

**BANKRUPTCY TOURISM AND THE EUROPEAN UNION'S
CORPORATE RESTRUCTURING QUANDARY:
THE CATHEDRAL IN ANOTHER LIGHT**

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ABSTRACT

For the last decade, the European Union (EU) has been reconceptualizing its corporate restructuring framework with the hope of bolstering capital markets and improving cross-border lending. Unfortunately, the system remains plagued by two intractable problems: divergent substantive law at the Member State level and jurists unaccustomed to guiding reorganization cases. The result is a system beset by uncertainty and disparate treatment. The EU is intent on addressing these problems, but progress has been elusive. The EU must work through recommendations and directives to encourage Member States to align substantive restructuring law with policy design. But Member States have been unresponsive to the EU's recent efforts. The prospect of addressing these intractable problems in the foreseeable future is grim. Therefore, this Article breaks with current scholarship and urges the EU to adopt a radical alternative. The EU should consider making legal and structural changes that will facilitate bankruptcy tourism. I argue that affording corporations increased discretion as to the location of restructuring cases will aid

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in creating judicial hubs of optimal law and experienced jurists. The EU has the power to adopt my recommendations by simply modifying its own law and procedure, which should accelerate implementation timelines.

Ultimately, a global financial correction is underway. The EU's restructuring framework is unprepared to offer predictable and comprehensive reorganization outcomes for the new wave of distressed corporations. This Article proposes a novel vantage point from which to assess policy alignment.

TABLE OF CONTENTS

I.	Introduction	209
II.	The European Union's Corporate Restructuring Framework	216
	<i>a. The European Union's Economic Policy Objectives and the Virtuous Cycle</i>	218
	<i>b. The Regulatory Framework</i>	221
	<i>i. The European Insolvency Regulation</i>	221
	<i>ii. Guidance from the European Commission</i>	222
	<i>iii. Guidance from the Court of Justice and Real Seat Theory</i>	224
	<i>iv. The Recast EIR</i>	228
	<i>v. A New Study of Business Failure</i>	231
	<i>vi. The Restructuring Directive</i>	232
III.	Intractable Problems Embedded in the EU's Restructuring Framework.....	234
	<i>a. The Harmonization Quandary</i>	234
	<i>b. Experience Deficiencies in the Judiciary</i>	237
	<i>c. The Bankruptcy Tourism Lever</i>	239
IV.	Reconceptualizing Bankruptcy Tourism Through the Lens of the U.S. Bankruptcy System.....	242
	<i>a. Controlled Tourism and How Permissive Venue Rules are Exploited in the United States</i>	242
	<i>i. Principal Place of Business</i>	243
	<i>ii. Principal Assets</i>	246
	<i>iii. Place of Incorporation / Registered Office</i>	248
	<i>iv. Affiliate Filing</i>	249
	<i>b. Assessing Bankruptcy Tourism</i>	252
	<i>c. Is Bankruptcy Tourism Deleterious?</i>	254
V.	The Cathedral in Another Light: Facilitating Controlled Tourism in Order to Address the EU's Intractable Problems	256
	<i>a. The Laboratory Theory and Advancing Restructuring Laws Through Tourism</i>	257
	<i>b. Forum Shopping Can Help Address Experience Deficiencies in the Judiciary</i>	259
	<i>c. Creating Judicial Hubs to Address Intractable Legal and Structural Problems</i>	260

VI.	EU Restructuring Law in a New Light.....	261
	<i>a. COMI and Incorporation Theory: Offering Debtors</i>	
	<i>Options and Certainty</i>	261
	<i>b. The Darkness of Governance Mismatch and the Need for</i>	
	<i>Risk Mitigation</i>	265
	<i>i. Court Fiduciary with the Power to Investigate</i>	
	<i>Malfeasance.....</i>	266
	<i>ii. Article 33 and the Refusal to Recognize</i>	
	<i>Judgements.....</i>	269
VII.	Conclusion.....	270

I. INTRODUCTION

In 1990, Frank Lorenzo—chairman of Continental Airlines—sat in his opulent Houston office and fumed. The crisis in the Persian Gulf had caused oil prices to spike, squeezing Continental’s margins and crippling the company’s ability to service its \$2.2 billion debt burden.¹ Lenders were unwilling to renegotiate the debt.² Lorenzo needed massive concessions from the company’s labor unions, but he had a vitriolic relationship with his employees.³ Labor unions regarded him as pure evil.⁴ The prospect of an amicable compromise was abysmal.

A bankruptcy filing was Continental’s only option. At that time, few large corporations viewed bankruptcy as a way to rehabilitate a struggling business. Rather, bankruptcy was seen as an act of suicide, with the bankruptcy court tasked with conducting the post-mortem and disposing of the body. But Lorenzo had taken Continental Airlines through bankruptcy in the early 1980s and understood that the process offered the possibility of meaningful value preservation and debt alleviation.⁵

Unfortunately, there was another problem to consider. At that time, troubled businesses invariably filed their bankruptcy cases in the city in which their home office was located. Indeed, the first Continental bankruptcy case had been filed in Houston.⁶ Lorenzo was troubled by the prospect of the second bankruptcy case landing there.⁷ Judge Wheless had overseen the first Continental bankruptcy case and ruled in the debtor’s favor in ostensibly every significant matter.⁸ However, after the company emerged from bankruptcy, Judge Wheless presided over the personal bankruptcy

¹ See Agis Salpukas, *Continental Files for Bankruptcy*, N.Y. TIMES, Dec. 4, 1990, at A1.

