MIND THE GAP: FIGHTING FORUM SHOPPING IN TRANSNATIONAL BANKRUPTCIES UNDER CHAPTER 15

by

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Forum shopping is ubiquitous in transnational bankruptcy. This has traditionally resulted from debtors' twin powers to choose where they file and change the law that governs their property by shipping it abroad before bankruptcy. It was hoped that the United States' adoption of Chapter 15 of the Bankruptcy Code, which extends the debtor's home law to anywhere in the world it has assets, would close up shop. However, forum shopping has survived in subtler ways that have so far evaded scholarly attention. Consistent with Chapter 15's universalist aims, a foreign debtor can now enforce rights from its home country in the United States—regardless of whether the United States would give those rights to its own debtors. At the same time, limits that the home country sets on the debtor's rights are preempted by U.S. law whenever they are stricter than the Bankruptcy Code. The result is to give foreign debtors the best—and their creditors, the worst—of both the old and the new paradigms.

To improve creditors' lot, while realigning Chapter 15 with its normative roots, this article proposes making the laws of the debtor's home country presumptive—whether more or less generous than U.S. law. Recognizing that foreign and U.S. law are sometimes irreconcilable, it further proffers a test to determine when this presumption should give way. The article contends this proposal is judicially feasible due to its similarity to inquiries bankruptcy judges already make and the shared common-law tradition of most countries that send Chapter 15 filers. Moreover, it demonstrates why instituting a home-law presumption would be a politically attractive amendment to the Bankruptcy Code. At a time when scholars increasingly doubt the practicality of the cross-border collaboration that Chapter 15 was intended to achieve, this article seeks to

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reinvigorate faith in the chapter while bringing it closer to its lodestar than ever before.

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INTRODUCTION

The magic of a Christmas in London has inspired hearts for generations, from the novels of Charles Dickens to the holiday single, *Christmas Time*

to Me.[1] Yet, on the eve of bankruptcy in December 1991, management at Maxwell Communications (Maxwell) was anything but jolly.[2]

The owner of several publishing houses, including the famed Macmillan, Maxwell had fallen on hard times since the death of its eponymous founder.[3] In a bid to stay solvent, Maxwell was hemorrhaging subsidiaries and leaning into its $30 million overdraft facility[4] at Barclays Bank.[5] This wasn't an earthshattering sum for Maxwell: It had paid $2.6 billion for Macmillan just three years before.[6] But that was Christmas Past, and now, Barclays was worried Maxwell might default. In a series of threatening messages, Barclays "warn[ed] [Maxwell] that the non-payment of the $30 million" would trigger the bank to "take whatever action . . . required to recover its money."[7] After weeks of hounding, Maxwell caved and wired the cash to London.[8] Less than a month later, it filed Chapter 11.[9]

Vested with the tools of a debtor in bankruptcy, Maxwell had a textbook claim to undo the payment to Barclays. Under § 547(b) of the Bankruptcy Code, a debtor may recover "an[y] interest . . . in property . . . made . . . on or within 90 days before the date of the filing of the petition."[10] As the bankruptcy judge presiding over Maxwell's case opined, the purpose of this avoidance power is to "discourage[] creditors from attempting to outmaneuver each other in an effort to carve up a financially unstable

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[1] *See* JORDIN SPARKS, CHRISTMAS TIME TO ME (RCA Records 2013). Much like the cash taken from creditors of Maxwell Communications, Sparks muses that she "could fly to London" where, as the creditors later did, she might "lose some time to Big Ben."

[2] Maxwell Commc'n Corp. plc v. Barclays Bank plc (*In re* Maxwell Commc'n Corp. plc), 170 B.R. 800, 801-03 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

[3] *Id.* at 801-02.

[4] An arrangement that allows borrowers to withdraw more than they have in their bank account, up to a credit limit. Aluma Zernik, *Overdrafts: When Markets, Consumers, and Regulators Collide*, 26 GEO. J. ON POVERTY L. & POL'Y 1, 7-8 (2018).

[5] *Maxwell*, 170 B.R. at 803-04.

[6] *Id.* at 802.

[7] Maxwell Commc'n Corp. plc v. Barclays Bank plc (*In re* Maxwell Commc'n Corp. plc), 170 B.R. 800, 804 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

[8] *Id.*

[9] *Id.*

[10] 11 U.S.C. § 547(b).

debtor."[11] Barclays did just that—and by taking advantage of its proximity to management to boot. Even so, Maxwell would never see its money again.

With limited exceptions, federal courts have long observed a presumption against the extraterritorial application of U.S. law.[12] Since Maxwell's "transfer ⟦was⟧ to a foreign transferee" and the "the center of gravity of that transfer ⟦wa⟧s overseas," § 547 was powerless to claw back the pilfered funds.[13] Even in a case where the court described British and U.S. authorities as having their "arms locked with ⟦each other to⟧ . . . urge" adoption of an extraterritorial order,[14] assets abroad were as good as gone from the standpoint of Maxwell's stateside bankruptcy.

Maxwell raises a frequent, but rarely easy, question: In a transnational bankruptcy, whose law is it anyway? The answer matters, because failing companies have limited money to pay their creditors, that money is dwindling fast, and who gets paid first (or at all) depends on which country's law applies. Employees of the debtor, whom Mexico and Pakistan assign top priority,[15] fall nearer to the bottom of the heap in the United States.[16] Property that the debtor acquires after bankruptcy, in which Spain allows prepetition lenders to maintain a security interest, is divided among the unsecured creditors in the United States.[17] And whether the U.S. court presiding over an Australian debtor follows Australian or U.S. law on staying creditors' lawsuits is the difference between U.S. creditors collecting now or needing to wait and see what remains after their Australian peers are paid in full—unless the Americans are up to litigate 8,000 miles from home.[18]

The money at issue might be just a pot of cash split among a few sophisticated companies. Or it might be someone's life savings,[19] the funds

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[11] *Maxwell*, 170 B.R. at 808.

[12] Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

[13] Maxwell Commc'n Corp. plc v. Barclays Bank plc (*In re* Maxwell Commc'n Corp. plc), 170 B.R. 800, 814 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

[14] *Id.* at 811.

[15] *See infra* note 102 and accompanying text.

[16] Claims for wages earned during the 180 days preceding bankruptcy receive fourth priority among creditors, and all other employee earnings are treated like general unsecured debts. *See* 11 U.S.C. § 507(a)(4).

[17] *See infra* notes 283-284 and accompanying text.

[18] *See infra* Part III.A.2.

[19] Taylor Locke, *'I'm Out Millions of Dollars': Thousands of Crypto Investors Have*

needed to fix the car they take their kids to school in,[20] or compensation for a tort the debtor inflicted on them.[21] As often happens in bankruptcy, the more sympathetic one's position, the harder a time she will have anticipating choice-of-law issues and the cost of litigation in a far-off forum—and charging the debtor more to account for them. This assumes she is poised to bargain with the debtor at all, a luxury that tort victims and the debtor's employees seldom have. As transnational commercial activity and retail investing rise (and fail[22]), more and more people will be affected by how countries choose to untangle their overlapping insolvency laws.

Unfortunately, the answer to this choice-of-law conundrum—as with most lawyerly questions—depends on who you ask. *Maxwell* offers a window into how international insolvencies traditionally (and in some parts of the world, still do[23]) play out. For centuries, when a company with assets around the globe went bust, each country where the debtor had operated would seize local assets and divide them among local creditors in accordance with local law.[24] Knowing this, strategic debtors (or creditors with enough sway over them) could rewrite the rules governing their assets by shipping them to a more favorable forum right before bankruptcy.[25] The redundant proceedings and duplicative fees that resulted took a toll on judicial resources, creditor recoveries, and the odds of a successful reorganization.[26]

Their Life Savings Frozen as Voyager Files for Bankruptcy Protection, YAHOO! FIN. (July 8, 2022), https://finance.yahoo.com/news/m-millions-dollars-thousands-crypto-223605273.html.

[20] *See infra* note 85 and accompanying text.

[21] *See infra* Part III.A.1.

[22] *Global Trade Growth Returns but Outlook for 2023 Is Poor*, U.N. CONF. ON TRADE & DEV. (June 21, 2023), https://unctad.org/news/global-trade-growth-returns-outlook-2023-poor#:~:text=Over%20the%20first%20three%20months,compared%20to%20the%20previous%20quarter; Krishan Arora, *The Rise of the Retail Investor*, FORBES (Nov. 4, 2022, 7:30 AM EDT), https://www.forbes.com/sites/forbesagencycouncil/2022/11/04/the-rise-of-the-retail-investor/?sh=5940a51b1755.

[23] *See* Kyrgyz Republic v. Kumtor Gold Co. CJSC (*In re* Kumtor Gold Co. CJSC), No. 21-civ-6578, 2021 WL 4926014, at *1-2 (S.D.N.Y. Oct. 20, 2021) (describing efforts by the Kyrgyz government to flout the automatic stay and seize the debtor's gold mine).

[24] *See infra* notes 117-118 and accompanying text.

[25] *See infra* notes 119-122 and accompanying text.

[26] *See, e.g.*, Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2309 (2000); Jennifer Greene, *Bankruptcy Beyond Borders:*

However, collaboration across borders was dismissed as fantastical in a world of coequal sovereigns unwilling to subordinate local interests to foreign ones.[27]

Since 2005, the United States has made strides toward realizing this egalitarian dream through the enactment of Chapter 15 of the Bankruptcy Code.[28] Contrary to the old "grab rule" of territorialism, "Chapter 15 embraces [an approach known as] universalism."[29] This model strives to extend the laws of the debtor's home country—its "center of main interests" (COMI)[30]—to anywhere in the world it owns property.[31] Under Chapter 15, a foreign debtor with assets in the United States may file a request in U.S. court for recognition of an ongoing bankruptcy in its COMI.[32] Assuming recognition is granted (which it nearly always is[33]), the debtor becomes free to administer its assets consistently with the proceeding back home, and the U.S. court pledges to "act[] as an adjunct or arm of" the debtor's COMI.[34]

Rather than the product of a stateside silo, Chapter 15 arose from a UN effort to coordinate transnational bankruptcies. The fruit of that labor—the Model Law on Cross-Border Insolvency[35]—was codified with minor variations as Chapter 15 and its analogues in 59 other countries.[36] Accordingly, whether the debtor is Welsh filing in Wilmington or Californian filing in Canada, the law that applies to a transnational case in a

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Recognizing Foreign Proceedings in Cross-Border Insolvencies, 30 BROOKLYN J. INT'L L. 685, 705 (2005). For a territorialist response to universalism's charge of inefficiency, see notes 290-293 and accompanying text below.

[27] *See infra* notes 148-149 and accompanying text.

[28] *Chapter 15—Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics (last visited July 17, 2024).

[29] *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 306 (3d Cir. 2013).

[30] *See* 11 U.S.C. § 1517(b)(1).

[31] *See infra* Part II.B.

[32] 11 U.S.C. § 1509(a).

[33] *See infra* note 166 and accompanying text.

[34] *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 306 (3d Cir. 2013) (citation omitted).

[35] U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014) [hereinafter MODEL LAW].

[36] *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNCITRAL, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited July 17, 2024).

Model Law country should, wherever possible, be that of the debtor's COMI.

The animating force behind Chapter 15, beyond the efficiency issues noted above, is a concern over forum shopping. Recalling that whose law applies often influences the outcome of a case, bankruptcy—in which the *debtor* decides where to file[37]—seems to invite venue manipulation. Domestically, critics contend that this strategic edge cuts into creditors' ability to make their case and, where the debtor's choice courthouse is far away, to attend the proceedings at all.[38] These perceived iniquities have prompted one bankruptcy judge to dub "[the domestic] venue law . . . the single most significant source of injustice in chapter 11 cases."[39] They have also generated at least six congressional attempts to confine venue to the debtor's principal place of business, though so far without success.[40]

Transnationally, forum shopping looks different and has received less attention in government and academic circles.[41] A foreign debtor in the United States will inherently be filing outside of its COMI (and may need to do so if it has stateside property), meaning the mere act of going abroad cannot be cause for concern. Instead, the variety of shopping over which the most ink has been spilled is that of switching one's COMI at the eleventh hour to bring the worldwide case beneath the law of a debtor-friendly jurisdiction—one that creditors did not anticipate.[42]

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[37] *See infra* note 70 and accompanying text.

[38] *See infra* Part I.A.

[39] Steven Rhodes, *The Baffling Rejection of Venue Reform by the ABI Chapter 11 Reform Commission*, WALL ST. J. (Feb. 9, 2015, 1:19 PM ET), https://www.wsj.com/articles/BL-BANKB-20640.

[40] Bankruptcy Venue Reform Act, H.R. 1017, 118th Cong. (2023); Bankruptcy Venue Reform Act, H.R. 4193, 117th Cong. (2021); Bankruptcy Venue Reform Act, S. 5032, 116th Cong. (2020); Bankruptcy Venue Reform Act, S. 2282, 115th Cong. (2018); Chapter 11 Bankruptcy Venue Reform Act, H.R. 2533, 112th Cong. (2011); Fairness in Bankruptcy Litigation Act, S. 314, 109th Cong. (2005).

[41] Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463, 467 (2021) (describing "the rise of global forum shopping as an alternative for debtors seeking to initiate insolvency proceedings" as "a problem that has largely been ignored in the conventional debate"); Markus Petsche, *What's Wrong with Forum Shopping?: An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005, 1006 n.1 (2011).

[42] *See, e.g.*, Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 155 (2005); Adrian Walters, *United States' Bankruptcy Jurisdiction over Foreign Entities:*

Commentators are right to worry because, for better or worse, forum shopping's effects are greater between countries than within them. Creditors—especially those least resourced—are less likely to be able to participate when the debtor files in a far-flung country instead of a few hours away.[43] The lack of a supranational government means that, if the debtor wishes to rewrite the laws against which creditors lent by sending their collateral overseas, there is little to stop it.[44] And while sophisticated creditors may be able to price this risk into their contracts with the debtor, the result is inflated rates and the diversion of resources away from more productive investments.[45]

Whether or not forum shopping's opponents are correct as a general matter, several authors have painted an attractive picture of Chapter 15's ability to restrain the phenomenon. As evidence, they generally cite a reduction in filings from "haven" jurisdictions: countries with favorable law that are not the debtor's COMI.[46] However, praise is only possible if one overlooks a more insidious variant of forum shopping: filing in multiple countries to obtain more power over one's creditors than the COMI ever intended. Prior scholarship has identified one-half of this problem: Chapter 15's penchant for enforcing COMI-created rights, even if broader than U.S. law.[47] Without negating the possibility of strategic changes in COMI, though, such shopping is hard to separate from Chapter 15's universalist goal: the extension of COMI law around the world.

The corresponding piece of the forum-shopping puzzle, which has so far eluded scholarly commentary, is that Chapter 15 *also* gives debtors the benefit of the old territorial default rule: U.S. law that goes broader than what COMI law provides. Hence, an Australian debtor gets a stay on creditors' suits not contemplated by Australian law, leaving U.S. creditors to recover nothing or litigate on the other side of the world.[48] A Cayman

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Exorbitant or Congruent?, 17 J. CORP. L. STUD. 367, 379 (2017). *But see* John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOKLYN J. INT'L L. 785, 801 (2007) (suggesting that COMI is less manipulable than the location of individual assets under territorialism).

[43] *See infra* notes 85-86 and accompanying text.

[44] *See infra* notes 92-93 and accompanying text.

[45] *See infra* notes 88-91 and accompanying text.

[46] *See infra* notes 176-183 and accompanying text.

[47] *See infra* note 191 and accompanying text.

[48] *See infra* Part III.A.2.

debtor gets discovery powers that the Caymans withhold, enabling it to investigate parties in interest for mismanagement, but not the other way around.[49] A Spanish debtor can free postpetition property from its lenders' security agreements,[50] contrary to "the organizing principle of the modern law of corporate reorganizations": absolute priority.[51] And perhaps most vividly, a backdoor into Chapter 11 allows foreign debtors to escape COMI law altogether, making the whole universalist project an optional exercise.[52]

Chapter 15 is a one-way ratchet in the debtor's favor: universalist when extending COMI rights to the United States, territorialist when denying COMI limits and, for creditors, whichever is worse. This state of play is a boon to opportunistic debtors. And although keeping forum shopping in check is a key task for any judge, the bankruptcy courts are asleep at the switch. Ignoring the warning that metro-goers hear upon exiting the London Tube, they have failed to "mind the gap" between U.S. law and that of the debtor's COMI—no less costly than catching your ankle in the platform.

This article's practical and theoretical contributions are sixfold.

First, it identifies a new kind of forum shopping that has evaded academic detection for 20 years: the application of universalist rights and territorialist limits to foreign debtors in a way that gives them the best of the old and new worlds. This, it illustrates through a pair of case studies: one situated at the "recognition" stage of Chapter 15, one regarding remedies that the court may award thereafter, and neither of which has been analyzed for its forum-shopping effects before.

Second, through a survey of each section of Chapter 15 and the other Bankruptcy Code provisions incorporated therein, the article examines the breadth of this chapter's affront to COMI-law limits and the forum-shopping incentives that more than a dozen of its provisions generate.

Third, drawing from data on foreign filings in the United States, it demonstrates that "remedy shopping" is a potential explanation for much of the forum shopping observed.[53]

Fourth, it contributes to the ongoing conversation around the optimal

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[49] *See infra* Part III.B.2.

[50] *See infra* notes 283-284 and accompanying text.

[51] Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 786 (2017).

[52] *See infra* notes 285-287 and accompanying text.

[53] *See infra* notes 184-186, 264-265 and accompanying text.

paradigm for international insolvency, contending that remedy shopping offers support to critics of Chapter 15 at a time when the future of the COMI system is increasingly up for debate.[54]

Fifth, it critiques prominent critics' proposals as either declining to address the shopping this article describes or inviting abuses of other kinds.

Sixth, it proposes an amendment to bring Chapter 15 into alignment with its universalist roots: a presumption that COMI law (both rights and restrictions, whether broader or narrower than U.S. law) should apply in proceedings under Chapter 15, subject to a series of exceptions that this article enumerates. Although not a fix for transnational insolvency writ large, focused as this article is on U.S. practice, the shared Model Law source of Chapter 15 and its foreign analogues allows the proposed presumption to offer insights applicable to all 60 jurisdictions that aspire to universalism. Given the United States' role in setting the agenda for developments in cross-border bankruptcy and the salutary effect that a COMI-law presumption would have on other Model Law countries—empowering them to, in many cases, better protect local creditors from foreign debtors—this article's reach should not be confined to U.S. law.

Critically, the value of this proposal does not depend on one's views regarding the merits or harms of forum shopping.[55] To the extent that shopping is a problem to be solved, this proposal offers a solution to one of its variants—promoting consistent applicability of remedies across borders, thereby preventing debtors from mixing and matching laws in a manner unforeseeable to their creditors. To the extent that shopping is venial, the rebuttable presumption envisioned would not eliminate value-accretive debtor choice, instead directing courts to apply local law whenever COMI law would be manifestly value destructive. Furthermore, this proposal remains viable whether one favors universalism, one of the alternatives discussed in Part III.C.2 below, or a different paradigm altogether. For example, if debtors should be free to pre-select a governing law (Robert K. Rasmussen's "menu approach"),[56] ensuring that their chosen law applies to the fullest—unfettered by one-off local-law substitutions—eliminates a remedial stumbling block.

