# Strategic Forum-Selection in Bankruptcy and Restructuring

By Joanna Diane Caytas

Forum-selection is a key ingredient of liberty: the ability to choose the most advantageous law, jurisdiction and venue within the Westphalian framework of sovereignties is a highly valuable tool of legal engineering and of transaction design. At the same time, opposing creditor interests — some of them already manifested in regulatory policy — seek to reduce opportunistic selection both of domestic venues and foreign fora. The reverse is also true: In cases of involuntary bankruptcies, the opposite considerations may be at play, including the very ability of creditors to initiate a bankruptcy proceeding for an insolvent or illiquid company.

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## Incentives for Domestic and Transborder Strategic Forum-Selection

In the U.S., the Bankruptcy Code grants debtors broad discretion to choose the venue in which to reorganize based on the location of "the domicile, residence, principal place of business," "principal assets," or the venue in which an affiliate's bankruptcy case is already pending.[1] Today, the overwhelming majority of U.S. corporate reorganizations are concentrated in the Southern District of Texas, District of Delaware and Southern District of New York.

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Highly experienced judges made these districts popular choices for large corporate bankruptcies due to their established expertise in handling complex cases, favorable legal precedents, and greater procedural efficiency and outcome predictability compared to less popular districts. At the same time, unfavorable or controversial decisions by bankruptcy or appellate courts, as well as major changes to local rules, including case assignment procedures, can have disproportionate effects on the significance of a domestic venue previously considered attractive for debtors, as well as senior creditors with a say in a debtor's choice of venue.

Substantive outcomes may well change by the scores of millions in value as a result of regulatory arbitrage on seemingly minor procedural differences, speed of approving reorganization plans, and the law of the venue affecting the resolution of a bankruptcy dispute, the latter at least until the highest court of the land or the legislature resolves substantive or procedural law differences between the venues, as was the case with third-party releases in the U.S.[2] Domestically, this is true of all jurisdictions with composite federal and sub-federal laws (such as Australia, Canada or the U.S.), but it is also true more generally for any international choice of forum.

## Foreign Fora and Regulatory Competition

Policy-driven differences in severity of bankruptcy laws toward debtors have long been examined by comparative studies, typically resulting in conclusions favorable to common law systems, but also finding that solutions in bankruptcy and restructuring favoring debtors need not translate overall into a diminution of creditors' rights.[3] Such favorable rules commonly include (1) policy preference for restructuring over liquidation; (2) absence of an obligation for managers to file a bankruptcy petition and absence of sanctions for failure to do so within a time limit; (3) possibility of automatic debt discharge upon completion of a court-approved plan; (4) availability of simplified procedures for small and medium-sized companies; (5) availability of speedier prepackaged proceedings; and (6) possibility of raising new financing during restructuring proceedings with privileges for creditors.[4] The policies behind those rules emphasize due diligence while also taking into account the interests and best possible outcomes for all stakeholders.

## COMI and Comity

The principal criterion guiding choice of bankruptcy fora around the world is the concept of Centre of Main Interests (COMI). By the traditional definition — as still reflected in EU law, while the UNCITRAL Model Law leaves the definition to implementing jurisdictions — the debtor's COMI is the "place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties."[5]

For a company, COMI is presumed to be located in

1 28 U.S.C. § 1408.

2 *See Harrington v. Purdue Pharma LP*, 603 U.S. 204 (2024).

3 *See, e.g.*, Sylwia Morawska, *et al.*, "Bankruptcy Law Severity for Debtors: Comparative Analysis Among Selected Countries," *Eur. Res. Stud. J.*, Vol. XXIII, Special Issue 2, 659-86 (2020); Ziad Azar, "Bankruptcy Policy: An Empirical Investigation of 50 Jurisdictions Worldwide," *Am. Bankr. L.J.* 82 (2007).

4 Morawska, *supra* n.3 at 665-68.

5 Regulation (EU) 2015/848, 2016 O.J. (L141/19), Art. 3(1).

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the place of its registered office.[6] In *Eurofood IFSC Ltd*., the European Court of Justice (ECJ) clarified that COMI must be "identified by reference to criteria that are both objective and ascertainable by third parties."[7] As a result, "empirically verifiable realities … are capable of displacing the effects of such formal criteria as the place of registration."[8]

The legislative and judicial reality in the Anglosphere, discussed below, has left the EU definition far behind. Today, many courts will deem changes of COMI for purposes of forum-selection in bad faith only if the change was not actually carried out.

## Supranational Solutions

### European Insolvency Regulation

The Recast Insolvency Regulation[9] establishes rules for cross-border insolvency proceedings within the European Union. It clarifies which court has jurisdiction, the applicable law and the recognition of insolvency judgments across member states. But the Recast Insolvency Regulation leaves a broad swath of options for forum selection and regulatory arbitrage.