² See THOMAS PETZINGER, JR., *HARD LANDING: THE EPIC CONTEST FOR POWER AND PROFITS THAT PLUNGED THE AIRLINES INTO CHAOS* 214 (1995).

³ *Id.* at 216-19.

⁴ See Cindy Skrzycki, *For Frank Lorenzo, Controversy is Business as Usual*, WASH. POST, March 9, 1989, at A14.

⁵ See PETZINGER, *supra* note 2, at 243-44.

⁶ See LYNN LOPUCKI, *COURTING FAILURE* 58 (2005).

⁷ *Id.* at 59

⁸ *Id.*

cases of the pilots that had participated in the labor strike against Continental and whom the company had refused to hire back.⁹ After witnessing the devastation from Lorenzo's personal vendettas, Judge Wheelless had gone so far as to describe Continental as "Attila the Hun."¹⁰

Frank Lorenzo needed to find a different venue for Continental's second bankruptcy case. He understood that the federal bankruptcy code's venue provision was woefully ambiguous. The right judge could construe the provision in a way that would allow Continental to forum shop. This type of maneuvering required an accommodating jurist. Continental found such a jurist in the Delaware bankruptcy court.¹¹

Judge Helen Balick was the only bankruptcy judge in Delaware at that time.¹² And she had a light caseload. From 1980 to 1989, only one large publicly held company filed for bankruptcy in Delaware.¹³ The vast majority of Fortune 500 companies were—and still are—incorporated in Delaware, but only a few have any meaningful connection to the state and even less are headquartered there.¹⁴ In 1990, the Delaware bankruptcy court lacked the prominence of the Delaware chancery courts, which adjudicated the most complex business law disputes in the country. The Continental bankruptcy case was an opportunity for Judge Balick to redefine how the corporate bankruptcy market viewed her court. She seized that opportunity.

Over the course of the case, Judge Balick demonstrated an unprecedented conviction to fulfill the requests made by the debtor's management team. She issued injunctions to stop

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.* at 60-61. By the time the bankruptcy case was filed, Lorenzo had sold his controlling ownership interest in Continental but remained on the board of directors. *Id.* at 58-59.

¹² Ann Davis, *Judges Are Added to Bench in Delaware Bankruptcy Court*, WALL ST. J. (Feb. 5, 1997, 12:01AM), <https://www.wsj.com/articles/SB85509666622716500> [<https://perma.cc/TT36-9BCV>].

¹³ UCLA-LOPUCKI BANKR. RSCH. DATABASE, <http://lopucki.law.ucla.edu> [<https://perma.cc/PDF6-HP7W>].

¹⁴ *See* Delaware Division of Corporations, *About the Division of Corporations*, DELAWARE.GOV, <https://corp.delaware.gov/aboutagency/> [<https://perma.cc/V2PY-T2ZT>].

troublesome litigation in other jurisdictions and forbade attorneys from appearing in other courts to seek relief against Continental.¹⁵ Many of her rulings were devoid of any supporting basis.¹⁶ She received rebukes from more senior and experienced jurists in other jurisdictions.¹⁷ Judge Balick was not always successful in fulfilling Continental's requests, but the underlying premise of her conduct was clear: she would not allow the Continental case to be transferred from her court—even though pieces of the first case were still being litigated in Judge Wheless' court in Houston—or countenance any party undermining the restructuring objectives of Continental's management.¹⁸ Ultimately, Judge Balick staked out positions adopted by no bankruptcy court before her¹⁹ and virtually all of her actions were decidedly debtor friendly.²⁰

The result was a powerful signal to the bankruptcy bar. The Continental case became the fountainhead for a new way of conceptualizing the bankruptcy process and venue. After receiving only one bankruptcy case involving a large publicly held company from 1980 to 1989, the Delaware bankruptcy court oversaw forty-one such cases from 1991 to 1996.²¹ In just seven years, the overlooked Delaware bankruptcy court had become the most prominent bankruptcy court in the country.

In my 2013 article,²² I employed a unique set of criteria to determine that forum shopping²³ had become ubiquitous in the US in the years since the second Continental bankruptcy case. From 1991 to 1996, 55% of publicly held companies with approximately

¹⁵ See LOPUCKI, *supra* note 6, at 60-68.

¹⁶ See *id.*

¹⁷ See *id.* at 64. The incomparable Judge Easterbrook described Judge Balick's actions as "preposterous," "unfathomable," and "rogue." *Id.*

¹⁸ See *id.* at 60-68.