This article proceeds in five parts. Part I summarizes two decades of

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[54] *See infra* Part III.C.2.

[55] *See* Casey & Macey, *supra* note 41, at 469.

[56] *See infra* notes 294-297 and accompanying text.

debate on bankruptcy forum shopping, identifying the ways that cross-border cases amplify its ease and effects. Part II describes the three paradigms of transnational bankruptcy—territorialism (the traditional approach), universalism (the collaborative ideal), and modified universalism (the growing majority rule)—and the potential of each to generate forum shopping. From there, it examines how (and how well) Chapter 15 pursues its universalist goals. Part III presents two case studies, which demonstrate that Chapter 15 enables foreign debtors to obtain greater power than their home countries intend, incentivizing opportunistic filings while failing to forestall them. This Part subsequently surveys every other section of Chapter 15 that works a similar abridgment of COMI law and, given these shortcomings, considers alternative insolvency models. Part IV recommends a solution to remedy shopping in the form of a COMI-law presumption, while formulating a test to determine whether U.S. law should apply instead. It argues that the comparative analysis proposed would be feasible for judges to conduct, since they already engage in similar inquiries in transnational cases, most Chapter 15 filings come from common-law countries, and judges would have the parties to assist them in deciphering the relevant COMI law. It then contends that this proposal is politically feasible despite the impediments to prior venue-reform efforts, addresses the problems that a COMI-law presumption raises, and identifies areas for future research. A short conclusion follows.

I. The Good and Bad of Forum Shopping in Bankruptcy

U.S. law's aversion to forum shopping is axiomatic.[57] Yet, reality is more complicated. Forum shopping assumes a special role in bankruptcy, where it occurs at staggering levels[58] and disputes over its pros and cons have raged since soon after the adoption of the Bankruptcy Code.[59] Tracking the terms of this debate is key to understanding why debtors file away from home and whether to allow it, either domestically or internationally. Hence, this Part

[57] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75-77 (1938).

[58] *See infra* notes 61-63 and accompanying text.

[59] Professors Lynn M. LoPucki and William C. Whitford first described bankruptcy forum shopping in 1991. Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 34-40.

discusses the mechanisms and magnitude of forum shopping in bankruptcy, the arguments for and against it, and the unique issues presented by cross-border cases. Mirroring the growth of scholarship in this space, it begins with an overview of the U.S. context, in which forum-shopping research initially developed, before working its way out toward international insolvency.

A. Domestic Forum Shopping Is Widespread, Prompting Praise and Pushback Alike

Forum shopping occurs in the United States at a scale that some have claimed threatens "the fairness—real or perceived—of the bankruptcy system."[60] During each of the past five years, more than 75% of large corporate bankruptcies[61] were filed in a city other than the debtor's headquarters.[62] In 2020, the five so-called magnet courts—the Southern District of Texas, the District of Delaware, the Eastern District of Virginia, and the Southern District of New York (Manhattan and White Plains Divisions)—accounted for 90% of all large cases.[63]

Defenders of the flow of large bankruptcies into a half-dozen forums rest their arguments on two principal claims: efficiency and expertise. Exemplified by the University of Pennsylvania's David A. Skeel, Jr.,[64] they

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[60] Terrence L. Michael et al., *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741, 762 (2019) (quoting NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 779 & n.1914 (1997)).

[61] FLORIDA-UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, https://lopucki.law.ufl.edu/index.php (last visited July 17, 2024) (defining a case as "large" if the debtor's last annual report on Form 10-K indicated assets exceeding $100 million).

[62] *Id.* (to locate, select "Run-a-Study," then select "Two-variable studies," then "Venue cities" and "Filing years" under Steps 1 and 2, or *vice versa*, and press "Run study").

[63] Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 257 (2022). Domestically, bankruptcy forum shopping is enabled by a loose approach to venue. The debtor chooses where to file and may do so at the location of its principal assets, principal place of business, domicile, or residence, or where the bankruptcy of an affiliate has already been filed. 28 U.S.C. § 1408. The last of these options lets the debtor establish venue practically anywhere in the United States. LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 34-37 (4th ed. 2008). For an overview of Chapter 15's even-more-pliable venue provisions, see notes 163-165 below.

[64] Todd J. Zywicki, Review Essay, *Is Forum Shopping Corrupting America's*

praise popular courts like Delaware "for ⟦their⟧ speedy confirmation of reorganization plans,"[65] pioneering of new strategies to achieve company survival,[66] and expert, professionalized bankruptcy benches.[67]

Opponents contend that case competition has corrupted the courts.[68] Chief among them is Lynn M. LoPucki,[69] who asserts that judges have prioritized the appeasement of "case placers" over the unpopular work of forcing debtors to address the causes of their distress.[70] Unlike their Article III counterparts, bankruptcy judges serve limited terms and are appointed partly on feedback from the bar.[71] Since large cases are a cash cow for local attorneys, the argument goes, they push judges to "play the game" by cutting case placers sweetheart deals.[72]

Ultimately, whether forum shopping accrues or destroys shared value "is an empirical ⟦question⟧ that remains open."[73] The same rules that save one debtor from playing guinea pig in an inexperienced court allow another to strong-arm its way out of local law intended to protect its creditors.[74] Where commentators at either end of the debate agree, however, is in the importance of legal predictability.[75] Ideally, this is a two-way street, giving

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Bankruptcy Courts?, 94 GEO. L.J. 1141, 1163 (2006) (dubbing Skeel "⟦t⟧he leading defender of Delaware").

[65] David A. Skeel Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 20 (1998); Barry E. Adler & Henry N. Butler, *On the "Delawarization of Bankruptcy" Debate*, 52 EMORY L.J. 1309, 1312-13 (2003).

[66] Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1991-95 (2002).

[67] Kenneth M. Ayotte & David A. Skeel, Jr., *Why Do Distressed Companies Choose Delaware?: An Empirical Analysis of Venue Choice in Bankruptcy* 3 (U. Pa. Inst. for Law & Econ., Rsch. Paper No. 03-29, 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=46300; Miller, *supra* note 66, at 1993; Adler & Butler, *supra* note 65, at 1314-15.

[68] LOPUCKI, *supra* note 63, at 250.

[69] Adler & Butler, *supra* note 65, at 1310 (identifying "⟦t⟧he leading critics" of forum shopping as "LoPucki a⟦nd⟧ . . . his co-authors").

[70] Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1984-85 (2002).

[71] LOPUCKI, *supra* note 63, at 19-24.

[72] *Id.* at 127, 139-63.

[73] Casey & Macey, *supra* note 41, at 473.

[74] *Id.* at 467, 498.

[75] Marcus Cole, *"Delaware is Not a State": Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1859 (2002) ("The prominent

the debtor greater certainty of a successful reorganization and its creditors—no matter how favorable the applicable law—enough forewarning to safeguard their interests. Unfortunately, as the following subpart demonstrates, predictability is among the aspects of venue most undermined by the international dimension.

B. How International Forum Shopping Imperils Predictability

Foreign debtors shop into the United States by the thousands. Between 2019 and 2024, companies headquartered abroad filed over 1,300 Chapter 11 cases, along with nearly 700 under Chapter 15.[76] Without negating the capacity of such transnational forum shopping to increase the value of the estate, debtors' access to foreign courts—unless reliably constrained—can be caustic to creditors' interests. Whether one embraces or opposes forum shopping, clarity as to the venue and law that will govern a transnational case is essential to avoiding economic deadweight and ensuring a fair and efficient outcome for all stakeholders.

1. The good: International forum shopping as a fix for nonexistent or suboptimal local law

Abroad just as domestically, forum shopping has its benefits—particularly for debtors in countries with undeveloped insolvency laws. To take a recent example, in 2020, Chilean-Brazilian airline LATAM filed Chapter 11 in New York after being grounded by the COVID-19 pandemic.[77] In theory, LATAM could have stayed home: Chile adopted a law based on Chapter 11 in 2014.[78] Yet, from management's perspective,

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debtors' and creditors' counsel with whom I have spoken list several factors as important in their choice of Delaware as a forum[:] Leading their list is 'predictability.'"); Steven L. Harris, *Choosing the Law Governing Security Interests in International Bankruptcies*, 32 BROOKLYN J. INT'L L. 905, 906 n.5 (2007) ("Both territorialists and universalists claim that their approach to international bankruptcies fosters predictability.").

[76] Figures obtained from Bloomberg Law, which retrieves information from the Public Access to Court Electronic Records (PACER) database: a public website containing dockets for all federal cases. Data on file with author.

[77] Justin Cloyd, *Advantages of US Bankruptcy Law for Foreign Travel Companies*, BLOOMBERG L. (Aug. 2022), https://www.bloomberglaw.com/external/document/X77LMUU4000000/bankruptcy-professional-perspective-advantages-of-us-bankruptcy-.

[78] Richard Cooper et al., *Chilean Restructures: Proceeding with Caution*, INT'L FIN. L.

reorganizing under the Chilean insolvency law would have been a gamble. Precedent is thin, with only 9% of distressed Chilean companies filing domestically.[79] Unpredictability would have been especially acute for LATAM, since the Chilean insolvency law is silent as to corporate groups.[80] As the company observed at the time of its filing, Chapter 11 offered "a proven legal framework" the likes of which Chile did not.[81]

Access to such a reliable framework is also relevant well before bankruptcy appears on the horizon. The promise of freedom from untested or even corrupt domestic courts is an important bargaining chip for developing countries seeking to attract foreign investment in the first place.[82] Whether building or restructuring the capital stack, forum shopping can be the key ingredient to achieving a palatable outcome for the debtor and its creditors alike.

This upside potential persists even when the discrepancy between venues is not so stark as in the case of LATAM. Anthony J. Casey and Joshua C. Macey have described the English scheme of arrangement as an increasingly "viable alternative to chapter 11."[83] Despite lacking some of the chapter's benefits, such as the automatic stay, schemes enable contract modification upon the vote of 75% (by value) of the affected class of creditors.[84] They are subject to fewer formalities than Chapter 11 and therefore capable of generating speedier, inexpensive outcomes. Beyond its capacity to create a forum where none exists in the debtor's home country, forum shopping thus provides foreign debtors with a menu of options from which to pick the insolvency law that best suits their unique circumstances.

REV., July-Aug. 2014, at 48, 48.

[79] Gianfranco Lotito & Andrés Ignacio Lafuente Quiroz, *Chile: Recent Changes Made to Restructuring Proceedings*, GLOB. RESTRUCTURING REV. (Nov. 27, 2023), https://globalrestructuringreview.com/review/restructuring-review-of-the-americas/2024/article/chile-recent-changes-made-restructuring-proceedings.

[80] Cooper et al., *supra* note 78, at 49.

[81] Press Release, LATAM, LATAM Announces Reorganization to Ensure Long-Term Sustainability (May 26, 2020), https://www.latamairlinesgroup.net/news-releases/news-release-details/latam-announces-reorganization-ensure-long-term-sustainability.

[82] *See* Dolan D. Bortner, Note, *Amending ICSID to Safeguard Indigenous Rights*, 52 GEO. J. INT'L L. 1057, 1065-66, 1084-85 (2021).

[83] Casey & Macey, *supra* note 41, at 489.

[84] *Id.* at 488.

2. The practical bad: Castaway creditors, careening capital costs, and sidelined states

Still, from a creditor's perspective, international forum shopping poses several problems.

First, creditors face a greater risk of disenfranchisement when cases are filed not simply across town but on the other side of the globe. This burden falls heaviest on many of the weakest constituencies in bankruptcy—tort victims, employees, and trade creditors among them. For instance, when a Nebraska insurance company transferred $24 million in reserves for U.S. vehicle-servicing contracts to the Cayman Islands, then liquidated, creditors were left to litigate nearly 2,000 miles from the debtor's headquarters.[85] While one can presume a sophisticated lender to have little trouble (and perhaps relish) flying to the Caymans, the same cannot be said of the policyholders, whose financial constraints and other commitments might impede travel to another state—let alone overseas.[86]

Second, for contract creditors, eve-of-bankruptcy changes in governing law upend the assumptions upon which they entered into agreements with the debtor. A creditor whose collateral is transferred to a country that rebuffs foreign bankruptcy judgments[87] is unlikely to ever see it again. In forum shopping's defense, one might argue that lenders can price the risk of such fly-by-night transfers into their bargains with the debtor. Of course, that is no answer to those who dealt on trade credit—much less the unwitting tort victim or employee. But even if shafting these creditors can

[85] Hoffman v. Bullmore (*In re* Nat'l Warranty Ins. Risk Retention Grp.), 384 F.3d 959, 961 (8th Cir. 2004).

[86] Since the COVID-19 pandemic, many bankruptcy courts have implemented video conferencing. Debtors and their advocates assert that this ameliorates any risks a remote forum might otherwise pose to creditor participation. *See, e.g.*, John R. Ashmead et al., *Bankruptcy Venue Reform Redux*, SEWARD & KISSEL LLP (July 22, 2021), https://www.sewkis.com/publications/bankruptcy-venue-reform-redux/. However, even when functioning at their best, these technologies are a poor substitute for live assessment of witness credibility (a necessity when resolving the "battles of the experts" that often arise in bankruptcy), are not equally accessible to litigants of all means, and so offer an incomplete safeguard against forum shopping's effects on creditor involvement in transnational proceedings. *See* Melissa B. Jacoby, *Congressional Testimony on H.R. 2533: "The Chapter 11 Bankruptcy Venue Reform Act of 2011"* 3 (UNC Legal Stud., Rsch. Paper No. 1975868, 2011), https://ssrn.com/abstract=1975868.

[87] *See infra* Part I.B.3.

be explained away, the balm of their well-heeled counterparts' inflated rates is undermined by the third practical problem of forum shopping: deadweight loss.

Like the contract concept of bad faith, shopping to a far-flung place subverts creditors' expectations.[88] Unless they are willing to accept what amounts to a midstream modification of the agreement, creditors must pay to ward off that risk. As Judge Posner once bemoaned, bad faith "induces costly defensive expenditures, in the form of overelaborate disclaimers or investigations into the trustworthiness of a prospective contract partner."[89] Elevated borrowing costs that reflect the risk a debtor will file in a forum unfriendly to creditors, no less than money spent to avoid dealing with a crook, are cash not being put to a higher and better use.

Higher interest rates are not the only deadweight that transnational forum shopping generates. The option of filing in countries that prejudice foreign creditors introduces inefficiencies in the global allocation of capital. Knowing that they need not share local collateral with their foreign counterparts, creditors in expropriative countries can count on reaping a larger share of that collateral in bankruptcy and lend at reduced rates.[90] This effective subsidy from creditors in "honest" countries enables those in "dishonest" ones to tempt debtors with suboptimal-but-cheaper investments.[91]

Fourth, for the greater threat of inefficiency and creditor disenfranchisement that transnational forum shopping poses, it is less susceptible to legal limits than its domestic variant. The latter, albeit widespread, is policed by appellate courts and a national legislature.[92] No such institutions exist on the world stage. While diplomatic negotiation and the power to rebuff a foreign court's baseless assertion of jurisdiction offer some relief, neither is a substitute for national sovereignty.[93] Gamesmanship abroad is therefore simpler than at home.

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[88] *Id.*

[89] Market Street Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 594 (7th Cir. 1991).

[90] Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2256 (2000).

[91] *See id.*

[92] Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2229 (2000).

[93] *Id.*

3. The normative bad: Undercutting the creditors' bargain and unbalancing the debtor's and creditors' rights inter se

Beyond the dollars and cents of creditor recoveries and the flow of capital worldwide, forum shopping can be difficult to square with several of bankruptcy's normative pillars.

For one, it has the potential to force a unilateral amendment to the creditors' bargain. Bankruptcy's dominant paradigm,[94] the creditor's bargain explains the field's priority scheme as approximating how creditors would divide the debtor's assets if they could contract to do so before bankruptcy entered the scene.[95] Under this approach,[96] as reflected in the Bankruptcy Code,[97] the preservation of creditors' ex ante entitlements is the overriding concern. Where, for example, a lender accepts a lower rate of interest in return for security in the debtor's assets, bankruptcy should not allow that lender's recovery to be diluted by unsecured claims.[98]

Yet, eve-of-bankruptcy transfers of assets—if not the debtor's entire principal place of business[99]—"can and do" occur in transnational cases.[100] Hence, even "the sanctity of . . . secured debts"[101] is not the foregone conclusion that it is domestically. As noted, creditors of a multinational company who fail to anticipate a bankruptcy filing in Pakistan or Mexico may find their claims subordinated to the tax authorities and debtor's

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[94] Vincent S.J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, HARV. L. SCH. BANKR. F. (Oct. 15, 2019), https://blogs.harvard.edu/bankruptcyroundtable/tag/creditors-bargain/.

[95] *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982).

[96] *Id.* at 871.

[97] *Report of the Committee on the Judiciary, House of Representatives, To Accompany H.R. 8200*, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977) ("The purpose of bankruptcy is to enforce rights that have arisen before bankruptcy, and to enforce them in an orderly . . . process."); *see also* 11 U.S.C. § 1129(a)(7).

[98] *See* Jackson, *supra* note 95, at 868, 871.

[99] *In Re* Bank of Credit and Commerce International SA, [1996] 4 All E.R. 796 (U.K.), the United Arab Emirates (UAE) was deemed the proper forum for the bankruptcy of an investment firm—although the firm was incorporated in Luxembourg and headquartered in London—because its managers had returned to the UAE shortly before filing.

[100] BOB WESSELS ET AL., INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 55 (2009).

[101] *In re* Perimeter Park Inv. Assocs., No. B77-2456A, 1980 Bankr. LEXIS 4719, at *113 (Bankr. N.D. Ga. July 31, 1980).

employees, whom both countries exempt from the automatic stay.[102] Claims that such transfers "are generally limited to a small portion of the debtor's assets . . . and . . . highly visible"[103] offer scant comfort to those affected.[104] And even if creditors can dodge the blow by raising their rates—writing a new bargain, with debtor deviousness as an implied term—the result is a global diversion of capital away from more productive uses,[105] hardly a normative win.

Second, beyond the option of evading one's home court, the "remedy shopping" that forms the crux of this article gives debtors the discretion to mix and match the substantive laws of *multiple* countries.[106] This enables them to amass more power over their creditors than any one forum would allow. Some remedies (like discovery unavailable at home but brought back from abroad) have effects both in the jurisdiction that grants them and elsewhere.[107] The results of this legal potpourri are therefore harder for creditors to predict, hampering their ability to account for the associated risks through interest rates—and raising rates, in any case.