The EU Directive on Preventive Restructuring Frameworks and Second Chance (2019)[10] provides a framework for EU members to adopt restructuring legislation analogous to U.S. Bankruptcy Code's chapter 11, especially in jurisdictions where until then only liquidation options were available. In March 2026, a new directive harmonizing aspects of insolvency law between EU member states introduced minimum rules for corporate insolvency proceedings, including avoidance actions, prepackaged proceedings, creditors' committees, asset-tracing across borders, and personal liability for directors for not initiating insolvency proceedings within three months of financial distress unless alternative measures offer equal protection for creditors.[11]

Article 33 of the Recast Insolvency Regulation establishes a public policy (*ordre public*) exception as the only significant restriction to EU-wide recognition of main proceedings in another member state.

### UNCITRAL Model Law on Cross-Border Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency,[12] in the 29 years since its promulgation adopted by 62 states in a total of 65 jurisdictions,[13] regulates access, recognition, relief and cooperation in transborder insolvencies. It was supplemented by two more recent UNCITRAL model laws: the Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2019), and the Model Law on Enterprise Group Insolvency with Guide to Enactment (2020). With certain local differences, the Model Law has been adopted by major jurisdictions, including the U.S., the U.K., and Singapore.

## Select Jurisdictional Approaches

### United Kingdom

British insolvency law provides for multiple forms of restructuring:

(1) *Formal administration*, where a court-appointed trustee seizes control of the debtor entity to facilitate recovery by either a going-concern sale or by a liquidation.[14]

(2) *Company voluntary arrangement* (CVA),[15] which leaves directors some control over the process. CVA is available only to small companies, requires plan approval by 75 percent in value and more than half in number of the unaffiliated creditors, and cannot bind secured creditors.

(3) *Scheme of arrangement* (SOA), authorized under part 26 of the Companies Act 2006[16] for use by *both* solvent and insolvent debtors seeking to restructure debt quickly and with minimal judicial oversight. As long as certain statutory voting thresholds are met (75 percent in value of each class and majority in number in each class), claims even of secured creditors or bondholders may be reduced or discharged without unanimous consent in their class. The advantages of SOA include an option to negotiate the deal in advance, lower cost, and greater speed compared to other procedures. The British SOA has gained substantial popularity for debt restructuring worldwide and provided a highly influential model for similar legislation in Australia,[17] Canada,[18] Ireland,[19] New Zealand,[20] South Africa,[21] Nigeria,[22] Singapore[23] and Malaysia.[24] Even civil law jurisdictions such as Spain, the Netherlands, Germany and Mexico are working on developing credible alternatives to the highly successful British model.[25]

(4) *Restructuring plan* (RP), under the newer Part 26A of the Companies Act 2016,[26] allows cross-class cramdown and imposing a compromise on one or more classes of creditors. Unlike the SOA, RPs do not have a numerosity requirement for class acceptance. Instead, to carry a class, 75 percent by value of voting creditors need to accept the plan.

English courts have found COMI to exist by an extremely broad range of criteria, such as (a) holding assets in the jurisdiction, (b) carrying on activities there, (c) holding restructuring negotiations there, (d) having the debt instrument governed by

6 *Id.*

7 Case C-341/04, at ¶ 33 (interpreting Regulation (EC) 1346/2000).

8 Georg Friedrich Schlaefer, *Forum Shopping Under the Regime of the European Insolvency Regulation, International Insolvency Studies*, International Insolvency Institute (2010), at 16 (*quoting* Ian F. Fletcher, *Insolvency in Private International Law: National and International Approaches* (2nd edition, Oxford University Press, 2005) at 7.41).

9 Regulation (EU) 2015/848, superseding Regulation (EC) No. 1346/2000.

10 Directive (EU) 2019/1023, 2019 O.J. (L172/20) (amending Directive (EU) 2017/1132).

11 Directive (EU) 2026/799.

12 UNCITRAL Model Law on Cross-Border Insolvency (1997).

13 UNCITRAL, *Status: UNCITRAL Model Law on Cross-Border Insolvency* (1997).

14 Insolvency Act of 1986, c. 45, Part II.

15 Insolvency Act of 1986, c. 45, Part I.

16 Companies Act 2006, Pt. 26.

17 Corporations Act 2001, Pt. 5.1.

18 Canada Business Corporations Act, S. 192.

19 Companies Act 2014, Pt. 9, Ch. 1.

20 Companies Act 1993, Pt. 15 (as amended in 2014).

21 Companies Act 71 of 2008.

22 Companies and Allied Matters Act 2020.

23 Companies Act, S. 210.

24 Companies Act 2016, S. 366.

25 Anthony J. Casey & Joshua C. Macey, "Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars," 37 *Emory Bankr. Dev. J.* 463 (2021) at 490.