¹⁹ See *id.* at 65.

²⁰ See *id.*

²¹ See *id.* at 90.

²² See Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 U. CONN. L. REV. 159 (2013).

²³ The terms "forum shopping" and "bankruptcy tourism" are synonymous and will be used interchangeably throughout this Article.

\$500 million or more in assets (“Megacases”)²⁴ forum shopped.²⁵ From 2007 to 2012, 69% of Megacases did so.²⁶ And the practice became more prevalent. Forty-eight of the eighty-eight Megacases filed between 1991 and 1996 had forum shopped, but that number spiked to 110 out of 159 from 2007 to 2012.²⁷ Consequently, between the two periods, frequency with which Megacases forum shopped grew at a statistically significant rate (14%) and the absolute number of Megacases that forum shopped grew at a staggering rate (130%).²⁸ The last thirty years has been a golden age of bankruptcy tourism in the United States.

The U.S. bankruptcy system is regarded as the preeminent bankruptcy system in the world due to its ability to secure high creditor recovery rates, preserve value for stakeholders, and facilitate successful restructurings of financially viable entities.²⁹ It is recognized as “the model to which European restructuring laws should aspire.”³⁰ In fact, the EU has been extremely clear about its aspirations and the reasons for them. One of the EU’s primary policy objectives is to strengthen the economy and the single market

²⁴ See Parikh, *supra* note 22, at 173-81; see also UCLA-LOPUCKI BANKR. RSCH. DATABASE, *supra* note 13. This number was initially measured in 1980 and is adjusted depending on the year the case was filed. For example, a bankruptcy filed in 2007 would qualify as a Megacase if the debtor(s) had assets with a fair market value of at least \$1.2 billion.

²⁵ See Parikh, *supra* note 22, at 177.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.* at 178.

²⁹ See generally DOING BUSINESS REPORT, RESOLVING INSOLVENCY 2019, <https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency> [<https://perma.cc/2K4W-P8DU>]; Gerard McCormack & Wai Yee Wan, *Transplanting Chapter 11 of the US Bankruptcy Code Into Singapore’s Restructuring and Insolvency Laws: Opportunities and Challenges*, 19 J. CORP. L. STUD. 69 (2019).

³⁰ GERARD MCCORMACK, ANDREW KEAY, SARAH BROWN & JUDITH DAHLGREEN, UNIV. OF LEEDS, STUDY ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY: COMPARATIVE LEGAL ANALYSIS OF THE MEMBER STATES’ RELEVANT PROVISIONS AND PRACTICES 219 (2016) [hereinafter 2016 COMMISSION STUDY] (first citing Maria Brouwer, *Reorganization in US and European Bankruptcy Law*, 22 EUR. J. L. & ECON. 5 (2006); then citing Alan Tilley, *European Restructuring: Clarifying Trans-Atlantic Misconceptions*, 8 J. PRIV. EQUITY (SPECIAL TURNAROUND MANAGEMENT ISSUE) 99 (2005); and then citing Christine Pochet, *Institutional Complementarities within Corporate Governance Systems: A Comparative Study of Bankruptcy Rules*, 6 J. MGMT & GOVERNANCE 343 (2002)).

by stimulating investment to create jobs.³¹ Bolstering capital markets and encouraging cross-border investment is a prerequisite to this objective.³² The free flow of capital is one of the EU's fundamental principles.³³ But suboptimal restructuring processes diminish creditor recoveries and inhibit capital flow.³⁴ Divergent restructuring laws preclude successful restructurings and risk assessment, which drives up borrowing costs and, in many cases, restricts access to credit entirely.³⁵ This is the primary reason the EU has focused on modeling an optimal restructuring framework for implementation across Member States.³⁶

Unfortunately, as it currently exists, the framework is undermined by two intractable problems: 1) significant divergence of substantive restructuring law across Member States that undermines predictability and promotes disparate treatment; and 2) lack of restructuring experience in the judiciary that suppresses efficient and successful restructurings. Scholars have suggested various means to address these problems, but progress has been elusive. Indeed, the EU works through recommendations and directives in order to encourage Member States to make substantive changes to national law.³⁷ The EU has repeatedly attempted to encourage Member States to modify substantive restructuring law to align with policy objectives, but the urgings have been met with inaction.³⁸ There is no reason to believe that this intransigence will abate any time soon.

³¹ See *Action Plan on Building a Capital Markets Union*, at 3, COM (2015) 468 final (Sept. 30, 2015) [hereinafter *Capital Markets Action Plan*].

³² *Id.*

³³ *Id.*

³⁴ See *Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive*, at 2-3, COM (2016), 723 final (Nov. 22, 2016) [hereinafter *Restructuring Directive*].

³⁵ See *id.*

³⁶ See *id.* Due to Brexit uncertainty, I have excluded the UK from Member State discussions and assumed that the English courts will not be a viable restructuring venue option in upcoming years.

³⁷ Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J (C 326) 171-72.