Third, the pairing of remedies from multiple countries throws off the balance of power that each country envisions for its debtors and creditors. Bankruptcy laws differ between countries based on their unique circumstances and policy goals.[108] For example, as noted, certain

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[102] Ziad Raymong Azar, *Bankruptcy Policy: A Review and Critique of Bankruptcy Statutes and Practices in Fifty Countries Worldwide*, 16 CARDOZO INT'L COMP. POL'Y & ETHICS L. REV. 279, 319 (2008).

[103] LoPucki, *supra* note 42, at 160.

[104] Pottow, *supra* note 42, at 817.

[105] *See supra* notes 89-91 and accompanying text.

[106] *See infra* notes 199-204 and accompanying text.

[107] *See infra* Part III.B (analyzing a case in which the Cayman Islands admitted evidence that a debtor obtained in the United States, but which the Caymans itself would not have allowed the debtor to discover).

[108] Sandeep Gopalan & Michael Guihot, *Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling*, 48 VAND. J. TRANSNAT'L L. 1225, 1272 (2015) ("[T]he diversity in national insolvency laws evidences the fact that each state has designed its laws to suit its unique circumstances and policy preferences."); Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 EMORY BANKR. DEV. J. 387, 387 (2013).

Not all countries address insolvency with equal efficiency. The World Bank estimates that average recoveries range in amount from zero cents on the dollar in the Central African

proceedings in common-law jurisdictions like the United Kingdom lack an automatic stay.[109] If a debtor can nonetheless shop into a foreign court and stay its assets there or elsewhere, it will have grown its powers more broadly than where its home country says they should stop. Assuming that the insolvency regimes of the Global North function comparably well,[110] an outcome that enables the debtor to escape the shackles of its home court and take up the tools of another is suboptimal. Nor can it be squared with universalism: the principle of extending the debtor's home rule worldwide, which ostensibly animates transnational practice.[111]

II. International-Insolvency Models and Their Effects on Forum Shopping

Whether international forum shopping is positive or negative on net, any proposal that would allow it must endeavor to minimize the harms associated with haphazard shopping, as summarized above. These same concerns naturally underlie proposals that would abolish forum shopping. In either case, predictability is paramount, making it necessary to determine in which forum(s) the proceeding should be held. That is easier said than done. The answer trenches on a centuries-long[112] debate between "two competing and opposite models."[113] The first, territorialism, would let the laws of each asset's location govern,[114] implying parallel proceedings

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Republic and Chad to $0.93 in Osaka, Japan; and by time from 0.4 years in Ireland to 6.0 in Cambodia. *Doing Business Legacy*, WORLD BANK: BUSINESS READY (B-READY), https://www.worldbank.org/en/businessready/doing-business-legacy (last visited July 17, 2024). But at least among advanced economies, "[n]either economic theory nor the available empirical evidence support[s] the claim that a single bankruptcy regime . . . Pareto dominate[s] the [rest]." Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 OXFORD. J. LEGAL STUD. 97, 104 (2014).

[109] *See supra* notes 83-84; *see also infra* Part III.A.

[110] *See* Franken, *supra* note 108. As discussed below in Part IV.B.2, however, where COMI law is truly *inefficient*, foreign legal tools obtained through a secondary filing can (and should) offer a patch to generate going-concern value.

[111] *See infra* Part II.B.

[112] Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT'L ECON. L. 679, 684-85 (2000).

[113] John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 92 (2006).

[114] *Id.* at 93; LoPucki, *supra* note 92, at 2216 ("[T]erritoriali[sm] means that the bankruptcy courts of a country have jurisdiction over those portions of the [debtor] that

wherever the debtor owns property.[115] The second, universalism, would subject the debtor's assets (wherever they are) to the laws of its home country.[116]

This Part considers the extent to which these approaches frustrate or foster predictability of venue and governing law. Observing the rising popularity of universalism, it discusses how this model has been adapted to suit a pluralistic legal world. The resulting "modified" universalism, as codified in Chapter 15, is examined in Part II.C.1. From there, Part II.C.2 questions the rosy narratives that have emerged from data on Chapter 15's fight against forum shopping. Contrary to existing authors, it asserts that Chapter 15 has redirected, not restricted, strategic debtors. Gamesmanship persists in a transnational insolvency system that gives debtors the best of both paradigms, enabling them to take COMI-law remedies to the United States (even if prohibited by U.S. law), extinguish COMI-law limits intended to safeguard creditors, and avoid Chapter 15 entirely by initiating a plenary proceeding under another chapter of the Bankruptcy Code. These critiques are substantiated by the case studies and survey of Chapter 15's COMI-law deviations presented in Part III.

A. Territorialism: Each Asset's Location Confers Jurisdiction

Territorialism's strategy for finding the right forum, as noted, "is unrelenting in its brightness: ⟦I⟧t is where the assets are physically located on the nanosecond of bankruptcy."[117] Predictability is a hallmark of the

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are within its borders and not those portions that are outside them.").

[115] Eric Sokol, *The Fate of Universalism in Global Insolvency: Neoconservatism and New Horizons*, 44 HASTINGS INT'L & COMP. L. REV. 39, 43 (2021); Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 742 (1999).

[116] Chung, *supra* note 113, at 94 ("⟦Universalism⟧ envisions a single bankruptcy proceeding in the debtor's 'home country' where a single court applies the bankruptcy law of its country and makes a unified worldwide distribution to creditors through liquidation or reorganization."); *see* LoPucki, *supra* note 42, at 143 (defining "universalism" as a system "in which a court of a multinational debtor's 'home country' would apply home country law to control the company's bankruptcy worldwide").

[117] Pottow, *supra* note 42, at 795.

model.[118] However, a clear rule is a gameable one.[119] Under territorialism, the debtor can be certain of which law will apply to its assets in each jurisdiction, affording it freedom of choice over the relevant rules.[120] This freedom is limited only by the fungibility of its assets which, as *National Warranty Insurance* illustrates,[121] "may fly as fast as a bank wire."[122]

Territorialism's adherents contend that asset transfers can be prevented with "local legal restrictions and contract devices," or remedied with "treaties and conventions . . . provid[ing] for the return of fleeing assets."[123] Yet, these arguments do not necessarily support the model, since they are equally true of universalism.[124] Further undermining the utility of territorialism, its predictability may only benefit debtors. The law that applies when a creditor obtains security in an asset will evaporate if that asset crosses national borders,[125] forcing the creditor to follow its collateral across the globe.[126] Moreover, "confusion and expensive legal knowledge costs" are the likely effects of multiple bankruptcy laws applying at once.[127]

B. Universalism: Extending the Debtor's Home Law Worldwide

Universalism purports to untangle the web of bankruptcy laws that territorialism spins, while curbing debtors' incentives to forum shop, by projecting the rules of the debtor's home country across the globe.[128] Since a U.S. company would be subject to U.S. law wherever it files, universalists assert that their model offers superior certainty to *all* parties, including creditors. By enabling creditors to better anticipate which law will govern

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[118] Edward S. Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcies: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43, 66 (2009); LoPucki, *supra* note 115, at 751.

[119] Pottow, *supra* note 42, at 795; Mihailis E. Diamantis, *Arbitral Contractualism in Transnational Bankruptcy*, 35 SW. U. L. REV. 327, 336 (2006).

[120] Diamantis, *supra* note 119, at 336.

[121] *See supra* note 85 and accompanying text.

[122] Pottow, *supra* note 42, at 801.

[123] LoPucki, *supra* note 92, at 2242.

[124] *See* Diamantis, *supra* note 119, at 337.

[125] Pottow, *supra* note 42, at 796.

[126] *See id.* at 788. Under universalism, collateral would (at least in theory) remain subject to the laws of the debtor's COMI even if transported to another country. *See infra* notes 128-129 and accompanying text.

[127] Diamantis, *supra* note 119, at 338-39.

[128] *See supra* note 116 and accompanying text.

their disputes with the debtor, universalism may further reduce the cost of credit.[129]

Fresh out of the gates, however, the question of where a corporate debtor is "at home" muddles universalism's clarity. The most frequent answer—the debtor's COMI—is not even defined in the Bankruptcy Code.[130] The principal universalist ventures—Chapter 15,[131] the Model Law,[132] and the EU Insolvency Regulation[133]—all presume COMI to be synonymous with the debtor's place of incorporation. So long as that presumption holds, it gives lenders a reliable indication of which law will govern the debtor in bankruptcy, saving them the resources they would expend tracking its assets under territorialism.[134] However, responding to the risk of "sham incorporations,"[135] each of these systems allows the presumption to be rebutted.[136] For example, if the debtor's registered office is merely a mailbox, U.S. courts have found that proof of its "nerve center" (as articulated in *Hertz v. Friend*[137]) offers persuasive—albeit not dispositive[138]—evidence of COMI.[139] Scholarly interpretations comport with this approach.[140]

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[129] Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 17 (1997); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 466 (1991).

[130] *In re* Gerova Fin. Grp., Ltd., 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012).

[131] 11 U.S.C. § 1516(c).

[132] MODEL LAW, *supra* note 35, at art. 16.3.

[133] European Union Regulation on Insolvency Proceedings, 2000 O.J. (L 160) 1, at art. 3.1 [[hereinafter EU Insolvency Regulation]].

[134] *See* Pottow, *supra* note 42, at 788.

[135] Chung, *supra* note 113, at 135 n.148.

[136] 11 U.S.C. § 1516(c) (conditioning the presumption on "the absence of evidence to the contrary"); MODEL LAW, *supra* note 35, at art. 16.3 (same); EU Insolvency Regulation, *supra* note 133 (same).

[137] 559 U.S. 77, 80 (2010) (defining a corporation's "nerve center" as the place "where [[its]] . . . officers direct, control, and coordinate the corporation's activities").

[138] Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 138 n.10 (2d Cir. 2013).

[139] *Id.*; *In re* Serviços De Petróleo Constellation S.A., 613 B.R. 497, 508-09 (Bankr. S.D.N.Y. 2020).

[140] *See, e.g.*, Adams & Fincke, *supra* note 118, at 60; Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, *in* THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE 263, 281 (Gabriel Moss et al. eds., 2002).

Still, even assuming agreement on the definition of COMI, discerning it in a given case is no easy task. While some argue that such difficulties are overblown,[141] particularly when corporate families file together, the question arises whether the subsidiaries' COMI is the same as the parent or where each is incorporated and carries out its business.[142] At the time of bankruptcy, courts might struggle to identify a singular "center" amid this mess of corporate interests. Lenders face the even more onerous task of pricing risk by anticipating which forum will be deemed the debtor's COMI, perhaps many years in advance.[143] Universalism's efficiency may thus come at the cost of predictability, foregone transactions, and higher interest rates.[144]

C. Modified Universalism: Cure or Cause for Forum Shopping?

Recognizing that each model has its pros and cons, both are more theoretical than practical.[145] If truly independent, the parallel proceedings that territorialism envisions would be a massive waste of judicial economy—a fact that even prominent territorialists, such as Lynn M. LoPucki, acquiesce.[146] From this observation, "cooperative territoriality" has emerged. This model proposes coordination between courts on issues such as

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[141] Jay Lawrence Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247, 261 (2013); Fabio Weinberg Crocco, *When Deference Makes a Difference: The Role of U.S. Courts in Cross-Border Bankruptcies*, 28 NORTON J. BANKR. L. & PRAC. 567, 601 (2019).

[142] *See infra* Part IV.D.

[143] LoPucki, *supra* note 42, at 160.

[144] *Id.* at 143; Anthony J. Casey et al., *A Commitment Rule for Insolvency Forum* 6 (Eur. Corp. Governance Inst., Law Working Paper No. 754/2024, 2024) (arguing that, since "a market participant . . . can never be entirely sure about where a company's future insolvency case will be administered[,] . . . . [l]enders will rationally price their loans to account for [the worst] possible scenario[]," i.e., "an inefficient or creditor-unfriendly forum").

Some advocates lean into this unpredictability, calling it "the very genius" of universalism. Pottow, *supra* note 42, at 790. When COMI is hard for debtors to foresee, the logic goes, it is hard for them to game. *Id.* at 801-02. However, this rationale offers scant comfort against the concerns of unpredictability and deadweight loss that critics level at universalism. It acquiesces the former and leaves the latter unanswered.

[145] Adrian Walters, *Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law*, 93 AM. BANKR. L.J. 47, 110 n.61 (2019).

[146] *See* LoPucki, *supra* note 115, at 755.

distribution lists, the joint sale of assets, and the seizure and return of property obtained through avoidable transfers.[147]

Universalism, which in its "pure" form would have the laws of the debtor's COMI apply wherever its assets are located,[148] is likewise "impractical in a world with differing legal regimes, differing political and economic systems, differing court systems, and differing levels of realization of the rule of law."[149] On the ground, it has given way to the "interim solution" of modified universalism.[150] This model balances universalism's lofty aims with the fact of legal pluralism, "accept[ing] the . . . premise . . . that assets should be collected and distributed on a worldwide basis" while empowering local courts to rebuff the debtor's COMI,[151] as when compliance would be "manifestly contrary to . . . public policy."[152] It is this approach that has been enshrined in the Model Law and its domestic analogues around the world, including Chapter 15.[153]

Given that momentum favors universalism's modified form,[154] deciding whether that model is the Platonic ideal for insolvency is unnecessary for present purposes. It suffices to say that, if the costs of universalism (including COMI's elusiveness and upward pressure on interest rates[155]) are to be incurred, they ought to be offset by its benefits (namely, bending transnational cases to COMI rule as much as possible and avoiding forum shopping[156]). To determine whether Chapter 15 is delivering on that bargain, one needs to know how it works.

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[147] *See infra* Part III.C.2.

[148] Diamantis, *supra* note 119, at 332-33.

[149] Samuel Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 AM. BANKR. L.J. 105, 110 (2005); Diamantis, *supra* note 119, at 344-45.

[150] Westbook, *supra* note 26, at 2277.

[151] Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvency*, 17 BROOKLYN J. INT'L L. 499, 517 (1991).

[152] *See* 11 U.S.C. § 1506; MODEL LAW, *supra* note 35, at art. 6.

[153] Walters, *supra* note 145, at 64; Andrew B. Dawson, *The Problem of Local Methods in Cross-Border Insolvencies*, 12 BERKELEY BUS. L.J. 45, 53 (2015).

[154] *See supra* note 36 and accompanying text.

[155] *See supra* notes 142-144 and accompanying text.

[156] *See supra* notes 128-129 and accompanying text.

1. An overview of Chapter 15: Commencing a case and obtaining relief

A Chapter 15 case begins when a debtor files a petition for recognition of a foreign proceeding in U.S. bankruptcy court. For the petition to be granted, the debtor must satisfy seven criteria, which together prove the existence of:

> (i) a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation.[157]

This test is woodenly applied.[158] Although a public policy exception exists,[159] it has precluded recognition only two times.[160] Contrary to the requirements of Chapter 11,[161] recent courts have held that even bad faith is not fatal to a Chapter 15 filing.[162] The lack of property in the United

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[157] *In re* Betcorp Ltd., 400 B.R. 266, 277 (Bankr. D. Nev. 2009) (citing 11 U.S.C. § 101(23)).

[158] Peter M. Gilhuly et al., *Bankruptcy Without Borders: A Comprehensive Guide to the First Decade of Chapter 15*, 24 AM. BANKR. INST. L. REV. 47, 95 (2016) ("[R]ecognition is mandatory where the aforementioned criteria are met . . . ."); Weinberg Crocco, *supra* note 141, at 620.

[159] 11 U.S.C. § 1506.

[160] Ronit J. Berkovich & Olga F. Peshko, *US: The High Burden to Satisfy the 'Manifestly Contrary to Public Policy' Standard of Chapter 15*, GLOB. RESTRUCTURING REV. (Nov. 15, 2018), https://globalrestructuringreview.com/review/restructuring-review-of-the-americas/2019/article/us-the-high-burden-satisfy-the-manifestly-contrary-public-policy-standard-of-chapter-15.

[161] Bruce H. White & William L. Medford, *Dismissals of Bankruptcies Filed in Bad Faith: What's the Standard?*, 23 AM. BANKR. INST. J., Dec. 2004/Jan. 2005, at 26, 26.

[162] *In re* Culligan Ltd., No. 20-12192, 2021 WL 2787926, at *14 (Bankr. S.D.N.Y. July 2, 2021).

States may likewise be forgiven.[163] But to the extent it cannot be,[164] this hurdle has been lowered so far that a contract governed by U.S. law—even where both counterparties are foreign—was recently held to count.[165] Accordingly, the vast majority of debtors that file are successful.[166]

If a case is recognized as "foreign-main"—meaning that it comes from the debtor's COMI, as opposed to an ancillary jurisdiction—certain relief flows automatically.[167] This includes a stay on creditors' actions and the power to use, sell, or lease property of the estate[168] and avoid postpetition transfers.[169] If "necessary to effectuate the purposes of [Chapter 15]," or in the case of a non-main proceeding, the court can grant additional remedies.[170] For example, the debtor may be given leave to examine witnesses or transfer U.S. property to a foreign proceeding; if filing from a non-main jurisdiction, relief to substitute for the automatic remedies may also be available.[171] Albeit not to the same degree as recognition,

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[163] 28 U.S.C. § 1410(2)-(3) (providing that a debtor that "does not have a place of business or assets in the United States" may nevertheless file a Chapter 15 petition "in the district court . . . in which there is pending against the debtor an action in a Federal or State court" or "in which venue will be consistent with the interests of justice and the convenience of the parties").

[164] Notwithstanding the expansive language of § 1410, some courts have extended other provisions of Title 11, which do require stateside property, to Chapter 15. *Compare* Drawbridge Special Opportunities Fund LP v. Barnet (*In re* Barnet), 737 F.3d 238, 247 (2d Cir. 2013) (finding that 11 U.S.C. § 109(a) is applicable to Chapter 15 and so requires the debtor to possess property, a domicile, or a place of business in the United States), *with In re* Viacao Itapemirim, S.A., No. 18-24871, 2020 Bankr. LEXIS 634, at *3 (Bankr. S.D. Fla. Mar. 10, 2020) ("This Court declined to follow *Barnet* in a prior chapter 15 case and continues to reject the Second Circuit's holding that § 109 applies in chapter 15 cases.").

[165] Jennifer DeMarco, Partner, Clifford Chance LLP, Address at the 2018 Annual Spring Meeting of the American Bankruptcy Institute: Why Foreign Companies Are Filing Under U.S. Chapter 11 (Apr. 19-22, 2018), https://globalinsolvency.com/webinar/why-foreign-companies-are-filing-under-us-chapter-11 [hereinafter DeMarco Address].

[166] Weinberg Crocco, *supra* note 141, at 606 (analyzing 129 Chapter 15 cases and finding that U.S. bankruptcy courts recognized foreign proceedings over 99% of the time).

[167] 11 U.S.C. §§ 1502(4)-(5), 1520(a).

[168] It should be noted that Chapter 15, unlike Chapter 11, does not create a formal "estate." *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 312 (3d Cir. 2013). That term is used informally here and throughout this article to refer to property of the debtor.

[169] 11 U.S.C. § 1520(a).

