choice mechanism.<sup>150</sup> Thus, if the mechanism pointed to the United States as the required forum, a United States court would refuse to recognize an English scheme of arrangement initiated by the debtor. Likewise, if the mechanism pointed to Singapore, a United States court would recognize proceedings in Singapore but not proceedings in England.<sup>151</sup>

One might object that this approach would conflict with chapter 15's comity principles.<sup>152</sup> If some forums ignore the choice mechanisms while the United States insists on enforcement, debtors might have to pursue parallel proceedings. But this is not the likely outcome, at least not for debtors with significant assets in the United States. In those cases, debtors are likely to comply with the choice mechanism in order to secure enforcement in the United States.<sup>153</sup>

## 2. *Amend Substantive Bankruptcy Law*

A frequent argument for domestic venue reform is that managers and creditors can choose jurisdictions in order to extract value from nonadjusting creditors. While not every case involves nonadjusting creditors, cases that do present a risk of opportunistic venue shopping. Above we discussed the importance of quick and clear substantive reforms to reduce the potential for this form of opportunism.

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<sup>150</sup> This is akin to the treatment of forum selection clauses in general litigation. Existing and proposed rules and statutes often allow or require courts to refuse recognition of foreign judgments that are inconsistent with forum selection clauses. But these rules do not usually cover insolvency proceedings, where multiparty public mechanisms for forum choice of the type described here have not been previously available. *See In re Gercke*, 122 B.R. 621, 632 (Bankr. D.D.C. 1991) (“But the intervention of insolvency proceedings requires the mandatory venue clause to yield to considerations of comity and the interests of all creditors of Dominion’s estate in an equality of distribution.”); *In re Northshore Mainland Servs. Inc.*, 537 B.R. 192, 206 (Bankr. D. Del. 2015) (declining to enforce a two-party venue selection clause in an insolvency proceeding); Richard Levin & Carl N. Wedoff, *What Did You Expect? Insolvency Forum Clauses*, 35 AM. BANKR. INST. J. 22, 22–23 (2016) (proposing that parties adopt special insolvency forum clauses).

<sup>151</sup> As a separate point, the committed choice mechanism could also point to a specific venue for the chapter 15 proceedings. A choice mechanism might require the debtor to seek recognition in the Southern District of New York rather than the District of Delaware or vice versa. The general analysis and our proposals for reform are the same here as they are for venue in chapter 11 filings more generally. But note that the existing venue rules are different for chapter 11 and chapter 15. *See supra* note 4. *Compare* 28 U.S.C.A. § 1408 (West), *with id.* § 1410.

<sup>152</sup> *See supra* page 492.

<sup>153</sup> This is different from the outcome when there is an outright ban on recognition of foreign proceedings. *See supra* page 492. With an outright ban, the debtor is deprived of all possibility of cross-border recognition and is likely to pursue parallel proceedings in multiple jurisdictions because it has no other option. Here, the nonrecognition is narrowly tied to the choice mechanism and the debtor is still allowed to shop for a forum and seek recognition according to the terms of the choice mechanism, which it will, itself, have selected *ex ante*.

The same problem arises in the context of global forum shopping. But the appropriate reform measures are more complicated. No legislative body or court can definitively resolve substantive inconsistencies that exist across international borders. The United States cannot change the law in Singapore, and Singapore cannot change the law in the United States. At best, when inconsistencies exist, one forum's lawmakers or courts could attempt to achieve uniformity by fully mimicking the laws of the competing forum. But few forums would commit to a form of consistency that essentially cedes lawmaking authority to a foreign jurisdiction. Such a move might also set off a full-out forum war with each jurisdiction competing itself to the pro-managerial bottom.

What to do? The key is to tie substantive consistency to the law of recognition. While the United States cannot force consistency across jurisdictions, it can require certain consistency as a condition of recognition.<sup>154</sup> To be clear, this is a drastic measure and—for reasons discussed in Part II—should be used sparingly, but it could be effectively deployed when it comes to nonadjusting creditors. The rationale behind the measure is that nonadjusting creditors do not have a say in designing the *ex ante* choice mechanism and often may not have a voice in any subsequent decisions to implement or amend the mechanism. As such, it is problematic to bind these creditors to a forum choice that disadvantages them. Moreover, the United States has an interest in protecting domestic nonadjusting creditors from opportunistic forum shopping in cases that would otherwise have been brought in the United States.

The solution to this problem is to prohibit recognition of a foreign proceeding when: (1) the proceeding affects the rights of domestic nonadjusting creditors; (2) those rights were affected such that the nonadjusting creditors would have been better off if the case had been brought in a United States forum; and (3) the United States would have been the appropriate default forum absent the choice mechanism.

To implement this rule, we would need to define some terms. First, of course, is the question of who counts as a nonadjusting creditor. This is a decades-old debate. We are confident that most tort and environmental victims fall into this category, but we do not attempt a further definition here. For now, we just note that the reform we propose requires a definitive statement—by legislation or by Supreme Court precedent—on the matter.

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<sup>154</sup> The case *In re Vitro* might be viewed as a United States court doing this. The court drew a line at forum shopping to take advantage of a legal inconsistency that allows insiders to vote for their own releases. *See In re Vitro SAB De CV*, 701 F.3d 1031, 1053 (5th Cir. 2012).