³⁸ See Horst Eidenmüller, *Contracting for a European Insolvency Regime 3* (Eur. Corp. Governance Inst. Working Paper No. 341/2017, 2017).

This Article proposes a novel vantage point from which to view the EU's restructuring framework. The EU cannot abide a protracted timeline for correction. Instead, the EU should consider a radical alternative: facilitating bankruptcy tourism in order to afford corporations increased discretion as to the location of restructuring cases. If implemented, certain Member States will aggressively modify substantive and procedural restructuring laws in order to attract Megacases.³⁹ In a new regulatory environment premised on a forum-shopping model, distressed corporations will be able to easily access restructuring laws in a variety of Member States. In some respects, the market of distressed companies will help select which Member States have optimal substantive law and procedure. As cases pool in a select group of jurisdictions, judges in these courts will repeatedly encounter meaningful restructuring issues and develop a thoughtful approach to key, case-dispositive issues. Over time, a more predictable restructuring system emerges, improving creditor recoveries, bolstering capital markets, and encouraging cross-border lending. The realization of this virtuous cycle may seem unlikely, but this phenomenon has animated the U.S. bankruptcy system over the last thirty years.

Part II of this Article explores the EU's economic policy objectives and the beneficial effect an efficient and effective

³⁹ Many jurisdictions seek to attract corporate bankruptcy cases in order to boost local economies and professional industries. See Corinne Ball, Sushma Jobanputra & Ben Larkin, *Singapore Enacts New Corporate Bankruptcy Law in Bid to Become Center for International Debt Restructuring*, JONES DAY (May/June 2017), <https://www.jonesday.com/en/insights/2017/05/singapore-enacts-new-corporate-bankruptcy-law-in-bid-to-become-center-for-international-debt-restructuring> [<https://perma.cc/HK3U-G359>]; see also McCormack & Wan, *supra* note 29, at 78 (explaining that Singapore's recent reforms to its restructuring laws are a blatant attempt to encourage international companies to locate their restructuring cases in Singapore); NAT'L CONF. OF BANKR. JUDGES, SPECIAL COMM. ON VENUE, REPORT ON PROPOSAL FOR REVISION OF THE VENUE STATUTE IN COMMERCIAL BANKRUPTCY CASES 56 (2018) [hereinafter VENUE REPORT], https://cdn.ymaws.com/www.ncbj.org/resource/resmgr/docs_public/Venue_White_Paper_-_Final.pdf [<https://perma.cc/HK3U-G359>] ("Based upon estimates from Bloomberg Businessweek, the flood of companies fleeing their home jurisdictions over the past thirteen years has drained nearly \$4 billion from local economies." (quoting Venue Fairness: Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, Submitted in Support of Testimony of Douglas B. Rosner Before the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 (Nov. 22, 2013), <http://commission.abi.org/sites/default/files/statements/22nov2013/Venue-Statement-ABI-Commission.pdf> [<https://perma.cc/LMD8-YGXV>])).

restructuring system can have in furthering those objectives. This part also describes the EU's current legal and regulatory framework and how this framework aggressively polices bankruptcy tourism. Part III analyzes the two primary intractable problems embedded in the EU's restructuring framework: 1) significant divergence of substantive restructuring law across Member States that undermines predictability and promotes disparate treatment; and 2) lack of restructuring experience in the judiciary that suppresses efficient and successful restructurings. This part also poses the question whether the EU can effectively address these problems in the foreseeable future.

Part IV argues that a radical new approach is necessary in order to advance the EU's economic policy objectives. In arguing for a model premised on the type of controlled tourism prevalent in the United States, this part describes forum shopping in the United States and posits that by facilitating tourism, the EU may be able to address the intractable problems embedded in its restructuring framework.

In Part V, I explain how tourism can help create judicial hubs, and this prospect is particularly appealing in the EU. Over time, tourism supports the development of optimal restructuring laws and experienced judges located in distinct locales. Countries wishing to host these hubs may be more inclined to adopt EU restructuring policy suggestions. If successful, judges in these hubs will repeatedly encounter meaningful restructuring issues and develop a thoughtful approach to key, case-dispositive issues. Predictability allows companies and creditors to formulate a range of in-court restructuring outcomes with a high degree of certainty. This data also informs and facilitates out-of-court restructuring negotiations and improves outcomes. Experienced judges accelerate case speed, which increases the likelihood of a successful restructuring while also lowering process costs. As creditor recoveries improve, capital markets grow, ultimately reducing borrowing costs and enhancing cross-border lending.

In Part VI, I delineate my proposed amendments to EU restructuring law. My primary proposal focuses on a new conceptualization of a company's center of main interests ("COMI") that better aligns EU venue provisions with U.S. law but with meaningful distinctions to avoid abuse. I acknowledge that easing venue regulations increases the risk of abusive or fraudulent

tourism. Consequently, I further propose procedural changes that empower courts to better investigate malfeasance that may be the true motivation for tourism.