[170] *Id.* § 1521(a).

[171] *Id.*

discretionary relief is similarly granted more often than not[172] and has been denied on public policy grounds only twice.[173] Moreover, just as courts have equivocated over the stateside-property requirement,[174] they may award relief even if its purposes are wholly disconnected from the U.S. proceedings.[175]

2. Chapter 15 has repackaged, not restricted, transnational forum shopping

Existing research has not resolved whether modified universalism prevents more forum shopping than the territorial default rule. However, several studies suggest as much. Andrew B. Dawson's analysis of all Chapter 15 cases from the first three years after the law's adoption found a decrease in filings from debtor-friendly haven jurisdictions[176] compared with the last three years of its predecessor, § 304.[177] Dawson interprets this decrease as a sign that Chapter 15 has made strides toward disincentivizing debtors from shopping out of their COMI.[178]

Four years later, Jay Lawrence Westbrook examined 573 Chapter 15 cases and corroborated Dawson's findings. Haven filings had fallen by

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[172] Weinberg Crocco, *supra* note 141, at 606 (finding that discretionary relief was denied in less than 5% of cases recognized and subject to qualifications in only a third, with the exemption of certain creditors from the stay being the most common modification).

[173] Berkovich & Peshko, *supra* note 160. In tandem with the high approval rate of petitions for recognition and discretionary relief, the vanishingly small number of cases in which the debtor's COMI-law remedies were invalidated on public-policy grounds implies that such remedies are generally given effect, even when broader than U.S. law. *See id.*; *supra* note 172.

[174] *See supra* note 163 and accompanying text.

[175] *In re* Fairfield Sentry Ltd. Litig., 458 B.R. 665, 679 n.5 (S.D.N.Y. 2011) ("[S]ection 1521(a)(4) . . . allows for discovery in the United States whether or not a debtor has assets here."); *In re* Millennium Glob. Emerging Credit Master Fund Ltd., 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012).

[176] Dawson's sample of offshore havens consisted of the Bahamas, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Dominica, Grenada, the Isle of Man, Jersey, Nevis, and St. Vincent and the Grenadines. Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. 317, 336 n.131 (2009).

[177] 11 U.S.C. § 304 (1994). Section 304 lacked a standard comparable to COMI and instead left recognition of foreign proceedings to the judge's discretion, yielding inconsistent results and opportunities for gamesmanship by strategic debtors. Dawson, *supra* note 176, at 327-28.

[178] Dawson, *supra* note 176, at 337-40.

nearly 75%[179] since *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*,[180] the first case in which a U.S. bankruptcy court applied the COMI standard to refuse assistance to a forum-shopping debtor.[181] Westbrook also found that U.S. courts were less likely to recognize filings from havens as foreign-main proceedings: 63% of the time, compared with 97% for non-havens.[182] The high failure rate of haven filings is evidence that Chapter 15 is successful at weeding out opportunism. The decrease in such filings, in turn, suggests that many would-be forum shoppers have decided not to test their luck. More recently, Fabio Weinberg Crocco analyzed 129 Chapter 15 proceedings and found that all but three were deemed foreign-main, lending support to Westbrook's results.[183]

Yet, like a carnival cup game, a significant amount of forum shopping appears to have avoided these scholars' detection by coming in beneath a different chapter. As elaborated in Part III.C.1 below, § 1511 of the Code enables the Chapter 15 debtor to begin a comprehensive proceeding under another heading of Title 11, such as Chapter 7 or 11. Given the availability of Chapter 15 as a means of administering stateside assets in parallel with a COMI proceeding, one wonders how many foreign debtors truly must commence a plenary case in the United States due to nonviability of their home countries' insolvency laws, à la LATAM.[184] This doubt is

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[179] That is, from 37% of all Chapter 15 filings before *Bear Stearns* to just 10% in its aftermath. *See* Westbrook, *supra* note 141, at 264.

[180] 374 B.R. 122, 130 (Bankr. S.D.N.Y 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

[181] Dawson, *supra* note 176, at 337.

[182] Westbrook, *supra* note 141, at 255.

[183] Weinberg Crocco, *supra* note 141, at 616.

[184] A few of the remedies available under Chapter 11 are absent from Chapter 15. Perhaps the most conspicuous are the powers to avoid fraudulent transfers and preferences and exempt property from the bankruptcy estate. 11 U.S.C. §§ 1519(a)(3), 1521(a)(7). Yet, while a full discussion of the "Chapter 11 backdoor" is beyond the scope of this article, it bears mentioning that a debtor's foreign representative will generally have standing to pursue prepetition transfers as a matter of state law, making Chapter 11 unnecessary in this respect. *See, e.g.*, Laspro Consultores LTDA v. Alinia Corp. (*In re* Massa Falida Do Banco Cruzeiro Do Sul S.A.), 567 B.R. 212, 224-25 (Bankr. S.D. Fla. 2017). Furthermore, corporate debtors—the focus of this article—are not entitled to exemptions under any chapter. *See* 11 U.S.C. § 552(b)(1). Many foreign Chapter 11 filings are therefore unlikely to be motivated by a debtor's need to obtain remedies that Chapter 15 withholds. This is especially true where the debtor's COMI would provide the desired relief, given the high frequency with which U.S. courts grant comity to COMI rights unavailable under the

underscored by the fact that most foreign Chapter 11 filers hail from other common-law jurisdictions with developed bankruptcy systems—namely, Canada (44%), the United Kingdom and its overseas territories (22%), and Australia (10%).[185] For the strategic debtor, however, stateside plenary proceedings offer a compelling benefit: COMI law does not apply.[186] While there are surely condonable use cases for Chapter 11 by foreign debtors (and intervening variables, such as linguistic convenience between Anglo-American jurisdictions), Chapter 15—with its built-in opt-out from COMI law—has transformed forum shopping, rather than preventing it.

Even those authors who *do* recognize Chapter 11's COMI-law escape hatch[187] have not identified it as symptomatic of a broader forum-shopping problem embedded in Chapter 15. Regardless of whether a foreign debtor avails itself of § 1511, Chapter 15 courts replace creditor-protective COMI law with U.S. law in areas as integral as the automatic stay,[188] the validity of security interests,[189] and the rules of evidence.[190] At the same time, they shower comity on the debtor's COMI-law rights, even if broader than what

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Bankruptcy Code. *See infra* note 191. On the other hand, where a remedy is proscribed by both the debtor's COMI and Chapter 15 and yet remains available under another chapter, a foreign filing calculated to obtain that remedy is hard to square with universalism.

[185] Figures obtained from Bloomberg Law, *see supra* note 76. Data on file with author.

[186] 11 U.S.C. § 103(l) ("Chapter 15 applies only in a case under such chapter . . . ."). This territorialist loophole sweeps even broader than § 1511. 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, 360 (2021) (noting that, even *without* filing a Chapter 15 petition, "[a] non-U.S. entity . . . [with] a place of business or property in the United States" can file Chapter 11" and that demonstrating stateside property "is easy to [do]"); *see also* 11 U.S.C. § 109(a). For a discussion of how foreign debtors' access to Chapter 11 impacts proposals to restrain forum shopping in Chapter 15, see Part IV.D below.

[187] *See, e.g.*, Couwenberg & Lubben, *supra* note 186; George Klidonas, *Automatic Stay in Chapter 15: Global Stay Applicable Only in Chapter 11 Cases*, 29 AM. BANKR. INST. J., Nov. 2010, at 38, 40; Martin S. Kenney et al., *Utilizing Cross-Border Insolvency Laws to Attack Fraud: An Analysis of How It Could Work in the British Virgin Islands, the United States, and Germany*, 13 L. & BUS. REV. AM. 569, 587 (2006) (noting that the foreign representative in a Chapter 15 case that is recognized "will have the authority to file a bankruptcy case under other chapters of the Bankruptcy Code" but "may have this authority without chapter 15 as well").

[188] *See infra* Part III.A.1.

[189] *See infra* notes 283-284 and accompanying text.

[190] *See infra* Part III.B.1.

U.S. law prescribes.[191] Notwithstanding its universalist ambitions, Chapter 15 allows debtors to leave "bad" law at home while taking "good" law with them,[192] thereby transforming the U.S. bankruptcy courts into a potential haven.

III. Gaps Between U.S. and COMI Law Allow Debtors to Shop for Remedies in Chapter 15

To demonstrate how a pernicious form of forum shopping has infected the United States' aspirationally universalist bankruptcy system, this Part presents two case studies—one at each stage of the Chapter 15 "life cycle." The first, *Betcorp*,[193] has received modest attention, being treated as an example of judicial "confusion" over the recognition requirements of Chapter 15,[194] misapplication of COMI law[195] or, on the contrary, a sound model for how COMI and U.S. law should interact in Chapter 15.[196] Yet, to date, both *Betcorp*'s effect of incentivizing forum shopping and the fact that this result flows from the text of Chapter 15 have gone unrecognized.[197]

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[191] *See supra* note 173; Casey & Macey, *supra* note 41, at 484 ("[B]ankruptcy courts in the United States will enforce broad provisions of foreign proceedings *according to the foreign jurisdiction's rules*[,] . . . . 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." (emphasis added)); *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) ("[P]rinciples of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States . . ., even if [the relevant] provisions [of COMI law] could not be entered in a plenary chapter 11 case."); Tacon v. Petroquest Res. Inc. (*In re* Condor Ins. Ltd.), 601 F.3d 319, 327 (5th Cir. 2010) (observing that, in adopting Chapter 15, "Congress did not intend to restrict the powers of the U.S. court to apply the law of the country where the main proceeding pends").

[192] *See infra* note 260 and accompanying text.

[193] 400 B.R. 266, 277 (Bankr. D. Nev. 2009).

[194] Gopalan & Guihot, *supra* note 108, at 1234, 1250-53.

[195] Look Chan Ho, *Recognizing an Australian Solvent Liquidation Under the UNCITRAL Model Law:* In re Betcorp, 18 NORTON J. BANKR. L. & PRAC. 537, 541 (2009).

[196] Alexandra CC Ragan, Comment, *COMI Strikes a Discordant Note: Why U.S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 149 (2011).

[197] *Betcorp* has been mentioned in connection with forum shopping in just one prior work, which raises the issue only to reject it for fear of inviting territorialist denial of foreign

The second case, *Platinum Partners*,[198] has not been examined in any detail by bankruptcy scholars.

As these cases illustrate, both the automatic and discretionary phases of Chapter 15 relief enable debtors to amass more power than COMI law prescribes. For those in countries with modest protections, the prospect of a U.S. court granting broader U.S. remedies offers ample incentive to shop away from home. And for all their success at stopping haven filers,[199] bankruptcy courts are complacent toward this more insidious sort of strategizing. Paradoxically, the courts' tacit acceptance of opportunism stems from no misapplication of Chapter 15. Rather, it is the natural outcome of replacing universalism's goal of "one law, one court"[200] with tests that are blind to forum shopping and yield decidedly un-universalist results.

U.S. courts give little weight to whether COMI law intends for debtors to wield a power or how providing it will affect a debtor's leverage over creditors. Failure to conduct these inquiries incentivizes forum shopping while leaving it unchecked. Thus, a debtor whose COMI allows creditors to execute on its assets can stay U.S. creditors through a stateside filing.[201] And one whose COMI takes a conservative approach to evidence can obtain expansive discovery the same way.[202] That both of the cases presented involve debtors from common-law jurisdictions (Australia in *Betcorp*, and the Cayman Islands in *Platinum Partners*) underscores the distortive effect of "remedy shopping," even between countries with similar legal systems. In the name of universalism, Chapter 15 is conferring U.S. remedies territorially, on top of those that the debtor carries over from its COMI.[203]

Worse yet, as demonstrated by a survey of all Chapter 15 provisions,[204]

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proceedings through the back door. *See* Timothy T. Brock, Column, *Problems in the Code: Canada's "Northern Lights" Could Dispel Shadow of* Bear Stearns *over Ch. 15 Practice*, 30 AM. BANKR. INST. J., Nov. 2011, at 34, 34.

[198] 583 B.R. 803, 805-06 (Bankr. S.D.N.Y. 2018), *aff'd sub nom.* CohnReznick LLP v. Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P., No. 18cv5176, 2018 WL 3207119 (S.D.N.Y. June 29, 2018).

[199] *See supra* notes 176-183 and accompanying text.

[200] Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31, 34-35 (2001).

[201] *See infra* Part III.A.1.

[202] *See infra* Part III.B.1.

[203] *See supra* note 191.

[204] *See infra* Part III.C.1.

the automatic stay and rules of evidence are not the only areas where U.S. courts negate COMI-law limits on debtor rights. Rules regarding the use, sale, and lease of debtor property, creditors' interests in collateral, and even elements of the priority scheme are all displaced by U.S. law. These criticisms pave the way for Part III.C.2's analysis of Chapter 15 alternatives—and Part IV's proposal for salvaging the existing system.

A. *Betcorp*: Debtors Get a Stay, but Their COMI Gets No Say

Betcorp was an Australian company that ran online gambling platforms.[205] Passage of the Unlawful Internet Gambling Enforcement Act of 2006[206] dealt Betcorp a bad hand, banning gaming sites in the United States, its primary revenue center.[207] With its business model upended, Betcorp's shareholders called an extraordinary general meeting and voted almost unanimously for a members' voluntary winding up (MVL), a form of Australian liquidation proceeding.[208]

Per Australian law, liquidators were appointed to reimburse Betcorp's creditors. In the course of their work, they learned of a claim by 1st Technology LLC, a U.S. company with a patent on high-speed data transmission systems that it accused Betcorp of infringing.[209] Unable to agree with the liquidators on the value of its debt, 1st Technology sued Betcorp in the District of Nevada.[210] In response, Betcorp sought Chapter 15 recognition to stay the lawsuit.[211]

1. Chapter 15 balances the parties' interests the American way, irrespective of what the COMI intends

Betcorp turned on whether an MVL is a "foreign proceeding" under Chapter 15.[212] Of § 101(23)'s seven factors,[213] the *Betcorp* court reserved

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[205] *In re* Betcorp Ltd., 400 B.R. 266, 271 (Bankr. D. Nev. 2009).
[206] Pub. L. No. 109-347, 120 Stat. 1884 (codified as 31 U.S.C. §§ 5361-67).
[207] *Betcorp*, 400 B.R. at 273.
[208] *Id.*
[209] *Id.* at 271, 274.
[210] *In re* Betcorp Ltd., 400 B.R. 266, 274-75 (Bankr. D. Nev. 2009).
[211] *Id.* at 275.
[212] *Id.*
[213] *See supra* Part II.C.1.

the greatest attention for the first, "a proceeding."[214] Discerning in Chapter 15 a legislative "intent to meld American law into international law," it rebuffed 1st Technology's invitation to adopt a narrow definition.[215] As the court observed, while "[t]o an American ear, ... the term 'proceeding' has a fairly circumscribed meaning," denoting "in-court events," it takes on "a broader definition" in Chapter 15.[216]

Channeling the Model Law's universalist aims, the court found the "hallmark" of a proceeding to be "a statutory framework that constrains a company's actions and . . . regulates the final distribution of [its] . . . assets."[217] In *Betcorp*, that framework lay in the Australian Corporations Act, which provides distressed companies with a "multitude of… procedures" to end their existence, including an MVL.[218] Determining further that the Corporations Act is the exclusive means by which insolvent companies are disposed of in Australia and that an MVL occurs in the shadow of litigation, the *Betcorp* court held "that an Australian voluntary winding up is a 'proceeding' under section 101(23) and, by extension, chapter 15."[219] Upon satisfying the other six criteria and proving that Australia was its COMI, Betcorp received Chapter 15 recognition—and with it, a stay on all stateside creditors' actions, including that of 1st Technology.[220]

2. Chapter 15's mechanical approach to automatic relief gives courts no chance to examine whether a stay is appropriate

The *Betcorp* court may have followed § 101(23) to the letter, but its result is glaringly inconsistent with Australian law, which does not provide for an automatic stay in an MVL. This reflects the procedure's purpose: to enable a solvent company to return value to its shareholders after making all creditors whole.[221] As the Supreme Court of Australia observed a

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[214] *See supra* note 157 and accompanying text.

[215] *In re* Betcorp Ltd., 400 B.R. 266, 276 (Bankr. D. Nev. 2009).

[216] *Id.* at 277.

[217] *Id.* at 278.

[218] *Id.*

[219] *Id.* at 278-80.

[220] *In re* Betcorp Ltd., 400 B.R. 266, 295 (Bankr. D. Nev. 2009).

[221] *Members' Voluntary Winding Up (MVL)*, HAMILTON MURPHY, https://hamiltonmurphy.com.au/corporate-insolvency/members-voluntary-liquidation-mvl/ (last visited July 17, 2024); Ho, *supra* note 195, at 545.

decade before *Betcorp*, the same considerations that justify a stay when a company is insolvent—namely, insufficient funds to satisfy all creditors and the resulting need to avoid a race to the courthouse—"do not apply . . . where the company is *not* insolvent."[222] Perhaps owing to this distinction, in adopting the Model Law, the Australian legislature limited the breadth of "proceeding" for purposes of recognition to cases "involving companies *in severe financial distress*."[223] It is difficult to see how a solvent company would satisfy these terms. By reflexively applying § 101(23), the *Betcorp* court gave an Australian debtor "a shield Australian law says ⟦it⟧ . . . did not need."[224]

The windfall that Betcorp received was not the bankruptcy court's fault but, rather, that of a myopic Chapter 15. While the court correctly observed that it "may look to any relevant material or source" in evaluating transnational laws like Chapter 15,[225] § 101(23) constrains the universe of relevant information to what is necessary to satisfy its seven criteria.[226] A successful showing yields recognition and, with it, the automatic stay.[227] At no point during this rote procedure does the court look beyond § 101(23) and into how the choice between COMI and U.S. remedies affects the debtor's power over creditors or the balance between foreign and domestic creditors—let alone whether the COMI even intended for a "proceeding" to count as such in the first place.[228]

In the name of universalism, the *Betcorp* court stretched the definition of "proceeding" as thin as it would go, then supplanted COMI law (no stay) with U.S. law (stay away). Provided that Australia had struck a happy medium between the debtor's and creditors' rights,[229] predicated partly on

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[222] *Catto v. Hampton Austl.* (1998) 29 ACSR 225 ¶ 22 (Austl.) (emphasis added).

[223] Explanatory Memorandum, Cross-Border Insolvency Bill 2007 (Cth) 19 (Austl.), http://www5.austlii.edu.au/au/legis/cth/bill_em/cib2007284/memo_0.html (emphasis added) ⟦hereinafter Explanatory Memorandum⟧.

[224] Ho, *supra* note 195, at 545.

[225] *In re* Betcorp Ltd., 400 B.R. 266, 282 (Bankr. D. Nev. 2009) (citing FED. R. CIV. P. 44.1).

[226] *See supra* notes 157-158 and accompanying text.

[227] *Id.*

[228] *See* Explanatory Memorandum, *supra* note 223 (strongly suggesting that the Australian legislature did not intend for solvent restructurings to qualify as proceedings under Chapter 15).