26 Corporate Insolvency and Governance Act 2020 (CIGA).

English law and subject to the exclusive jurisdiction of British courts, or (e) the debtor's COMI jurisdiction has no equivalent mechanisms available and a large majority of creditors are in favor — criteria almost as flexible as those routinely applied to justify U.S. courts' jurisdiction.[27]

### Singapore

Singapore positioned itself as a jurisdiction of choice for multinational corporations not only for registration of domicile, but also for schemes of arrangement based on as little as choice of local law for credit agreements, local assets, location of a cryptocurrency hot wallet, registration as a foreign company in Singapore, or submission to Singaporean jurisdiction.[28]

Singapore overhauled its restructuring laws with the Insolvency, Restructuring and Dissolution Act 2018 (IRDA), which further enhanced the Singapore Companies Act (Cap. 50), amended in 2017. Singapore's restructuring and insolvency law framework currently provides for super-priority to creditors to provide debtor-in-possession financing, a global automatic moratorium on debt collection similar to the automatic stay under the U.S. Bankruptcy Code, a cramdown mechanism, and procedures governing pre-packaged schemes.[29]

As part of the increasing attractiveness of Singapore as a venue, changes to the Singapore International Commercial Court Rules 2021 provide for restructuring and insolvency proceedings to be heard before the new Singapore International Commercial Court (SICC), comprised of leading international commercial law judges from both civil and common law traditions, including former Delaware Chief Bankruptcy Judge **Christopher Sontchi** and former Southern District of New York Bankruptcy Judge **James Peck**.[30] The SICC allows submissions by foreign lawyers by permission and the flexibility of conditional fee agreements in insolvency cases.[31]

Still, the geographical remoteness, small size and relative novelty of Singapore as a venue for U.S. or European practitioners and debtors somewhat limits the attractiveness of Singaporean courts in global competition for mega bankruptcies. That is not to say that Singapore will not succeed in attracting restructuring proceedings from Asia, Australia and the countries of the Persian Gulf.

### United States

Libraries exist on chapter 11 of the U.S. Bankruptcy Code and its jurisprudence, considered the global gold standard for restructuring. But if this were the case, companies would not pursue outgoing cross-border strategic forum-selection, since a debtor's choice of venue within the U.S. is extremely liberal and the competitive challenge for an overseas forum is substantial. Hence, this article will look at chapter 15, which regulates domestic recognition and enforcement of foreign bankruptcy proceedings.

Exercising comity, U.S. courts liberally grant preclusive effect to foreign judgments even absent a treaty and regardless of consistency with domestic procedural or substantive laws, as long as the foreign rule does not contradict U.S. policy. The foreign proceeding[32] is a "main" proceeding if it is pending in a country of the debtor's COMI,[33] which remains undefined by the U.S. Bankruptcy Code except to provide that "in the absence of evidence to the contrary, the debtor's registered office … is presumed to be" its COMI.[34]

On the other hand, a foreign proceeding is "nonmain" when it pends in a country of the debtor's establishment.[35] But even nonmain proceedings are entitled to recognition in the U.S., although certain relief is not automatic, including automatic stay upon recognition.[36]

U.S. courts will enforce the outcome of foreign proceedings according to the foreign jurisdiction's rules, even if such relief would not be available in a chapter 11 restructuring, including enforcing through chapter 15 post-*Purdue Pharma* third-party releases.[37] That applies also to U.S.-based companies deciding to restructure abroad and to enforce the foreign plan under chapter 15 of the Bankruptcy Code. Such was the case of Nasdaq-listed Fossil Group's restructuring under English Part 26A of the Company's Act: It avoided the numerosity requirement and was enforced in a chapter 15 proceeding, including nonconsensual third-party releases allowable under English law.[38]

## Conclusion

The increasing convenience of foreign bankruptcy fora results in a variety of options for sophisticated debtors with international presence. At the same time, venue competition provides incentives to previously more conservative jurisdictions (such as most European nations) to consider debtor-friendly substantive reorganization strategies to remain relevant in the increasingly globalized restructuring choices of large enterprises. abi

27 *See, e.g., Insolvency Forum Shopping*, Assoc. Bus. Recovery Professionals (July 2015), at 6-7.

28 *See, e.g.,* Meiyen Tan & Josiah Tham, *Singapore: International Debt Restructuring Hub or More To Do?*, Singapore Global Restructuring Initiative, Singapore Management University (Aug. 23, 2024).

29 *Id.*

30 Tan & Tham, *supra* n.29; Appointments of International Judges to the Singapore International Commercial Court and Completion of Term on the Supreme Court Bench, PMOMedia Release, SG Courts (Dec. 15, 2023).

31 Tan & Tham, *supra* n.29.

32 11 U.S.C. § 101(23).

33 11 U.S.C. § 1502(4).

34 11 U.S.C. § 1516(c).

35 11 U.S.C. § 1502(5).

36 *Compare* 11 U.S.C. §§ 1520 and 1521.

37 *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.*, No. 25-10208 (TMH), 2025 WL 977967, at *1 (Bankr. D. Del. Apr. 1, 2025); *In re Odebrecht Engenharia e Construção S.A. - Em Recuperação Jud.*, No. 25-10482 (MG), 2025 WL 1156607, at *1 (Bankr. S.D.N.Y. Apr. 21, 2025).

38 *In re Fossil (UK) Global Services Ltd.*, Chapter 15 Case No. 25-90525 (Bankr. S.D. Tex. Nov. 12, 2025), *Order*, ECF No. 39.