There is extensive literature exploring the EU's restructuring framework and how to improve it. This Article offers a view of the cathedral in another light.⁴⁰ Controlled bankruptcy tourism may be a necessary lever for addressing intractable framework deficiencies. By fostering the creation of judicial hubs with optimal restructuring laws and experienced jurists, tourism would allow the EU to promptly address legal and structural deficiencies. But in order to enjoy these benefits, the EU must first revise its restructuring laws to facilitate tourism. This Article includes multifaceted proposals designed to encourage the beneficial aspects of bankruptcy tourism but, at the same time, avoid negative externalities that could destabilize the restructuring system.

II. THE EUROPEAN UNION'S CORPORATE RESTRUCTURING FRAMEWORK

The European Union represents a political and economic confederation of twenty-seven countries, commonly known as Member States.⁴¹ To those outside of Europe, the EU may appear to be a type of federal government exerting supremacy, but that is inaccurate. The EU is pursuing economic objectives that will ideally create an efficient single market and facilitate the production and

⁴⁰ In the late 19th century, Claude Monet produced a series of paintings capturing the front façade of the Rouen Cathedral in Normandy. Each painting detailed the façade from the same angle but at a different time of day. The variances in light have a profound impact on the Cathedral's visage. Monet made over thirty paintings, and it has been said that one must see all of them to truly understand the Cathedral. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-90 n.2 (1972) (citing G. HAMILTON, CLAUDE MONET'S PAINTINGS OF ROUEN CATHEDRAL 4-5, 19-20, 27 (1960)).

⁴¹ *The 27 Member Countries of the EU*, EUROPEAN UNION (Oct. 30, 2020), https://europa.eu/european-union/about-eu/countries_en [https://perma.cc/N3Ny-YNCE].

sale of goods and services within that market.⁴² For example, the different political and legal institutions that make up the EU (“EU Institutions”) are not authorized to manage most of the fundamental matters overseen by the U.S. federal government, including a military, taxation, social welfare provisions, education, civilian infrastructure, and human rights.⁴³ EU Institutions do not enjoy the U.S. federal government’s power to extract revenue through a comprehensive tax structure.⁴⁴ Rather, EU Institutions employ a variety of direct and indirect mechanisms to facilitate the free movement of goods, services, capital, workers, and people within a single market.⁴⁵

Capital markets integration is a preeminent issue for the EU.⁴⁶ Capital markets are more efficient—resulting in lower borrowing costs—when creditor recoveries in corporate distress situations are predictable.⁴⁷ And predictability is based in large part on the substance and implementation of restructuring laws. However, unlike the U.S. federal government, EU Institutions cannot unilaterally mandate changes to substantive restructuring laws.⁴⁸ There is no one bankruptcy code for bankruptcy proceedings in the EU. Member States control the substantive law within their own country, and the divergence across the region is significant.⁴⁹ EU Institutions are resigned to formulating an optimal corporate restructuring framework and then attempting to incentivize

⁴² See Andrew Moravcsik, *Federalism in the European Union: Rhetoric and Reality*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 173 (Kalypso Nicolaidis & Robert Howse ed. 2003).

⁴³ See *id.* at 166-69 (noting that the task of collective security was arguably placed in the hands of NATO).

⁴⁴ See *How the EU is Funded*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/eu-budget/revenue-income_en [<https://erma.cc/KQ7U-V75B>]. The EU’s primary sources of income include agricultural levies, a portion of national value-added taxation from Member States, and fines imposed when businesses fail to comply with EU rules. *Id.*

⁴⁵ See generally Gabriel Moss, Ian Fletcher & Stuart Isaacs, *The EU Regulation on Insolvency Proceedings* (3d ed. 2016).

⁴⁶ See *Capital Markets Action Plan*, *supra* note 31.

⁴⁷ See *Restructuring Directive*, *supra* note 34, at 2.

⁴⁸ See generally MOSS, FLETCHER & ISAACS, *supra* note 45.

⁴⁹ See Part III.A., *infra*.

Member States to align substantive national laws with EU policy objectives.

a. The European Union's Economic Policy Objectives and the Virtuous Cycle

The EU's economic policy objectives are varied but one overriding priority is to strengthen the economy and the single market by stimulating investment to create jobs.⁵⁰ Bolstering capital markets and encouraging cross-border investment is a prerequisite to this objective.⁵¹ Indeed, the free flow of capital is one of the EU's fundamental principles.⁵² The EU's ability to implement this principle has been mixed. The European economy is as large as the U.S. economy, "but Europe's equity markets are less than half the size, [and] its debt markets less than a third."⁵³ Borrowing costs, access to credit, and capital liquidity—including cross-border investment—are directly affected by default risk and creditor recoveries in distressed scenarios.⁵⁴ Suboptimal restructuring processes diminish creditor recoveries and inhibit capital flow.⁵⁵

⁵⁰ See *Capital Markets Action Plan*, *supra* note 31, at 3.

⁵¹ The ultimate goal has been described as the "Capital Markets Union" – one true single market for capital across the EU. See *id.* at 4-6.

⁵² See *Capital Markets Action Plan*, *supra* note 31, at 3.