[229] *See supra* notes 108-111 and accompanying text.

freeing the latter to exercise their legal remedies, the court threw off this equilibrium in the former's favor, with implications for venue abuse and for creditors on both sides of the Pacific. In a world of asset fungibility,[230] debtors can stay any property they can get into America, thwarting creditors back home. Alternatively, U.S. creditors (who are stayed) are left either to wait and enforce their claims against whatever stateside assets remain at the end of the case or duel with the debtor at its home court in a far corner the world.[231]

The above is not to suggest that Chapter 15's cancellation of COMI law makes every debtor a remedy shopper. Debtors with property in the United States may *need* to initiate a proceeding under this chapter to administer their assets. But that is no consolation to the affected creditors, as it does not follow that U.S. law *must* replace COMI law, and the resulting displacement is no less an affront to the universalist principles that supposedly underlie Chapter 15. Furthermore, as the following case demonstrates, Chapter 15's gifts to the debtor are not confined to the initial stay and subsequent capacity to thwart its lifting. They extend to discretionary remedies, including the power to grow the estate by pursuing third parties for fraudulent transfers. And they are given without regard to how the debtor's COMI balances its interests against those of its creditors.

B. You *Can* Take It with You: *Platinum Partners* Offers Discovery that the COMI Withholds

Platinum Partners Value Arbitrage Fund L.P. (the Master Fund) and its affiliates were hedge funds incorporated in the Cayman Islands and overseen by a New York investment firm.[232] By 2012, the Master Fund was in financial distress. Three years later, and after numerous defaults, it was

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[230] *See supra* notes 85, 122 and accompanying text.

[231] This is particularly troubling in MVLs, where distribution of the debtor's assets is often over within six months to a year. Mara O'Brien et al., *Australia: Overview of Members' Voluntary Liquidation and Deregistration of an Australian Company*, LEXOLOGY (July 19, 2018), https://www.lexology.com/library/detail.aspx?g=260a2995-7882-4f8c-a134-e0c8c69b0c7d. By the time a U.S. court resolves a motion to lift the stay, the debtor might not exist.

[232] *In re* Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803, 805-06 (Bankr. S.D.N.Y. 2018), *aff'd sub nom.* CohnReznick LLP v. Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P., No. 18cv5176, 2018 WL 3207119 (S.D.N.Y. June 29, 2018).

placed in liquidation by the Grand Court of the Cayman Islands.[233] A federal grand jury subsequently indicted several of the investment firm's officers on various white-collar charges, including securities and wire fraud. Within a week, the SEC filed a civil complaint.[234]

In October 2016, the liquidators filed a request for Chapter 15 recognition in the U.S. Bankruptcy Court for the Southern District of New York, which was granted.[235] In addition to the automatic remedies that flowed from recognition, the bankruptcy court authorized the liquidators to "examine witnesses, take evidence, and seek the production of documents within the territorial jurisdiction of the United States concerning the . . . . [f]unds."[236] The liquidators thus requested that CohnReznick LLP, the funds' auditor, produce all relevant documents.[237] CohnReznick partly complied but withheld certain files. The liquidators responded by subpoenaing CohnReznick and, after its continued refusal, moving to compel.[238]

1. COMI-law limits do not apply to Chapter 15 discretionary relief

Chief among CohnReznick's objections was that Cayman law would prohibit the liquidators from obtaining its work papers. Enabling the debtor to circumvent COMI law, the auditor argued, would conflict with Chapter 15's purpose of serving "not only the debtor but all interested entities," itself included.[239] The liquidators countered that foreign law on the discoverability of subpoenaed documents has no bearing on relief determinations in Chapter 15.[240]

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[233] *Id.* at 806.

[234] *Id.*

[235] *Id.* at 806-07.

[236] *See* Order Granting Recognition and Relief in Aid of a Foreign Main Proceeding Pursuant to Sections 1504, 1509, 1515, 1517, 1520 and 1521 of the Bankruptcy Code ¶ 7, *Platinum Partners*, 583 B.R. 803, ECF No. 27.

[237] *In re* Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803, 807-08 (Bankr. S.D.N.Y. 2018), *aff'd sub nom.* CohnReznick LLP v. Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P., No. 18cv5176, 2018 WL 3207119 (S.D.N.Y. June 29, 2018).

[238] *Id.* at 808-09.

[239] *Id.* at 812; *see* 11 U.S.C. § 1501(a)(3).

[240] *Platinum Partners*, 583 B.R. at 812-13.

Although the bankruptcy court entertained the parties' arguments as to the limits of discovery in the Cayman Islands, it quickly sidestepped the question and sided with the liquidators. "Even assuming *arguendo* that the discovery of audit work papers . . . [i]s clearly prohibited under Cayman law," the court observed, "the scope of discovery available in the foreign jurisdiction is not a valid basis upon which . . . [to] limit relief available to the [l]iquidators pursuant to the Bankruptcy Code."[241] After disposing with CohnReznick's remaining arguments, the court ordered production of the requested documents.[242]

On appeal, the district court affirmed the bankruptcy court's reasoning, finding further support for production "[i]n the analogous context of 28 U.S.C. § 1782 proceedings."[243] Discovery under this section, which enables the court to order a party in the United States to comply with a request from a foreign or international tribunal, has been held valid even if "far broader" than what the foreign forum's law allows.[244] There being no requirement of congruence between domestic and foreign remedies under § 1782, the court "decline[d] to impose" one on Chapter 15.[245] As a final blow to CohnReznick, the court observed that its Cayman counterparts, even if unable themselves to order the production sought, are generally receptive to the fruits of U.S. discovery.[246]

2. Ignoring home-court constraints when awarding discretionary relief gives debtors more than their COMI intended, with no parallel benefit to creditors

The holding that courts need not consider the limits of COMI law before arming debtors with U.S.-style discovery tells them not to police forum shopping just as it makes it more likely. Following this laissez-faire approach, the bankruptcy court glancingly noted—but did not rebut—CohnReznick's prediction that swapping in stateside evidentiary rules for

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[241] *Id.* at 815.

[242] *In re* Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803, 818-22 (Bankr. S.D.N.Y. 2018), *aff'd sub nom.* CohnReznick LLP v. Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P., No. 18-CV-5176, 2018 WL 3207119 (S.D.N.Y. June 29, 2018).

[243] *Platinum Partners*, 2018 WL 3207119, at *6.

[244] Mees v. Buiter, 793 F.3d 291, 303 (2d Cir. 2015) (citation omitted).

[245] *Platinum Partners*, 2018 WL 3207119, at *6.

[246] *Id.*

narrow COMI ones would invite forum shopping.[247] This argument went unaddressed on appeal.[248] To the contrary, by referencing the receptiveness of Cayman courts to U.S. discovery (even if broader than what they would grant), the district court justified its opinion *because of* the very reason forum shopping would be attractive to a debtor in a case like this: to retrieve otherwise-unobtainable evidence from the United States and bring it back home.

If *Betcorp* is a testament to the courts' inability to constrain the forum-shopping incentives of automatic relief, *Platinum Partners* suggests that remedies awarded at the court's discretion fare no better. Indeed, the latter may be subject to greater exploitation by debtors, while harming creditors more. By ousting COMI law to apply a territorialist U.S. stay, the *Betcorp* court injured U.S. creditors and fell short of Chapter 15's universalist aims. Yet, despite the inappropriateness of a stay in that case, the court had no option but to award it upon granting recognition, which the debtor arguably had to seek to manage its stateside assets. And in any case, the reach of the court's decision stopped at the border. By contrast, the *Platinum Partners* court had a choice between territorialist and COMI remedies—and after reviewing both, went with the former. The effects of that decision would extend beyond the United States, freeing the debtor from COMI constraints to take home any evidence it may find.[249]

Ironically, the district court's analogy to § 1782,[250] with which it justified denying the effect of COMI-law limits on discovery, calls attention to the more serious perils of evidentiary forum shopping in bankruptcy than in general civil litigation. Commentators have observed that the breadth of § 1782 fosters venue abuse by offering foreign litigants "an attractive alternative to the limited discovery procedures" of their local rules.[251] Thus,

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[247] *In re* Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803, 812 (Bankr. S.D.N.Y. 2018), *aff'd sub nom.* CohnReznick LLP v. Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P., No. 18-CV-5176, 2018 WL 3207119 (S.D.N.Y. June 29, 2018).

[248] The phrase "forum shopping" never appears in the opinion. *See Platinum Partners*, 2018 WL 3207119, at *6.

[249] To be sure, this result would have been avoided if not for the Caymans' complicity in ousting its own law—but neither would it have occurred if Chapter 15 exhibited universalism on the ground.

[250] *See supra* notes 243-245 and accompanying text.

[251] Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L.

a witness's chance visit to the United States gives French litigants a ticket out of home-court discovery,[252] and a party discontent with "narrow German procedures" can use the federal courts to "haul ⟦in⟧ . . . 30 million emails."[253] Whatever undue benefits that section may confer, however, it offers them to plaintiffs and defendants alike.[254] By contrast, discretionary relief under Chapter 15 is asymmetrical, being confined to the debtor's foreign representative.[255] Even if that were not the case, creditors would have limited use for discovery. Their actions against the debtor are stayed within the United States[256] (and around the world if the debtor files for Chapter 11[257]). If by some chance a creditor escapes the stay, U.S. courts are unlikely to authorize any discovery against the debtor.[258] While Chapter 15 augments the powers of the debtor—freeing it to seek evidence of preferences, fraudulent transfers or, in the case of *Platinum Partners*, liability for civil or criminal mismanagement—it adds nothing to the already

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127, 151-52 (2012).

[252] Edelman v. Taittinger (*In re* Edelman), 295 F.3d 171, 174-75 (2d Cir. 2002).

[253] *See* Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 594-95 (7th Cir. 2011).

[254] On its face, § 1782 assistance is available to "litigants," no matter which side they are on. 28 U.S.C. § 1782.

[255] 11 U.S.C. § 1521(a)(4).

[256] *In re* JSC BTA Bank, 434 B.R. 334, 348 (Bankr. S.D.N.Y. 2010) (holding that Chapter 15 stays actions against the debtor within the United States as well as abroad, so long as there is "a demonstrated relationship" between the foreign proceedings and the debtor's U.S. property).

[257] Klidonas, *supra* note 187.

[258] Transcript of Doc #75 First Motion to Allow 2004 Discovery from the Foreign Representative and Notice of Motion; Doc #79, Application for FRBP 2004 Examination Before the Honorable Robert E. Gerber, United States Bankruptcy Judge at 16-17, *In re* China Med. Techs., Inc., No. 12-13736 (Bankr. S.D.N.Y. Mar. 29, 2013), ECF No. 111 (denying a shareholder's request to obtain discovery from a Chapter 15 debtor on grounds that §§ "1521 and 1507 give⟦⟧ benefits to foreign representatives that, by their terms, don't extend to other parties-in-interest," but declining to "impos⟦e⟧ a hard and fast rule" that such requests must always be refused); Patricia B. Tomasco & Sara C. Clark, *Heads I Win, Tails You Lose: Asymmetric Discovery in Chapter 15*, 38 AM. BANKR. INST. J., Sept. 2019, at 26, 27 (observing that Chapter 15 discovery powers, "like all discretionary relief," are "one-sided" in the debtor's favor and that "⟦t⟧he few courts" that have considered whether other parties are entitled to conduct discovery in Chapter 15 "have denied ⟦such⟧ requests"). *But see In re* Viacao Itapemirim, S.A., 607 B.R. 761, 763-64 (Bankr. S.D. Fla. 2019) (finding that whether a party other than the debtor can obtain discovery in Chapter 15 is an open question but denying the request of certain parties in interest due to their lack of a pecuniary interest in the case).

negligible capabilities of creditors.

Most importantly, *Platinum Partners* reveals an inconsistency between how Chapter 15 treats COMI rules that grant, and those that limit, debtors' relief, yielding an arbitrage opportunity among legal systems. As noted, COMI law is subject to a high bar for ouster when it confers a right on the debtor, having been defeated on public policy grounds only four times.[259] Hence, where the debtor seeks to exculpate its management from creditor lawsuits more than the United States normally allows, for example, Chapter 15 heeds its universalist aims and affirms the releases.[260] Yet, when the COMI withholds a right that U.S. law would confer, home-court restrictions lose their "valid[ity]" and are replaced with territorialist remedies.[261] In comes the stay, out go the discovery limits and, thus, the "modified" qualifier on Chapter 15's universalism comes into view.

Where COMI-law limits on the debtor are not enforced, correlative COMI-law rights of its creditors are extinguished, denying them the benefits of universalism. And where COMI-law rights of the debtor *are* enforced, the U.S. rights that creditors would enjoy under territorialism once more disappear. Debtors may pick whichever of universalism or territorialism offers them the most, while creditors content themselves with whichever offers least. Like a funnel on its side, the public policy exception is narrow only one way, giving comity to COMI laws that the debtor invokes to grow its power, while broadening at the other end to swallow those that the debtor would prefer to forget. The goal of extending COMI law worldwide, which Chapter 15 is intended to help realize, cannot be squared with a system that, for debtors, amounts to "universalism for me, but not for thee."

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[259] *See supra* notes 160, 173 and accompanying text. Since discretionary relief has been denied for public-policy reasons only twice, the fact that it was denied in 5% of recent cases suggests that courts may have other reasons for refusing to extend debtors' COMI-law rights. *See supra* note 172 and accompanying text. However, regardless of the criteria that courts apply when evaluating these rights, debtors appear to receive their benefit in nearly all cases. At the same time, the case studies above and the survey in Part III.C.1 below attest to the high frequency with which COMI-law limits are denuded when more stringent than U.S. law.

[260] *See infra* note 316 and accompanying text.

[261] *See In re* Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803, 815 (Bankr. S.D.N.Y. 2018), *aff'd sub nom.* CohnReznick LLP v. Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P., No. 18-CV-5176, 2018 WL 3207119 (S.D.N.Y. June 29, 2018).

C. Chapter 15 Is Replete with Other Conflicts Between U.S. and COMI Law Likely to Incentivize Remedy Shopping

From the holdings of *Betcorp* and *Platinum Partners* emerges a critique of the practical and normative implications of modified universalism, as codified in Chapter 15. Despite its goal of "one law, one court,"[262] Chapter 15 replaces meager COMI remedies with generous U.S. ones—amounting, in these respects, to territorialism. But when COMI law grants something that the U.S. denies, universalism finds a way. Both results favor strategic filers. The predictability thereof is the predicate of forum shopping.[263] And the incentives to shop are magnified where, as in *Platinum Partners*, the debtor's COMI is not fully principled in applying its own law—enabling Chapter 15 debtors to take U.S. remedies, which the COMI itself would not grant, back home.

Yet, the weight of this critique is limited by the narrowness of the case-study method. The cases above suggest that Chapter 15 incentivizes forum shopping by offering foreign filers a U.S. stay and discovery. These alone are significant territorialist vestiges within a modified universalist system. The automatic stay, for instance, applies in every case recognized, thereby elevating U.S. law and empowering some debtors more than their COMI prescribes. Still, an analysis of two remedies says little about the overall functioning of Chapter 15. It remains to be seen whether the remedy shopping that these cases suggest the chapter invites is pervasive or the odd exception.

This Part seeks to offer an answer. Unlike earlier inquiries into forum shopping, including some concerning Chapter 15,[264] its contribution is not a quantitative analysis of bankruptcy filings. Data already suggest that forum shopping, while no longer from havens, has persisted since Chapter 15's adoption.[265] More to the point, for present purposes, it is less a *forum* that debtors are shopping for than a set of remedies unavailable in their COMI. Many of these remedies are automatic, ousting COMI law whenever it insulates debtors less than U.S. law. Hence, all cases are potential forum shops, with genuine filings differing from strategic ones based only on the intent of the debtor's case placers. Motives aside, the result is to unbalance

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[262] *See supra* note 200 and accompanying text.

[263] *See supra* Part II.A.

[264] *See supra* Part II.C.2.

[265] *See supra* notes 76, 184-186 and accompanying text.

the power of debtors vis-à-vis their creditors (and domestic and COMI creditors inter se) whenever a debtor crosses the border. The remaining question is how much of Chapter 15 works this kind of territorialism.

1. Forum shopping's footholds: A survey of everywhere Chapter 15 ousts COMI law

By reviewing each section of Title 11 that operates in Chapter 15, this Part resolves to answer how many take the territorialist approach to remedies identified in the preceding cases. If few to none (beyond the automatic stay and discovery rules), perhaps such conflicts with Chapter 15's universalist roots can be forgiven—or at least rationalized by the "modified" caveat. Many more, and one starts to wonder whether this chapter slips too much of the old wine into new bottles—along with the unpredictability and inefficiency of the protean COMI concept.[266]

This survey proceeds as follows. In terms of scope, Chapter 15 consists of 32 sections.[267] A further 21, scattered through Chapters 1-5 of Title 11, are incorporated via § 103(a).[268] Each section is examined to determine whether it vests the debtor with a substantive or procedural right on its face. Narrowing the aperture to rights reflects the reality that debtors are unlikely to shop for provisions that give them no benefit, such as the periodic adjustment of dollar-denominated thresholds to account for inflation.[269] The focus on rights accruing *to the debtor* stems from the fact that it is rarely creditors who decide where to file. As demonstrated by the cases above, when Chapter 15 grants debtors a right, the bankruptcy court will generally enforce it over COMI law—unless enforcement depends on some other factor, such as the judge's discretion[270] or avoiding disruption of the foreign-main proceeding.[271] Hence, the more remedies that Chapter 15 prescribes,

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[266] *See supra* note 144 and accompanying text.

[267] 11 U.S.C. §§ 1501-32.

[268] *Id.* § 103(a) ("[C]hapter [1 and] . . . sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.").

[269] *Id.* § 104.

[270] *Id.* §§ 1519(a), 1521(a).

[271] *Id.* § 1519(c). Even when the remedy at issue is a discretionary one, *Platinum Partners* calls into question how much weight U.S. judges are willing give to COMI-law limits. *See supra* Part III.B.

the less filial it is to the COMI and its own "international origins."[272]

Since there is no obvious threshold for how much replacement of COMI law makes Chapter 15 more modified *territorialist* than universalist, the purpose of this review is less empirical than descriptive. Its results are visualized in Table 1 below. The applicable portions of Title 11 have been divided by chapter and section. Provisions are grouped when they serve similar purposes or for the sake of brevity if they do not confer any right on the debtor. Those that *do* confer a right have been highlighted. Asterisks in the right-most column distinguish rights that the debtor obtains automatically or on request (two) from those available only when the court allows (one). Of the 53 sections that are part of or incorporated by Chapter 15, 14 either automatically or in the judge's discretion replace COMI with U.S. law.