Second, to determine whether the creditor is worse off, a court will have to determine what rights and payments these particular creditors would have received had the proceedings been initiated in a United States court.

Third, there should be a default forum rule—for these creditors only—to determine whether the United States would have been the appropriate default forum. To respect principles of comity and the integrity of the cross-border insolvency system, the scope of this measure should be narrow. The United States should limit itself to protecting nonadjusting creditors with interests located in the forum. For example, the default forum might be the United States for a company that has its principal place of business in the United States and has domestic tort creditors. Alternatively, the United States could be the default forum whenever domestic tort or environmental claimants have claims over a certain amount.

Note that the debtor is not required to actually bring its case in the default United States forum. It has several other options. First, it can choose an alternative forum if the nonadjusting creditors are not affected or do no worse in that forum than they would have done in the United States. Second, the debtor could choose an alternative forum if it compensated the nonadjusting creditors for any shortfall in their position (compared to what would have resulted in the United States). Finally, the debtor could seek consent from the nonadjusting creditors to file in an alternative forum.

This system would protect nonadjusting creditors against opportunistic forum shopping but also limit the ability of those creditors to veto forum choice and minimize disruptions to the cross-border insolvency system. If the nonadjusting creditors are a small part of the case, or if the alternative forum's value is unrelated to the rights of nonadjusting creditors, the debtor could avoid a veto by ensuring those creditors consistent treatment in the alternative forum.

The enforcement of this solution would happen by way of the rules for recognition under chapter 15 or under general principles of comity. A debtor seeking United States recognition of a foreign proceeding would have to answer objections brought by nonadjusting creditors who claim they were disadvantaged by the choice of forum. When such disadvantages were sustained, the court would deny recognition (unless the debtor could cure the disadvantage).

Again, this is a drastic measure for reducing global forum shopping and should be used sparingly as it has the potential to disrupt the cross-border

insolvency system and lead to retaliation in the global forum wars.<sup>155</sup> We advocate this measure only for forum shopping matters related to nonadjusting creditors where the market-based solutions, such as precommitted choice mechanisms, are likely to be inadequate. With that limitation, we do not imagine that this rule would affect many cross-border insolvency cases.

### CONCLUSION

The primary criticism of venue shopping is that small differences in precedent, judicial exercises of discretion, and local procedures motivate parties to waste resources on venue shopping and perhaps even motivate jurisdictions to participate in a race to the bottom. But as we have discussed, ending the race by prohibiting venue shopping may lead to a more dramatic forum war.

While Delaware's ascent in the venue race was subtle and perhaps organic, foreign jurisdictions have made no secret of their intent to join the battle to attract debtors. Reforms that cut debtors off from their favored venues (or favored judges) in Delaware, New York, and Texas, significantly lower the debtor's opportunity cost of filing abroad. It may be that the expertise of one judge in White Plains was benefit enough for debtors to incur the extra costs of chapter 11 proceedings, costs that foreign jurisdictions can eliminate. That judicial expertise might be the single most important aspect of the United States bankruptcy system. Once access to that benefit is curtailed, a streamlined scheme of arrangement in England may look a lot more attractive than a costly chapter 11 proceeding before a less experienced or unpredictable judge in one of the United States' ninety-one other districts.

And unlike the venue race, the forum war will be fought with significantly more powerful instruments. Judges in different United States venues cannot unilaterally change the controlling law. Those courts are bound by the Code and the precedent of the courts of appeals and the Supreme Court. They may use procedural mechanisms to change the speed of the case, or they may exercise discretion at the margins when finding facts or interpreting law or precedents, but those are feeble measures compared to what a foreign jurisdiction can do to

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<sup>155</sup> It would, however, be much narrower than the Gibbs Rule, which is currently applied in England. That rule prohibits recognition in England of foreign proceedings that affect any debt governed by English law. See Stephan Mandus, *The Rule in Gibbs, or How to Protect Local Debt from a Foreign Discharge*, OXFORD BUS. L. BLOG (Dec. 19, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/12/rule-gibbs-or-how-protect-local-debt-foreign-discharge>. The rule described here is far narrower because it would only prohibit recognition of a foreign proceeding when (1) the proceeding affects claims of nonadjusting creditors, (2) those creditors would have done better had the case been brought in the United States, *and* (3) the United States was the default venue where the case should have been brought.

attract debtors. A foreign jurisdiction can unilaterally change plan voting rules, provide new measures for obtaining financing, or even alter priority. And it is likely to be especially bold in doing so if it senses that debtors are dissatisfied with chapter 11 relief being bundled with unpopular venue restrictions.

To be sure, we do not here take a position on whether the United States should enter an unconstrained war to be the dominant global insolvency forum. Such a war might involve substantive legal changes to make chapter 11 more efficient in a race to the top or to confer benefits on management in a race to the bottom. Recent reforms in other forums as well as substantive domestic proposals—such as the “chapter 16” proposal for a quick streamlined reorganization option—might be viewed as the first shots in this war. But the lengths to which jurisdictions are willing to go and whether their moves will push forums to the top or the bottom are still unclear.

But certainly, lawmakers should, in reforming venue rules, consider how such reforms interact with international developments and the availability of foreign forums and try to achieve a more cohesive set of policies that address both domestic venue and global forum choices. The reform elements we propose offer the foundation for those policies.