⁵³ See *id.* (stating that the gap between individual Member States is greater than the gap between Europe and the US).

⁵⁴ See *Restructuring Directive*, *supra* note 34, at 2 ("Importantly, insolvency matters are also a deterrent for cross-border expansion and investments. Many investors mention uncertainty over insolvency rules or the risk of lengthy or complex insolvency procedures in another country as a main reason for not investing or not entering into a business relationship outside their own country. A higher degree of harmoni[z]ation in insolvency law is thus essential for a well-functioning single market and for a true Capital Markets Union.").

⁵⁵ See *id.* at 3 ("The quality of Member States' restructuring and insolvency frameworks directly affects creditors' recovery rates. World Bank indicators suggest that in the EU recovery rates vary between 30% in Croatia and Romania, and 90% in Belgium and Finland. Recovery rates are higher in economies where restructuring is the most common insolvency proceeding. On average, in such economies creditors can expect to recover 83% of their claims, against an average of 57% in liquidation procedures. While these outcomes also reflect economic factors such as the overall health of the economy, they underline the importance of a comprehensive insolvency framework, anchored in a strong institutional and cultural setting, in delivering better outcomes for society.") (citations omitted).

Divergent restructuring laws suppress successful restructurings and preclude risk assessment, which drives up borrowing costs and can restrict access to credit entirely.⁵⁶ This is the primary reason that EU Institutions have focused on implementing a comprehensive restructuring framework across Member States.⁵⁷

Myriad economic benefits are available to the extent that EU restructuring laws become more coherent and can be implemented uniformly. I describe this phenomenon as the virtuous cycle. Primarily, efficient and effective in-court processes facilitate successful restructurings of financially viable companies. A system that makes restructurings a meaningful option is optimal because restructurings limit unnecessary liquidations, which destroy enterprise value, suppress creditor recoveries, and cause employee displacement.⁵⁸ Further, these system facets would improve the likelihood of out-of-court settlements with creditors. Out-of-court restructurings are far less disruptive to a business than court-supervised proceedings and recovery rates for creditors are invariably greater.⁵⁹ Process costs are reduced and process speed is accelerated.⁶⁰ Overall, successful out-of-court restructurings help

⁵⁶ See *id.* at 2.

⁵⁷ See *id.*

⁵⁸ The law in many Member States steers—perhaps unintentionally—viable businesses towards liquidation. Approximately 200,000 EU companies go bankrupt each year, resulting in 1.7 million job losses every year. One in four of these liquidations are cross-border insolvencies. Theoretically, “[a] significant percentage of firms and related jobs could be saved” through preventive procedures and restructurings. *Restructuring Directive*, *supra* note 34, at 2. Further, “[d]ata shows that the highest recovery rates for creditors are in economies where restructuring is the most common insolvency proceeding and that 45% of OECD economies use restructuring as the most common way to save viable firms. They also have an average recovery rate of 83 cents on the dollar, versus 57 cents on the dollar in countries where liquidation is the prevalent outcome.” *Id.* at 13. Unfortunately, from 1999 to 2012, restructurings—as opposed to liquidation or going-concern sales—occurred in Germany in only two percent of all business insolvencies. See Eidenmüller, *supra* note 38, at 15. The restructuring tally is only slightly better in the UK (approximately 10% in 2016), Spain (approximately 10% in 2015), and Italy (approximately 5% in 2014). See *id.*

⁵⁹ See STEFANIA BARIATTI, ROBERT VAN GALEN, INSOL EUR., STUDY ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY 20 (2014) [hereinafter 2014 INSOL STUDY], <https://op.europa.eu/en/publication-detail/-/publication/3299431a-86ac-11e5-b8b7-01aa75ed71a1/language-en/format-PDF/source-152035587> [https://perma.cc/GRG6-FHZ8].

⁶⁰ See *id.* at 9.

reduce borrowing costs.⁶¹ However, out-of-court settlement discussions occur in the shadow of in-court proceedings. Indeed, out-of-court restructurings are difficult to undertake when the potential recoveries through a court proceeding are highly unpredictable.⁶² A more predictable restructuring system allows creditors a proper frame of reference in developing their settlement options.

In the aggregate, a system that deemphasizes liquidations and encourages out-of-court settlements and in-court reorganizations of financially viable companies enhances creditor recoveries, which reduce borrowing costs.⁶³ Further, the risk profile of cross-border lending becomes more manageable, facilitating that type of lending and improving access to credit.⁶⁴

The virtuous cycle is realized through these dynamics. Entrepreneurial activity increases, restructurings are destigmatized, and businesses have the ability to withstand cyclical market downturns.⁶⁵ The overall benefits to capital markets and borrowers are profound.

Unfortunately, as detailed in the next section, the virtuous cycle is elusive. The EU has been unable to spur the implementation of an efficient and effective restructuring system overarching its Member States.

⁶¹ See *Restructuring Directive*, *supra* note 34, at 2.