Most of the dozen or so sections that vest rights in the debtor effect a considerable abridgment of COMI law. First, there are those that govern temporary, discretionary, and automatic relief.[273] Taking them in turn, § 1519 applies between when a petition for recognition is filed and granted. It empowers the court to provide provisional remedies "at the request of the foreign representative, where ⟦such⟧ relief is urgently needed to protect the assets of the debtor or the interests of ⟦its⟧ creditors."[274] These include a stay on the debtor's assets, "suspension of ⟦a creditor's⟧ right to transfer, encumber, or dispose of ⟦the⟧ assets of the debtor," the taking of evidence and, with

Table 1: Chapter 15 Provisions that Confer Rights on the Debtor

Title 11	Description	Debtor Right?
Chapter 1		
§§ 101-04	Definitions, rules of construction, applicability of chapters, and adjustment of dollar amounts.	-
§ 105	Gives the bankruptcy court certain powers and withholds others (e.g., the power to appoint a	-

[272] 11 U.S.C. § 1508.
[273] *Id.* §§ 1519-21.
[274] *Id.* § 1519(a).

	receiver).	
§§ 106-07	Waives sovereign immunity as to Title 11 proceedings and provides for public access to bankruptcy documents, subject to certain exceptions.	-
§ 108	Extends non-bankruptcy time limits for debtor to, e.g., commence an action or file a pleading.	**
§§ 109-11	Defines who may be a debtor under Title 11, penalizes fraudulent or negligent filings, and restricts the U.S. Trustee's ability to approve nonprofit budgets.	-
§ 112	Prohibits the disclosure of minor children's names.	-
Chapter 3		
§§ 307-62(o)	Allows the U.S. Trustee to appear in a Title 11 case and prohibits the bankruptcy court from staying certain third-party actions.	-
Chapter 5		
§§ 555-56, 559-62	Exceptions to the prohibition on ipso facto provisions.	-
§ 557	Compels expedited disposition of interests in grain, on the debtor's request.	**
Chapter 15		
§§ 1501-04	Purpose, definitions, priority as to other U.S. law, and case commencement.	-
§ 1505	Allows the bankruptcy court to authorize the debtor's foreign representative to operate in other foreign countries.	*
§§ 1506, 1508	Public policy exception and rules governing the interpretation of Chapter 15.	-
§§ 1509-10, 1512	Allows the debtor's foreign representative to file a petition in the United States without subjecting	**

	itself to jurisdiction for non-bankruptcy purposes.	
§ 1511	Allows the debtor's foreign representative to begin a fully-fledged bankruptcy *outside of* the Chapter 15 process, with respect to stateside entities.	**
§§ 1513-14	Parity of rights between similarly situated foreign and domestic creditors.	-
§§ 1515-18	Rules around the petition for recognition and the granting thereof.	-
§ 1519	Temporary relief the bankruptcy court may grant upon the filing of a petition.	*
§ 1520	Automatic relief upon the granting of a petition for recognition.	**
§§ 1507, 1521	Discretionary relief the bankruptcy court may grant upon recognition of a case.	*
§ 1522	Limits the court's ability to grant relief under §§ 1519 and 1521.	-
§ 1523	Gives the debtor's foreign representative standing to exempt property and pursue certain transfers if the debtor has begun a fully-fledged proceeding under another chapter of Title 11.	**
§ 1524	Gives the debtor's foreign representative a right of intervention in other proceedings upon recognition.	**
§§ 1525-27	Rules for cooperation between U.S. and foreign courts and the trustee (if any) and debtor's foreign representative.	-
§§ 1528-32	Rules governing concurrent proceedings.	-

limited exceptions, "any additional relief that may be available to a trustee."[275] Before the court has even gotten to the *Betcorp* stage of deciding whether the action before it qualifies as a proceeding, Chapter 15 empowers it to functionally repeal COMI law regarding creditors' rights, the preservation of estate property, the rules of evidence, and "any additional" areas for which the debtor can persuasively argue. These eliminations can be made permanent after recognition via § 1521's "any appropriate relief"

[275] *Id.* (incorporating by reference § 1521(a)(3)-(4), (7)).

provision.[276] Notwithstanding § 1519(c)'s caveat that "[r]elief . . . can be denied if it would interfere with the . . . foreign-main proceeding," the fact that the right to be granted would be withheld by the COMI has generally not been deemed a sufficient "interefe[nce]."[277] No comparable safeguard applies to § 1521.

Upon recognition of the foreign proceeding, the Chapter 15 debtor is further vested with all the remedies enumerated by § 1520. In addition to the automatic stay,[278] these include the powers to "use, sell, or lease" estate property,[279] avoid postpetition transfers not preauthorized by the court,[280] and acquire postpetition property free from prepetition security agreements.[281] As in *Betcorp*, the automatic nature of this relief precludes judicial inquiry into the effect that ousting COMI law has on the relationship between the debtor and its creditors and the foreign and COMI creditors among themselves—at the same time as it broadens the scope of the ouster beyond what even § 1519 would allow. Of note, despite the eminent role of absolute priority in bankruptcy,[282] § 552's "free and clear" provision (which § 1520(a)(2) incorporates) has the potential to throw off the COMI's distributional scheme. For example, Spanish law provides that interests "secured by a pledge over future receivables" are "'specially privileged' in an insolvency proceeding."[283] These interests are enforceable, and the associated collateral cannot be distributed among the unsecured creditors "until the . . . secured party is [paid in] full[]."[284] Section 1520, by providing that after-acquired property (like future receivables) is *not* subject to prepetition security interests, eliminates an asset conferred by the COMI, effecting a forced redistribution from secured creditors to their unsecured counterparts. In doing so, Chapter 15 slips outside the orbit of universalism and into the territorial lex situs rule.

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[276] *Id.* § 1521(a).

[277] *See supra* notes 241-244 and accompanying text.

[278] 11 U.S.C. § 1520(a)(1) (citing *id.* § 362).

[279] *Id.* § 1520(a)(2) (citing *id.* § 363).

[280] *Id.* (citing *id.* § 549).

[281] *Id.* § 1520(a)(2)-(4) (citing *id.* § 552).

[282] Baird, *supra* note 51.

[283] Héctor Bros & Manuel Follía, *Spain*, *in* LENDING AND SECURED FINANCE 2022, at 425, 427 (Thomas Mellor & Morgan, Lewis & Bockius LLP eds., 10th ed. 2022).

[284] *Id.*

These remedy-specific rules are not even the greatest affront to the debtor's COMI. That epithet arguably goes to § 1511 which, as noted above,[285] functions like a backdoor into territorialism. Thanks to this section, the foreign representative in a proceeding recognized as foreign-main may put the debtor into bankruptcy under a chapter *other than* Chapter 15.[286] Any debtor with property in the United States can thus be administered entirely under U.S. law.[287] While the foreign representative's freedom to deviate from COMI law is apt to be limited by the COMI itself, that should offer no comfort to adherents of universalism, which is concerned with how well *other countries* heed the COMI. Section 1511 blesses the commencement of a proceeding devoid of COMI law, giving the debtor with stateside property a choice between modified universalism and territorialism. One therefore wonders how much Chapter 15 truly improves upon the historical default rule.

2. To (old) new beginnings?: Chapter 15 alternatives to combat the forum shopping that U.S. courts' provision of territorialist U.S. remedies engenders

Modified universalism, as practiced under Chapter 15, is in some respects yielding the worst of both worlds. For tolerating the slipperiness of the universalist COMI, creditors and other stakeholders receive the protection of COMI remedies only to the extent that U.S. law would constrain the debtor—after which point, Chapter 15 reverts to territorialism.[288] This hybrid experiment gives debtors a choice between the old and new paradigms, forcing creditors to cover the externalities by bludgeoning the global economy with inflated rates and foregone transactions. Maybe it should be abandoned in favor of a return to the simplicity and predictability of territorialism.

Of course, as Part II.B illustrates, universalism has not become restructuring's utopian ideal without reason. Territorialism incurs significant costs, including duplicative proceedings and the risk of eleventh-hour asset transfers that transform the law which governs creditor rights.[289]

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[285] *See supra* notes 184-186 and accompanying text.
[286] 11 U.S.C. § 1511(a)(2) (citing *id.* §§ 301-02).
[287] *See supra* note 186 and accompanying text.
[288] *See supra* notes 259-261 and accompanying text.
[289] *See supra* Part II.A.

One option might therefore be to restore the traditional default rule, while updating it to cabin these inefficiencies.

LoPucki's "cooperative territoriality" offers a vision for how such a model could work. Responding to concerns over efficiency in a system where every country containing debtor assets administers its own case, LoPucki foresees each designating an administrator for the case.[290] Issues requiring international cooperation—such as surreptitious asset transfers—would be resolved by agreement of the administrators, rather than the fortuity of where the debtor's COMI is located at the time of filing. Critics have questioned why these administrators would collaborate: Indeed, their local creditors might reap greater recoveries if they refused to share.[291] To this, LoPucki offers a variant of the creditors' bargain: "If the assets of the multinational would bring a higher price if sold together, it will be in the interests of the administrators to sell them together and split the additional proceeds among them."[292] Administrators could agree on substantive and procedural law as needed, harmonizing the applicable insolvency rules à la universalism—but with less risk of magnifying the effect of inefficient COMI law.[293]

Yet, despite cooperative territoriality's superior predictability, it addresses only half of Chapter 15's remedy-shopping problem. Debtors would no longer enjoy the universalist power to extend favorable COMI law abroad: The bankruptcy court would apply its own law in toto. However, they would retain the power to replace *unfavorable* home-court remedies with more attractive U.S. ones, thereby preserving one of Chapter 15's principal forum-shopping incentives, raising debtor power over that of creditors, and constraining U.S. creditors more than the COMI would direct.

To be sure, cooperative territoriality might render these remedial wagers less certain for debtors via the ad hoc decision-making among administrators that LoPucki envisions. Even the *possibility* of consistency across borders is, from the standpoint of avoiding remedy shopping, an improvement upon the reflexive territorialist remedies that Chapter 15 presently awards. Still,

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[290] LoPucki, *supra* note 42, at 162.
[291] Bufford, *supra* note 149, at 116.
[292] LoPucki, *supra* note 42, at 162.
[293] *See infra* Part IV.B.2.

full-throated territorialism is hardly a panacea (and an ironic one at that) for the problem of Chapter 15's territorialist remedies. Debtors would keep prospecting for favorable law in other countries, offset only by the possibility of LoPucki's administrators deciding on a different rule—a source of uncertainty liable, in turn, to raise borrowing costs just as under universalism.

A different path to avoiding the uncertainty of both Chapter 15's COMI system and the case-by-case collaboration of cooperative territoriality might be to dispense with COMI but otherwise retain universalism's notion of a consolidated worldwide proceeding. That is the premise of the ex ante "debtor's choice" proposal first advanced by Robert K. Rasmussen[294] and, more recently, by Anthony J. Casey et al. This model accepts modified universalism as the most "sensible" approach to cross-border insolvency, contending "that the existence of a centralized proceeding is a superior option" to the numerous parallel proceedings necessitated by territorialism.[295] Yet, like territorialism, it would jettison the COMI concept. Instead, long before insolvency, debtors would specify in their organizational documents which venue and governing law should apply in the event of their bankruptcy. Doing so would dispense with the problem of creditors not knowing where a court will deem the debtor's COMI to lie until recognition. In contrast with eve-of-bankruptcy forum shopping (which yields deadweight loss),[296] forcing debtors to shop in advance would enable creditors to price their loans with greater certainty, driving down borrowing costs and enabling the reallocation of capital to more productive uses. Clarity around which country should preside over a multinational case, and what law would apply, can also be expected to eliminate litigation around the location of the debtor's COMI.[297]

Despite its benefits, the "menu approach"[298] is no answer to the problem of debtors shopping for remedies that their COMI withholds. There is little reason to think that replacing COMI law with that of the debtor's choice forum would keep U.S. courts from granting U.S. remedies in Chapter 15 cases. That risk is particularly high since requiring a preset COMI, without

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[294] Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 66-67 (1992); *see also* Rasmussen, *supra* note 129.

[295] Casey et al., *supra* note 144, at 3.

[296] *See supra* notes 89-91 and accompanying text.

[297] Casey et al., *supra* note 144, at 7.

[298] Rasmussen, *supra* note 294, at 66.

more, leaves open the Chapter 11 backdoor.[299] Hence, debtors would remain free to begin a plenary proceeding under U.S. law, regardless of what jurisdiction they claimed would govern their insolvency. To the extent that other countries *also* substitute their own remedies for those of the debtor's prechosen forum, lenders would continue needing to compare the relief available in the prechosen forum with that of every country in which the debtor has assets and any others to which it could transfer them—generating unpredictability and higher borrowing costs.

As this review of Chapter 15 alternatives suggests, prior scholarship has not yet determined how to ensure that "governing" law—whether that of the COMI or a forum preselected by the debtor—*actually* governs transnational proceedings. Despite their willingness to enforce COMI law when it grants rights, U.S. courts reject rules that bind the debtor more than they would and instead substitute their own—from the automatic stay to discovery, the sale of debtor assets, and even the scope of creditors' security. Reverting to territorialism with guardrails or requiring debtors to choose a COMI substitute in advance would not change this. Foreign debtors would retain the power to pursue favorable remedies in the United States (and by extension, other Model Law countries). Although the predictability of cooperative territoriality and the debtor's choice model makes either an improvement over the existing Chapter 15, the ideal approach would ensure that whichever law *should* provide all the important remedies in a transnational case does so.

IV. A COMI-Law Presumption as a Fix for Remedy Shopping in Chapter 15

The foregoing discussion has criticized Chapter 15 for failing to deliver on the promises of universalism while sacrificing clarity and enabling forum shopping. These revelations offer ample support to the chapter's critics, who would scrap it for an updated territorialism or embrace strategic filings so long as announced in advance.[300] Yet, after several hundred years of progress,[301] is it truly time to return to the drawing board? If the gaps between COMI law and the U.S. remedies that bankruptcy courts enforce

[299] *See supra* notes 285-287 and accompanying text.

[300] *See supra* Part III.C.2.

[301] *See supra* note 112 and accompanying text.

could be bridged, it would narrow the divide between Chapter 15 and its universalist goals, giving normative legitimacy and greater predictability to the modified-universalist project.

This Part develops a proposal to do so by making COMI law presumptive, thereby striking from the typical case the U.S.-law holdouts that incentivize forum shopping. Part IV.A argues that this reform would not exceed judges' capacity, despite requiring them to compare U.S. and COMI remedies (and their limits). It bases this claim on three observations: that (i) U.S. courts (and especially bankruptcy courts) already conduct the kind of comparative analysis proposed; (ii) most countries supplying Chapter 15 cases are from the common-law legal tradition, making their law more familiar to U.S. courts; and (iii) Chapter 15 already contains ample opportunities for the parties to direct judges to the relevant COMI law. Part IV.B offers a roadmap for schematizing situations where the COMI-law presumption should be rebutted, such as when a COMI rule is unduly value destructive or manifestly violates the public policy of the United States. Part IV.C contends that the amendment prescribed could garner the necessary congressional support, since it safeguards U.S. creditors from foreign opportunism and, unlike other venue proposals, would not prejudice domestic political and business interests. Finally, Part IV.D acknowledges and responds to the shortcomings of this proposal and identifies grounds for future research.

A. Making COMI Law Presumptive in Chapter 15: A Judicially Feasible Solution to Remedy Shopping

For as much as the prior parts suggest that Chapter 15 has become unmoored from its universalist foundations, there may be a legal solution. Unlike at present (where comparative analysis is cabined at the recognition stage, arising primarily in the discretionary context[302]), Chapter 15 could be amended to *require* a judge considering a request for recognition or discretionary relief to evaluate that request against the relevant rules from the debtor's COMI. The latter would be presumptively enforced, subject to the factors outlined below.[303] In doing so, courts would give credence to the claim that "a Chapter 15 court in the United States acts as an adjunct or arm

[302] *See supra* Parts III.A.1, III.B.1.
[303] *See infra* Part IV.B.

of a foreign bankruptcy court where the main proceedings are conducted."[304] An arm that overrides the nerve center's determinations is more of a medical malady than a system of insolvency.

The implication that this review would require courts to conduct comparative analysis should not, for several reasons, count against its feasibility. First, federal judges are expert comparativists, with numerous doctrines requiring them both to understand foreign law and to contrast it with their own. To take an obvious example, dismissing a case for *forum non conveniens* depends, inter alia, on the adequacy of foreign remedies and whether the plaintiff's choice of forum was motivated by opportunism.[305] Similarly, when giving res judicata effect to a foreign judgment, a U.S. court must be so certain about what the judgment says and whether the foreign proceeding was fair that a litigant's case can be foreclosed without a new trial under U.S. law.[306]

Bankruptcy courts are arguably even more practiced at analyzing foreign law than their Article III counterparts. As perhaps the primary adjudicators of state-law rights in the federal system[307]—the property interests that are their core concern being created by state law[308]—bankruptcy judges must constantly decide what unfamiliar state rules mean. And while such rules are not "foreign" in the international sense, the expertise of these judges extends to genuinely foreign law as well, at least as far as the magnet courts are concerned. The vast majority of foreign Chapter 11 and 15 petitions, numbering in the hundreds each year, pass through these six courts.[309]

The capacity of judges to undertake the kind of comparative analysis proposed—determining whether COMI law provides a remedy, and whether it should be preempted—is underscored by the case studies above. As *Betcorp* demonstrates, bankruptcy judges—even outside the magnet

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[304] *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 306 (3d Cir. 2013).

[305] Howe v. Goldcorp Invest., Ltd., 946 F.2d 944, 950-52 (1st Cir. 1991); Norex Petroleum, Ltd. v. Access Indus., 416 F.3d 146, 154-55 (2d Cir. 2005).

[306] *See* Taglieri v. Monasky, No. 15 CV 1052, 2018 WL 7575037, at *2-3 (N.D. Ohio Jan. 26, 2018) (reviewing "relevant portions of the Italian Codes of Civil and Criminal Procedure" to determine whether an Italian court's decision should receive res judicata effect).

[307] Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 636 (2004).

[308] Butner v. United States, 440 U.S. 48, 54-55 (1979).

[309] *See supra* note 76 and accompanying text.

courts—are more than capable of consulting foreign sources and legislative history when reconciling what qualifies as a "proceeding" in the debtor's COMI and under Chapter 15.[310] *Platinum Partners* suggests the same with respect to the rules of evidence.[311] What is recommended is therefore not a new species of analysis unlike anything bankruptcy courts have done before, but a different result to an inquiry they already make.

Second, in a supermajority of cases, the COMI law that bankruptcy judges would need to assess would not be all that "foreign" in the first place. Between 2019 and 2024, Bloomberg Law recorded 670 corporate petitions for Chapter 15 recognition in the United States. As summarized in Table 2 below, closer analysis of these filings reveals that nearly 80% came from just three countries: Canada, the United Kingdom, and Australia. Others represent a vanishingly small portion of the sample. For example, Luxembourg, Mexico, and Singapore, which together round out the top ten, accounted for a mere 1% each. Returning to the top-three filers, each speaks English and shares a common-law legal tradition with the United States. In the latter respect (and to some extent, the

Table 2: Top Source Countries of Chapter 15 Cases and Their Share of Overall Filings

Rank	Country	# Filings	% Sample
1	Canada	349	52%
2	United Kingdom (and overseas territories)	126	19%
-	United Kingdom	48	7%
	Cayman Islands	37	6%
	Bermuda	20	3%
	British Virgin Islands	17	3%
3	Australia	52	8%
4	Brazil	32	5%
5	France	13	2%
5	Indonesia	13	2%
7	Netherlands (and overseas territories)	11	2%

[310] *See supra* notes 217-219 and accompanying text.