⁶² In other words, systemic obstacles exist to out-of-court settlement when parties lack meaningful information regarding their alternatives to settlement. I agree with scholars who have argued that the highly unpredictable nature of the valuation fight embedded in a Chapter 11 plan confirmation process represents an incentive for consensual stakeholder bargaining. However, that is merely one unpredictable variable that exists among other relatively predictable variables in the US restructuring system. As detailed in Part III.a., *infra*, I assert that too many facets of the EU restructuring framework lack meaningful predictability, which undermines out-of-court settlement.

⁶³ See *Restructuring Directive*, *supra* note 34, at 2-3.

⁶⁴ See *id.* at 2.

⁶⁵ See *Restructuring Directive*, *supra* note 34, at 3, 6.

*b. The Regulatory Framework**i. The European Insolvency Regulation*

A “regulation” is one of the primary ways that EU Institutions advance policy objectives. Regulations provide provisions that have a general application to all Member States, though there may be differing practical effects for the various individual parties or entities to which they apply.⁶⁶ Regulations are also binding in their entirety and will apply in identical terms throughout the EU.⁶⁷ Regulations are an instrument of a single EU legal order and are expected to receive a uniform interpretation.⁶⁸ Finally, Member States may not enact national law that has the effect of modifying a regulation.⁶⁹

In order to provide a procedural framework and choice-of-law rules for cross-border bankruptcy cases,⁷⁰ a regulation for insolvency proceedings was entered into force on May 31, 2002 (“EIR”).⁷¹ The EIR contained “rules on jurisdiction for insolvency proceedings, the recognition of decisions with respect to such proceedings, and the coordination of multiple proceedings involving a single debtor.”⁷²

The EIR addressed bankruptcy tourism in its preamble, noting that “[i]t is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a

⁶⁶ See MOSS, FLETCHER & ISAACS, *supra* note 45; see also Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 171-72 (“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”). For example, the European Council will adopt a regulation when it seeks to impose common safeguards on goods imported from outside the EU.

⁶⁷ See MOSS, FLETCHER & ISAACS, *supra* note 45, at 25.

⁶⁸ See *id.*

⁶⁹ See *id.* at 26.

⁷⁰ See Horst Eidenmüller, *Abuse of Law in the Context of European Insolvency Law*, 6 EUR. CO. & FIN. L. REV. 1, 2-3 (2009).

⁷¹ See Council Regulation 1346/2000, 2000 O.J. (L 160) (EC) [hereinafter EIR].

⁷² *Id.*

more favorable legal position (forum shopping).”⁷³ The EIR effectuated this in Article 3 by enabling a main insolvency proceeding to be opened only in the Member State where the debtor had its COMI.⁷⁴ The EIR described COMI as “the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.”⁷⁵ Article 3 further provides that the place of the debtor’s registered office is presumed to be the COMI in the absence of proof to the contrary.⁷⁶

By design, the EIR had a limited scope. The regulation did not attempt to address any substantive restructuring law or the ultimate resolution of restructuring cases. Consequently, the regulation did little to address deficiencies in the EU restructuring framework that were apparent by the following decade.

ii. Guidance from the European Commission

On December 12, 2012, the European Commission adopted a report on the application of the European Insolvency Regulation (the “2012 Report on the EIR”).⁷⁷ The report noted that the EIR was “generally regarded as a successful instrument for the coordination of cross-border insolvency proceedings” but guidance as to substantive restructuring law was absent.⁷⁸ As to bankruptcy tourism, the report touted the use of a debtor’s COMI in determining jurisdiction for restructuring cases.⁷⁹ The report acknowledged that—despite the otherwise rigorous standards established by the COMI-test and further clarified by the Court of Justice of the European Union (“CJEU”)—corporations frequently forum

⁷³ *Id.* pmb. 4.

⁷⁴ *Id.* art. 3.

⁷⁵ *Id.* pmb. 13.

⁷⁶ *Id.*

⁷⁷ *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings*, COM (2012) 743 final (Dec. 12, 2012), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012DC0743> [https://perma.cc/CQ4Z-KAXK].

⁷⁸ *Id.* § 1.2.

⁷⁹ *Id.* § 3.1

shopped in order to benefit from what they perceived as more effective restructuring processes.⁸⁰ However, the 2012 Report on the EIR took a neutral view on this behavior. Indeed, the report explained that

[bankruptcy tourism] cannot per se be regarded as abusive or illegitimate. First, COMI moves of companies have been accepted by the CJEU as a legitimate exercise of the freedom of establishment Moreover, COMI relocation often benefits creditors rather than disadvantaging them. Often, relocations are even driven by the (senior) creditors in an attempt to rescue or restructure the company. There are several cases where COMI relocation to the UK allowed the successful restructuring of a company because of the flexibility which English insolvency law grants companies in this respect.⁸¹

Business failures in the EU received a considerable amount of attention in the years following the Great Recession. In 2012, the European Commission designated the modernization of EU insolvency law as a key action in order to improve business survival rates and creditor recoveries.⁸² In 2014, INSOL Europe—the European association of insolvency professionals—issued a comparative analysis of business failure and insolvency in Member States as of October 2013.⁸³ The 2014 INSOL Study highlighted the significant variance in national restructuring laws across the EU and how this fact creates a level of unpredictability that undermined corporate restructuring, capital markets, and cross-border investments.⁸⁴

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Single Market Act II*, § 2.2, COM (2012) 573 final (Oct. 3, 2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012DC0573> [<https://perma.cc/6ND6-FECH>].