[311] *See supra* notes 241-242, 246 and accompanying text.

	Netherlands	10	2%
	Curaçao	1	0%
8	Bahamas	5	1%
8	Germany	5	1%
10	Luxembourg	4	1%
10	Mexico	4	1%
10	Singapore	4	1%

former), they come closer to the typical substance of bankruptcy than Louisiana. These factors, together with the relative lack of countries with less-familiar law sending cases, would combine to ease the burden on U.S. courts of performing the recommended analysis.

Third and finally, bankruptcy judges would not be "going it alone" in their examination of COMI law. Chapter 15 already affords an opportunity for creditor commentary, no matter when in the proceeding a debtor requests relief. Recognition is a precondition to obtaining rights under § 1520 and can be granted only "after notice and a hearing," at which creditors may participate.[312] Creditors may likewise contest the discretionary remedies provided under §§ 1519 and 1521.[313] In determining what COMI law says and whether the presumption of its application should be rebutted, therefore, a judge would have the benefit of the parties' briefs to point her to the relevant provisions.

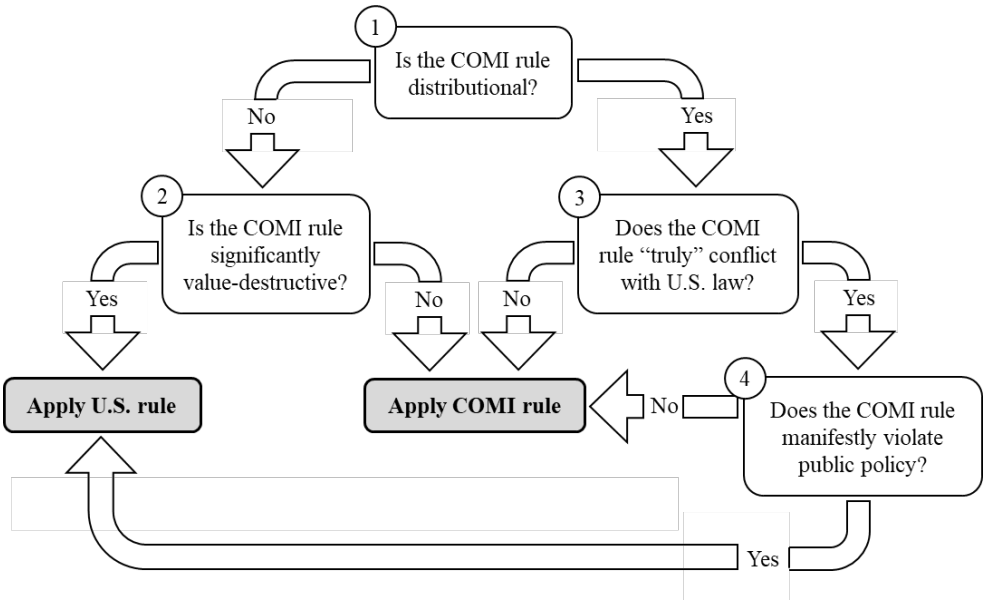
B. Rebutting the Presumption: Where COMI Law Is Manifestly Value Destructive or Contrary to Public Policy

Any reform to Chapter 15 that would retain the COMI model must, consistent with universalism, propose heeding COMI law wherever possible. Yet, it cannot direct courts to do the impossible: to apply rules that violate the public policy of the United States. Presently, Chapter 15 courts display a knack for enforcing COMI-law rights but invalidate COMI-law limits for far less than incompatibility with bedrock principles of U.S. law. If what the COMI prescribes is to become presumptive in *all* Chapter 15 cases (whether it entitles the debtor to more or less than U.S. law), a schema

[312] 11 U.S.C. § 1517(a).
[313] *Id.* § 1522.

is needed to assist judges in separating conflicts serious enough to rebut the presumption

Figure 1: A Model for Determining Whether the COMI-Law Presumption Is Rebutted



those that are not. Recognizing that the precise contours of any analysis are for case law to delineate, the following proposal—drawn from first principles of bankruptcy law, Chapter 15 precedent, and conflict-of-laws scholarship—offers one approach to harmonizing U.S. and COMI rules when the two conflict in Chapter 15.

1. Is the COMI rule distributional?

Upon receiving a request for relief from the debtor, the court would first identify the COMI rules concerning that relief and any U.S. analogues. Irrespective of whether the COMI grants or denies the remedies sought (as opposed to now, where COMI law is only relevant when it extends the debtor's power), the court would then ask whether the relevant rules are distributional. To use a common analogy, such rules define how the pie is divided. Beginning with this question is sensible because bankruptcy, if

nothing else, is a means for allocating insufficient assets among creditors.[314] Each country's answer is perhaps the most zealously guarded feature of its insolvency law, meaning the least reconcilable conflicts are apt to arise here.[315] Hence, if a conflict can be removed from the distributional sphere, its degree—and the justifications for rebutting COMI law—will likely be weaker.

For an example of relief that does not raise distributional questions, take the Cayman Islands' discovery rules, as were at issue in *Platinum Partners*. These conflict with U.S. law in that they offer narrower relief. By respecting Cayman limits on discovery, a U.S. court risks constraining the size of the pie (e.g., by denying the debtor access to documents that might disclose fraudulent transfers or other sources of new value). But given that no creditor's share of the available property changes, regardless of whether U.S. or Cayman law applies, the COMI rule lacks distributional effect. The same may be said of third-party releases (allowed in Singapore and Canada, but often rejected by U.S. courts[316]) and ipso facto clauses—contractual provisions that enable termination on the debtor's insolvency.[317] The latter were, until recently, a mainstay of English law[318] but prohibited as a matter

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[314] Baird, *supra* note 51.

[315] Bruce Grohsgal, *The Argument for a Federal Rule of Decision for a Bankruptcy Court's Recharacterization of a Claim as Equity*, 94 AM. BANKR. L.J. 681, 718 (2020) (asserting that "[b]ankruptcy law's distributional rules . . . . further the most fundamental purpose of bankruptcy": to "pick[] the winners and losers among creditors in a prescribed order"); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 727 (1984) (observing that distributional rules encompass "most provisions of the Bankruptcy Code" and "fulfill the primary aims of the bankruptcy process itself"); Douglas G. Baird et al., *The Bankruptcy Partition*, 166 U. PA. L. REV. 1675, 1678-79 (2018) ("[T]here is little room for departures from bankruptcy's distributional rules.").

[316] *Compare* BAKER MCKENZIE, GLOBAL RESTRUCTURING AND INSOLVENCY GUIDE—SINGAPORE 7 (2021) (observing that third-party releases are generally allowed), *and* BAKER MCKENZIE, GLOBAL RESTRUCTURING AND INSOLVENCY GUIDE—CANADA 5 (2021) (same), *with* BAKER MCKENZIE, GLOBAL RESTRUCTURING AND INSOLVENCY GUIDE—UNITED STATES 13 (2021) (referring to third-party releases as "a highly controversial question and a 'hot topic' in the United States," which "has been interpreted differently . . . by [the] appellate courts"); *see also infra* note 345.

[317] *See* Lehman Bros. Special Fin. Inc. v. BNY Corp. Tr. Servs. Ltd. (*In re* Lehman Bros. Holdings Inc.), 422 B.R. 407, 420 (Bankr. S.D.N.Y. 2010).

[318] *UK Ban on Terminating Contracts for Insolvency—Lending*, SIMMONS & SIMMONS (May 22, 2020), https://www.simmons-

of public policy in the United States.[319]

In the case of non-distributional rules like these, U.S. law should generally yield to the principle of deference to COMI law embodied in Chapter 15. To deny enforcement is to revert to territorialism without sufficient justification. Taking ipso facto clauses as an example, their prohibition in the United States may evidence a greater interest in ensuring the survival of debtors during bankruptcy than English law does.[320] Yet, however intuitive the rationale for prioritizing the going concern over individual creditors, such prohibitions are paternalistic as applied to English debtors. The finding that a debtor's COMI lies in England relegates any interest the United States may have in its reorganization to a secondary position, and U.S. courts to a supporting role. A difference of opinion over the relative importance of creditors' freedom to deal with whom they please and preservation of the debtor's business relationships is not for a putative "adjunct" to resolve.[321] That conflict is one of positive law and does not implicate the same compelling (and possibly constitutional) concerns as, for instance, deviations from absolute priority.[322] Strict observation of territorialist rights, no matter how unimportant to the overall scheme of U.S. restructuring, defies the cooperative spirit of the Model Law, which Congress codified in Chapter 15.

2. If not distributional, is the COMI rule significantly value destructive?

Still, the rationale for deferring to non-distributional COMI law only goes so far. In practice, transnational bankruptcies are likely to involve situations in which rules unrelated to the division of debtor assets should, even under the COMI-protective system proposed, be denied extraterritorial reach. As visualized by the left prong of Figure 1, one intuitive limit is where the COMI rule is tantamount to razing the debtor to the ground. The restructuring of Spanish energy company Abengoa offers a recent example. Spanish law prohibits new investors from receiving greater

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simmons.com/en/publications/ckahxd53h0lpb0a79fbbpsv97/uk-ban-on-terminating-contracts-for-insolvency---lending.

[319] *Lehman Bros.*, 422 B.R. at 420.

[320] *See In re* Golden Seahorse LLC, 652 B.R. 593, 615 (Bankr. S.D.N.Y. 2023).

[321] *In re* ABC Learning Ctrs. Ltd., 728 F.3d 301, 306 (3d Cir. 2013).

[322] *See infra* note 338 and accompanying text.

priority than existing creditors in what amounts to a ban on debtor-in-possession financing.[323] A company with no money to support itself through bankruptcy faces long odds of emerging. In the case of Abengoa, access to contrary U.S. bankruptcy rules—which enabled new capital to be channeled through certain foreign subsidiaries[324]—was indispensable to freeing the debtor from financial distress and preserving the jobs of its 20,000 employees.[325]

With this illustration in mind, the determination that a COMI rule is not distributional should give way to a further evaluation of whether its enforcement would unduly impair the value of the debtor. Recognizing both the risk that any rule which does not single-mindedly maximize value may be deemed an undue impairment (depending on the judge) and the norm of comity that underlies Chapter 15, this inquiry could be made subject to an exacting standard analogous to corporate waste[326] or the "manifest[]" threshold of the existing public policy exception.[327] Prohibiting the debtor from raising new funds should trigger any such condition; giving some creditors the benefit of their COMI-law termination provisions should not.

3. If distributional, is the COMI law truly in tension with U.S. law?

While non-distributional conflicts are at least theoretically susceptible

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[323] DeMarco Address, *supra* note 165.

[324] *Id.*

[325] ABENGOA, ANNUAL REPORT 2014, at 91 (2015), https://www.abengoa.com/export/sites/abengoa_corp/resources/pdf/en/gobierno_corporativo/informes_anuales/2014/Tomo3/2014_Volume3_AR.pdf.

[326] *See, e.g.*, Miller v. Black Diamond Cap. Mgmt., L.L.C. (*In re* Bayou Steel BD Holdings, L.L.C.), 642 B.R. 371, 406 (Bankr. D. Del. 2022) ("Corporate waste claims are reserved only for the 'rare unconscionable case where directors irrationally squander or give away corporate assets.'" (citation omitted)). The analogy is somewhat strained, since the doctrine of waste generally applies to *transactions* that are unreasonably one-sided. Here, by contrast, the focus would be on provisions of COMI law. Still, waste is a useful guide; one formulation of the inquiry could be whether enforcing COMI law is the equivalent of "irrationally squander[ing]" the debtor's assets.

[327] *See supra* note 152 and accompanying text. Here, the public policy would be one "in favor of reorganizations," such that COMI rules "which promote reorganization serve the public interest," while those that *manifestly* do not may be replaced with U.S. law. *See* 2 COLLIER ON BANKRUPTCY ¶ 105.03(1)(d) (16th ed. 2023).

to a COMI-friendly resolution, many of the foreign rules described above *do* allocate creditors' shares differently than their U.S. analogues. Mexico and Pakistan give super-priority to their own tax authorities and the debtor's employees, reducing the recoveries of creditors positioned lower in the bankruptcy "waterfall" to the extent needed to pay these claims in full.[328] Spain, unlike the United States, enforces security interests in postpetition property—enabling secured lenders to retain value that, in a U.S. proceeding, would be shared by the general unsecured creditors.[329] Albeit less directly than these examples, the absence of a stay on MVLs in Australia, as seen in *Betcorp*, also affects distributional priority. A U.S. court's refusal to apply this COMI rule prevents U.S. creditors from seizing stateside assets, while their peers in Australia are free to execute on any property located there. Although U.S. creditors retain the option of litigating down under, they do so at a time lag and with considerable inconvenience, both of which are liable to shrink their shares.

Turning to the right side of Figure 1 and drawing from the conflict-of-laws concept of "false conflicts,"[330] the next step asks whether the U.S. and COMI rules are truly in tension. If not, there is no reason to rebut the presumption in favor of COMI law. For example, the clash between U.S. and Australian law concerning the stay in an MVL is illusory. Applying the COMI rule merely extends a benefit enjoyed by Australian creditors to their U.S. counterparts, without trenching on any U.S. interest.[331] The only "losing" party (the debtor) is Australian—and is receiving exactly what Australia says it should. The same goes for tax claims to which the COMI assigns super-priority. Given that the United States provides an identical benefit to its tax authorities,[332] enforcing the priority of comparable claims

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[328] *See supra* note 102 and accompanying text.

[329] *See supra* notes 283-284 and accompanying text.

[330] EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.6 (1982) ("A 'false conflict' exists when the potentially applicable laws do not differ."); *see also* Eric J. McKeown, *Simon Says: Time for a New Approach to Choice-of-Law Questions in Indiana*, 82 IND. L.J. 523, 528 n.42 (2007) (defining a false conflict not as a situation where the different jurisdictions' laws are substantively identical but where "only one jurisdiction is truly interested in the application of its law to the legal issue presented").

[331] *See* James P. George, *False Conflicts and Faulty Analyses: Judicial Misuse of Governmental Interests in the Second Restatement of Conflict of Laws*, 23 REV. LITIG. 489, 539 (2004) ("In . . . a 'false conflict,' it is an established tenet of modern conflicts law that the law of the interested state should apply.").

[332] *See* 11 U.S.C. § 507(a)(2).

by the COMI (at least to the extent that U.S. authorities would recover) is consistent with the U.S. distributional scheme. Refusing to do so exhibits anti-universalist hypocrisy.

4. If distributional *and* in conflict with U.S. law, does the COMI rule manifestly violate public policy?

Unfortunately, some tensions are not so easily massaged. The super-priority that Mexican law vests in the debtor's employees cannot be reconciled with the cardinal rule of absolute priority. The enforceability of security interests in after-acquired property, such as Spain recognizes, also lacks an analogue in U.S. law. Yet, even with true conflicts like these, U.S. courts cannot eject COMI law automatically without lapsing into territorialism. Arriving at the last step of the Figure 1 analysis, a court should inquire into the magnitude of the conflict—specifically, whether it is "manifest[]."

In this respect, the analysis incorporates the existing public policy exception,[333] whose narrowness is routinely invoked by courts presiding over Chapter 15 cases.[334] Yet, while the exception's receptivity to COMI-law rights held by the debtor presently evaporates when faced with COMI-law limits that are tighter than in the United States,[335] the revised exception would extend in both directions. Debtors would thus be unable to free themselves from restraints set by their COMI unless enforcement would yield a "manifest[]" conflict with the public policy of the United States. Such conflicts have been found where, inter alia, "the procedural fairness of the foreign proceeding is in doubt" or granting the requested relief "would frustrate a U.S. court's ability to administer the Chapter 15 proceeding" or "impinge severely [on] a U.S. constitutional or statutory right."[336] Another formulation, framed in distributional terms, is provided by § 1507, which

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[333] *Id.* § 1506.

[334] *See, e.g.*, *In re* Millennium Glob. Emerging Credit Master Fund Ltd., 474 B.R. 88, 95 (S.D.N.Y. 2012) ("[T]he public policy exception . . . . applies only to actions that violate the most fundamental policies of the United States." (internal quotation marks and citation omitted)); *supra* notes 159-160 and accompanying text.

[335] *See supra* note 259 and accompanying text.

[336] Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 125 (Bankr. N.D. Tex.), *aff'd*, 701 F.3d 1031 (5th Cir. 2012).

compels the "distribution of proceeds of the debtor's property *substantially in accordance*" with the U.S. priority scheme.[337]

Applying these standards to the Mexican and Spanish laws noted above offers a template for distinguishing conflicts sufficient to rebut the presumption of COMI law from those that are the usual fare of a transnational case. A rule requiring payment of employees first risks depriving secured creditors of their interest in the debtor's collateral—a decision many courts would deem a taking in violation of the Fifth Amendment.[338] The constitutional interests that COMI law would otherwise offend rebuff the mere statutory principle of universalism contained in Chapter 15, and the employees must content themselves with parity alongside the remaining unsecured creditors.

As to the Spanish lender that claims security in after-acquired collateral, the situation is more complex. No other creditor holds any greater claim in these assets (the inventory or receivables accruing postpetition). The only public policy undermined by enforcing the security interest—and indeed, one that originates in the Model Law—is that of "equitable treatment [among] . . . similarly situated creditors."[339] Under U.S. law, the postpetition share of the Spanish lender's claim would be unsecured. Hence, broadening the scope of that lender's security introduces inequality relative to the other unsecured creditors. However, by analogy to the confirmation requirements of Chapter 11,[340] what U.S. practice prohibits is not *any* deviation from the ideal of equality among creditors, but a plan that "discriminate[s] unfairly" among them.[341] Even if recognizing the full breadth of a COMI-created security interest constitutes discrimination, there is a strong argument to be made that adherence to the directive of international cooperation codified in Chapter 15 is a "reasonable basis" for such treatment—at least as to creditors

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[337] 11 U.S.C. § 1507(b)(4) (emphasis added).

[338] "[S]ecurity interests have been recognized as property rights protected by our Constitution's prohibition against takings without just compensation." Bank of N.Y. & JCPL Leasing Corp. v. Treco (*In re* Treco), 240 F.3d 148, 160 (2d Cir. 2001) (collecting cases).

[339] Armada (Sing.) Pte Ltd. v. Shah (*In re* Ashapura Minechem Ltd.), 480 B.R. 129, 136-37 (S.D.N.Y. 2012) (quoting UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY LAW ¶ 35, U.N. Sales No. E.05.V.10 (2005)).

[340] *In re* Rede Energia S.A., 515 B.R. 69, 105-06 (Bankr. S.D.N.Y. 2014) (looking to Chapter 11 case law to assess a Chapter 15 creditor's claim of unfair discrimination).

[341] 11 U.S.C. § 1129(b)(1).

with no conflicting security in the same property.[342] Since the clash between COMI and U.S. law cannot be deemed "manifest[⁗]," insofar as the former does not work a "substantial[⁗]" deviation from the U.S. priority scheme, the presumption would go unrebutted in that case.

C. Passing the Presumption: An Amendment that Balances Public, Private, and Social Interests

Mandating that judges engage in comparative analysis would require an amendment to the Bankruptcy Code. Regardless of its desirability and feasibility, the likelihood of such an amendment as a legislative matter is a different question. Yet, its odds are favorable, benefiting from momentum toward venue reform without offending the powers that impeded prior efforts.

On introducing the 2018 Bankruptcy Venue Reform Act, Senator Elizabeth Warren vaunted it as an answer to "[w]ealthy corporations," which have for too long enjoyed the ability to "manipulate the system" to the detriment of "workers, creditors, and consumers."[343] The threat that venue rules pose to such stakeholders was on display in April 2021, when the National Rifle Association fled fraud investigations in New York through a bankruptcy-cum-reincorporation in Texas.[344] Not six months later, a third-party release seemingly pulled Purdue Pharma's Sackler family—and their $11 billion fortune—from the jaws of financial ruin.[345]

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[342] *Rede Energia*, 515 B.R. at 97 (finding that, although the COMI court's plan of reorganization prescribed "different treatment [for] certain unsecured creditors," the discrimination "ha[d] a reasonable basis and was necessary to consummate the [p]lan").

[343] *Warren, Cornyn Introduce Bill to Prevent Large Corporations from 'Forum Shopping' in Bankruptcy Cases*, ELIZABETH WARREN (Sept. 23, 2021), https://www.warren.senate.gov/newsroom/press-releases/warren-cornyn-introduce-bill-to-prevent-large-corporations-from-forum-shopping-in-bankruptcy-cases#:~:text=Washington%2C%20D.C.%20%E2%80%94%20United%20States%20Senators,where%20significant%20assets%20are%20located.

[344] Mark Maremont & Jonathan Randles, *NRA Leadership on Trial in High-Stakes Bankruptcy*, WALL ST. J. (Apr. 2, 2021, 2:29 PM), https://www.wsj.com/articles/nra-leadership-on-trial-in-high-stakes-bankruptcy-hearings-11617388187.

[345] *How Asbestos Saved the Sackler Family from Bankruptcy*, ECONOMIST (Sept. 9, 2021), https://www.economist.com/united-states/2021/09/09/how-asbestos-saved-the-sackler-family-from-bankruptcy. That release—along with the ability of bankruptcy judges to order such nonconsensual third-party releases—was later reversed by the Supreme

Other courts would have balked at the release.[346] But the availability of venue in the Southern District of New York—despite Purdue being incorporated in Delaware and headquartered in Connecticut[347]—made it possible. Amid rising socioeconomic inequality,[348] a system that enables companies that have mismanaged themselves into insolvency to saddle their employees, suppliers, and customers with cumbersome rules is a bad look. Yet, it provides ample justification for legislation to combat forum shopping.

However attractive such legislation may be, bipartisan attempts at venue reform have foundered at least five times before their latest installment,[349] which languishes in the House.[350] One reason for this poor performance is the opposition of politicians in magnet jurisdictions.[351] Even assuming a bill were to pass Congress, it would need the signature of President Joe Biden—who during his time in the Senate garnered a reputation for being "a strong supporter of the current bankruptcy venue rules," which ensure a steady stream of high-dollar cases to his native Delaware.[352] Efforts to end the debtor's-choice regime would encounter further resistance from its primary beneficiaries: large corporations and their advocates in the state and local bars.[353]

Court. Harrington v. Purdue Pharma L.P., No. 23-124 (U.S. June 27, 2024).

[346] *See supra* note 316 and accompanying text.

[347] U.S. Dep't of Just., Settlement Agreement ¶ II.A, F (2020), https://www.justice.gov/opa/press-release/file/1329571/download.

[348] Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/.

[349] *See supra* note 40 and accompanying text.

[350] Bankruptcy Venue Reform Act, H.R. 1017, 118th Cong (2023).

[351] Katy Stech Ferek, *Lawmakers Propose Bill on Bankruptcy Case Location*, WALL ST. J. (Sept. 20, 2019, 3:52 PM), https://www.wsj.com/articles/lawmakers-propose-bill-on-bankruptcy-case-location-11569009120.

[352] *Bankruptcy Reform: Hearing Before the Comm. on the Judiciary*, 109th Cong. 29 (statement of Sen. Joe R. Biden, Jr.) (2005) ("Eight years ago, the person who stopped [[the]] passage [[of a prior venue-reform bill]] was me . . . ."); Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, YALE L.J. F. 337, 355 n.90 (2021) (observing that then-Senator Biden "routinely opposed attempts to eliminate place of incorporation as a permissible venue for a Chapter 11 filing"); LOPUCKI, *supra* note 63, at 123 ("Delaware senator Joseph Biden engineered the omission of venue reform from the omnibus bankruptcy bill introduced in Congress the following year, and by 1998, it was clear that bankruptcy venue reform was dead.").

[353] *See Report Opposing the Bankruptcy Venue Reform Act of 2018*, N.Y. CITY BAR (Jan. 29, 2018), https://www.nycbar.org/member-and-career-

A bill restricting foreign debtors to the limits of COMI law stands to succeed where others have failed by enabling reform-minded politicians to be champions of a more "fair, predictable and efficient" bankruptcy system[354] without frustrating U.S. political and business interests. If there is one thing that both ends of an increasingly polarized political spectrum can agree on, it is that foreign corporations should not be allowed to aggrandize themselves at the expense of U.S. constituencies.[355] To the extent that a COMI-law presumption keeps foreign multinationals from prospecting for favorable rules while harming stateside creditors, its congressional supporters could claim credit for safeguarding the interests of Main Street and Wall Street alike.[356] Any blame it provokes is more likely to be directed at the courts—the ones charged with administering the reform—than at Congress. Nor is this proposal apt to ignite opposition from domestic corporations and law firms, since it would not touch them at all (unless and until other Model Law countries implement comparable reforms). And if such countries do, it might *benefit* U.S. corporations, insofar as they remain entitled to attractive U.S. bankruptcy laws that their foreign peers are not.

Finally, even the magnet jurisdictions would have little reason to object to the prescribed review. To be sure, it would strike one of the reasons for foreign debtors to shop out of their home forums: favorable U.S. law. Yet, these debtors would continue to have stateside property, making it necessary for them to file Chapter 15 *somewhere* in the United States. Delaware, New York, and Texas would retain their expert judges and lawyers and massive bodies of case law. Hence, no other state is likely to rival them by virtue of this proposal.

D. Limitations and Areas for Future Research

Making COMI-law rights and restrictions presumptive in Chapter 15

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services/committees/reports-listing/reports/detail/report-opposing-the-bankruptcy-venue-reform-act-of-2018.

[354] Fox Rothschild LLP, *The Bankruptcy Venue Reform Act of 2017*, JDSUPRA, https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=a7862e8d-dbc7-4e4a-b55e-5a57d3396330 (last visited July 17, 2024).

[355] *See* Bortner, *supra* note 82, at 1098.

[356] *See* Charlotte Twight, *From Claiming Credit to Avoiding Blame: The Evolution of Congressional Strategy for Asbestos Management*, 11 J. PUB. POL'Y, Apr.-June 1991, at 153, 155.

would realign the chapter with universalism, achieve greater consistency between the rights of debtors and creditors across borders, and reduce remedy shopping and the cost of credit. Yet, it far from the final word on gamesmanship in transnational cases. This Part discusses several practical and theoretical questions raised by the proposal, offers tentative answers, and identifies grounds for further inquiry.

First, as noted at the outset, fixing Chapter 15 would not fix modified universalism worldwide. Assuming the chapter were amended, foreign debtors determined to avoid COMI-law limits might spurn the United States for somewhere *without* a COMI-law presumption. Hence, the effects of any reform confined to the United States may be similarly cabined.

Still, magnet jurisdictions enjoy an incumbent advantage due to the depth of their precedents,[357] and the United States leads the world in corporate bankruptcies by a large margin.[358] Other countries routinely model their insolvency laws after developments in the United States, and a COMI-law presumption is unlikely to be the exception.[359] If Chapter 15 is any indication of how Model Law countries operate more generally, the proposed presumption would not affect the deference they already show to

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[357] *See* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 718, 725-26 (2002).

[358] During the first quarter of 2024, 20,316 foreign and domestic corporate bankruptcies were filed in the United States. *Bankruptcies*, TRADING ECON., https://tradingeconomics.com/country-list/bankruptcies (last visited July 17, 2024). The jurisdiction receiving the next-highest number of corporate filings, Hong Kong, recorded less than half at 7,378. *Id.* Switzerland reported 15,447 corporate *and* individual cases during the whole of 2023, the latest period for which data is available. *See Debt Collection and Bankruptcy Statistics 2023*, FED. STAT. OFF. (Apr. 9, 2024), https://www.bfs.admin.ch/bfs/en/home/news/whats-new.assetdetail.31186343.html. Disaggregating the corporate figure, only 3,845 corporate filings were reported during the first three quarters of the year. *Several Sectors at Risk of Bankruptcy*, SME PORTAL (Nov. 1, 2023), https://www.kmu.admin.ch/kmu/en/home/New/news/2023/several-sectors-at-risk-of-bankruptcy.html.

[359] *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Report of the Comm. on the Judiciary*, 109th Cong. 427 (2005) (statement of Rep. Jerrold L. Nadler) ("Chapter 11 is a model that other countries are trying to emulate . . . . [because] [t]hey [find] . . . our system of rehabilitating going concern[] values where possible [to be] preferable to their emphasis on liquidation."); Paul L. Lee, *Ancillary Proceedings Under Section 304 and Proposed Chapter 15 of the Bankruptcy Code*, 76 AM. BANKR. L.J. 115, 178 (2002) ("[T]he early adoption by the United States of the Model Law will influence other countries to follow its lead . . . .").

foreign debtors' COMI-law rights. Rather, it would enforce COMI-law limits on foreign filers, to the benefit of local creditors of the country receiving a petition for recognition. Amending their Chapter 15 analogues to include a COMI-law presumption would, paradoxically, enable countries to claim greater loyalty to universalism while placating territorialist interests. Given the combination of the United States' prominence and other countries' pecuniary interest in adopting parallel reforms, amending Chapter 15 is unlikely to yield an exodus of filers away from the U.S. courts.

Second, a COMI-law presumption has the same shortcoming as any choice-of-law proposal focused on Chapter 15: the Chapter 11 backdoor.[360] Even if the new presumption succeeds in keeping debtors from circumventing COMI-law limits, it is likely to have a hydraulic effect on foreign Chapter 11 filings, so long as that chapter (and its ouster of COMI law) remains available to foreign debtors. They already exploit it by the thousands.[361]

Yet, closing the plenary-proceeding loophole falls as squarely within Congress's power as the Chapter 15 amendment proposed. It could be done by making Chapter 15 the sole option for debtors with a COMI outside the United States. This article leaves to future research the empirical question whether ensuring the consistent application of legal remedies across borders is worth the cost of requiring debtors from countries with undeveloped or untested insolvency laws, such as LATAM,[362] to initiate foreign-main proceedings at home. Yet, to the extent that eliminating foreign access to Chapter 11 would yield discrepancies between U.S. and COMI law in terms of available remedies, these are largely accounted for by the current proposal. Where foreign debtors require access to COMI-law remedies withheld by Chapter 15 (but otherwise available under Chapter 11), these may be accessed through comity or, in many cases, state law.[363] And where the COMI prohibits a remedy that foreign filers enjoyed under Chapter 11, denying them access is precisely the point (subject to a framework of the kind outlined in Part IV.B above).

Third, the recommended approach would leave debtors with half the

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[360] *See supra* note 299 and accompanying text.

[361] *See supra* note 76 and accompanying text.

[362] *See supra* notes 77-81 and accompanying text.

[363] *See supra* note 184 and accompanying text.

benefits of remedy shopping: namely, the ability to extend favorable COMI law, denied by the Bankruptcy Code, to the United States. One might worry that this invites forum shopping by enabling debtors to "expand the⟦ir⟧ . . . substantive rights as compared to ⟦[U.S. law⟧]."[364]

Properly understood, however, extraterritorial application of COMI law—whether or not allowed under the laws of the recognizing country—is what universalism is all about. Despite the exceptionalist bent of American jurisprudence,[365] accepting the coequal legitimacy of insolvency systems the world over—the normative judgment at the heart of Chapter 15[366]—requires U.S. law to occasionally step aside. A COMI-law presumption will not always entail withholding U.S. remedies. Sometimes, it may mean granting a remedy that does not exist under U.S. law. Although universalism comes at the risk of magnifying COMI rules that are wasteful or harm creditors, these threats are mitigated by allowing reversion to U.S. law in the appropriate circumstances, as via the test described in Part IV.B above. Fears over eleventh-hour changes in COMI by self-interested debtors may be likewise assuaged by, inter alia, requiring a creditor vote to move the "nerve center."[367]

Fourth, bearing in mind both COMI's manipulability and potential to offer debtors more than U.S. law deems fair, there remains the question of corporate groups. As noted, discerning the "true" COMI of even one debtor can be complicated[368]—let alone many. For instance, the ongoing bankruptcy of crypto giant FTX involves over 100 entities incorporated and operating in jurisdictions as diverse as the Bahamas, Japan, and Turkey; a CEO based in New York; and venue in the District of Delaware.[369] If a subsidiary is Japanese but its parent is in New York, which is the COMI? More confoundingly, should all debtors in a corporate group be allowed to file

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[364] Casey & Macey, *supra* note 41, at 484.

[365] NATSU TAYLOR SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW 2 (2010) (noting that "the United States has consistently distanced itself from many established principles of international law, as well as the international institutions that have evolved to implement such law").

[366] *See supra* notes 150-151, 215, 272 and accompanying text.

[367] Casey et al., *supra* note 144, at 11-12.

[368] *See supra* notes 143-144 and accompanying text.

[369] *See* Declaration of John J. Ray III in Support of Chapter 11 Petitions and First Day Pleadings at 1, 9, 30, *In re* FTX Trading Ltd., No. 22-11068, 2023 WL 3721527 (Bankr. D. Del. filed Nov. 17, 2022).

wherever one of their affiliates is located? If so, that would enable picking and choosing the most favorable law from potentially hundreds of jurisdictions. To complicate matters further, it is unclear that such strategizing could even be called forum shopping, since the chosen forum would be home to at least *one* of the debtors. On the other hand, if only the principal debtor's COMI counts, it would incentivize the creation of shell entities in favorable jurisdictions—or require courts to engage in imprecise line-drawing exercises to determine which debtor is the "main" one as of bankruptcy.

Some imprecision is inevitable. Relative to territorialism's bright line, universalism takes a more complex approach to choice of law. At least in terms of untangling corporate groups, however, UNCITRAL has offered some guidance. Rather than identifying a single COMI for the group, UNCITRAL proposes that every member entity have its own.[370] Where an entity's COMI is located in a given jurisdiction (say, the United States), "any other enterprise group member may participate in ⟦an⟧ insolvency proceeding" filed by that entity in the United States.[371] To reduce the risk of shopping the whole group into an ancillary entity's forum, foreign affiliates would only be allowed to file in the United States to the extent that the U.S. entity is a "necessary and integral participant" in the overall group.[372] UNCITRAL further prescribes that foreign affiliates only be allowed to participate in the group proceeding to the extent permitted by *their* COMI.[373] Thus, similar to LoPucki's cooperative-territorialist administrators,[374] countries would together decide whether to allow "their" debtors to file in an affiliate's jurisdiction.

Reminiscent as this model may be of cooperative territoriality, it is equally consistent with modified universalism. Each country defers to the debtor's COMI, while contemplating coordination between countries as to joint management of the case. Forum shopping—in the sense of affiliates taking advantage of one debtor's COMI to pull themselves in—would occur only to the extent that the shopper's COMI allows. Fly-by-night filings

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[370] UNCITRAL, MODEL LAW ON ENTERPRISE GROUP INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.20.V.3 (2020).

[371] *Id.* at art. 18.1.

[372] *Id.* at art. 2(g)(ii).

[373] *Id.* at art. 18.2.

[374] *See supra* notes 290-292 and accompanying text.

would thereby be rendered less effective, resulting in greater predictability for creditors and likely lower rates. Whether UNCITRAL's proposal is equipped to succeed—notwithstanding the practical problems raised by multiple legal systems applying to a corporate group simultaneously—is a question for future research.

Fifth (and finally), this article's proposal dovetails with recent critiques of *domestic* venue reform in a manner that both underscores its relevance to ongoing policy debates and offers further lines of inquiry to policymakers and authors in the stateside and transnational contexts alike. Despite the abortive track record of domestic venue reform, Casey and Macey argue that achieving any such reform would exacerbate international forum shopping.[375] Barring access to domestic magnet forums like Delaware, while leaving debtors free to shop into attractive international hubs like Singapore, is more likely to drive debtors abroad than restrict them to their own local courts. This risk is seldom acknowledged in debates around domestic venue reform[376] but poses a practical limit to any such reform.

Passing a domestic venue bill would make a COMI-law presumption all the more critical. Failure to do so would preserve debtors' ability to mix and match remedial law across jurisdictions while raising their incentives to prospect abroad in the first place. That result is anathema to predictability and fairness in adjudication and should be prevented, as it would be by requiring debtors to accept a single governing law for both remedies and restrictions. Whether or not one supports domestic venue reform, future research in this space should be cognizant of the relationship between local and transnational forum shopping and the importance of ensuring consistent remedies in both contexts.

CONCLUSION

Bankruptcy forum shopping is a problem in both domestic and—even more so—transnational cases. Although Chapter 15 and its analogues elsewhere have largely liberated the world from a baseline of parallel proceedings and duplicative legal fees, forum shopping persists. Worse yet, universalism as "modified" by Chapter 15 appears to live up to its name only when extending COMI-law rights of the debtor; as to COMI-law

[375] Casey & Macey, *supra* note 41, at 493-95.
[376] *Id.* at 468.

restrictions, it might as well be territorialism. This favorable state of affairs (for debtors) incentivizes remedy shopping, which risks harming creditors and—if they can anticipate and price it into their interest rates—the global economy, too.

Nevertheless, the venue manipulation that arises from gaps between U.S. and COMI law is an unnecessary evil. Making the latter presumptive in Chapter 15 cases would free U.S. insolvency law from the practical costs of remedy shopping while making the chapter a truer expression of its normative goals. Congress has ample reason to adopt such an amendment, and judges would likely find little difficulty in applying it. If this article is any indication, the best days of transnational bankruptcy, like those of Dickens's festive characters, may be yet to come.

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