⁸³ See 2014 INSOL STUDY, *supra* note 59, at 5-6.

⁸⁴ See *id.* at 6-10.

Building on the 2014 INSOL Study, the European Commission issued a recommendation on March 3, 2014.⁸⁵ The recommendation acknowledged that the EU's key objectives related to corporate restructuring—lowering borrowing costs, improving capital markets efficiency, and facilitating successful in-court and out-of-court restructurings—would remain elusive without greater uniformity across Member States' substantive restructuring laws.⁸⁶ Therefore, the recommendation included numerous proposals regarding restructuring law and encouraged Member States to incorporate the recommendations into their respective national laws.⁸⁷ Unfortunately, the recommendation failed to spur meaningful action among Member States.⁸⁸

iii. Guidance from the Court of Justice and Real Seat Theory

During this time, the CJEU provided guidance on the interpretation of the regulatory framework noted above. More specifically, the court's rulings in *Eurofood* and *Interedil* added texture to the definition of COMI⁸⁹ and embraced the "real seat" theory.

*Eurofood*⁹⁰ involved a dispute regarding the appropriate location for the main insolvency proceedings of Eurofood IFSC Ltd. ("Eurofood"), a wholly-owned subsidiary of Parmalat SpA registered in Ireland. In December 2003, Parmalat SpA had been admitted to an insolvency proceeding in Italy.⁹¹ The following month, one of Eurofood's creditors asserted that Eurofood was insolvent and sought to institute liquidation proceedings against the

⁸⁵ Commission Recommendation 2014/135, 2014 O.J. (L 74) 65 [hereinafter 2014 Commission Recommendation].

⁸⁶ *See id.* ¶¶ 2-3.

⁸⁷ *See id.* ¶ 1.

⁸⁸ *Cf. Eidenmüller, supra* note 70, at 4 (noting that businesses continue to forum shop).

⁸⁹ The EIR does not define COMI, but Recital 13 in the EIR preamble provides that "the 'center of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties." EIR, *supra* note 71.

⁹⁰ Case C-341/04, *Eurofood IFSC Ltd*, 2006 E.C.R. I-3854.

⁹¹ *Id.* para. 18.

company in Ireland.⁹² The High Court appointed a liquidator.⁹³ In February 2004, Eurofood was admitted as part of Parmalat's insolvency proceeding, and the liquidator in the Parmalat case was appointed to oversee Eurofood.⁹⁴ A jurisdictional war erupted between the Italian and Irish courts with various questions being directed to the CJEU.⁹⁵

The CJEU was asked to determine, *inter alia*, the critical factors for identifying a subsidiary's COMI where the subsidiary and its parent have registered offices in two different Member States.⁹⁶ The court first explained that COMI is a concept unique to the EIR and must be interpreted in a uniform way, uninfluenced by Member State national law.⁹⁷ In exploring the contours of COMI, the court noted that the phrase contemplates consideration of criteria that "are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability" regarding the location of a main insolvency proceeding.⁹⁸

The court acknowledged that the EIR's Article 3(1) created a presumption that the place of the debtor's registered office is the center of its main interests.⁹⁹ That presumption "can be rebutted only if factors [that] are both objective and ascertainable by third parties enable it to be established that an actual situation exists" that does not align with the impression conveyed by the location of the registered office.¹⁰⁰ To clarify this proposition, the court offered a specific example where the presumption would be rebutted.¹⁰¹ In many cases, a debtor carries out the bulk of its business operations in one Member State while carrying out virtually none of its business

⁹² *Id.* para. 19.

⁹³ *Id.* para. 20.

⁹⁴ *Id.* para. 21.

⁹⁵ *See id.* paras. 22-25.

⁹⁶ *Id.* para. 26.

⁹⁷ *Id.* para. 31.

⁹⁸ *Id.* para. 33.

⁹⁹ *Id.* para. 6.

¹⁰⁰ *Id.* para 34.

¹⁰¹ *Id.* paras. 35-36.

operations in the Member State in which it has its registered office.¹⁰² In this case, there is a strong incongruence in the signals sent to creditors.¹⁰³ Consequently, the court explained, third parties will invariably be able to establish that objective and ascertainable factors rebut the Article 3(1) presumption.¹⁰⁴

As to venue decisions, *Eurofood* serves to dilute the certainty offered by reliance on the location of a debtor's registered office. The qualitative assessment advocated by the court subjects debtors to additional scrutiny and limits tourism options.

The CJEU further explored the contours of COMI in *Interdil*.¹⁰⁵ In that case, Interdil transferred its registered office from Italy to the United Kingdom in 2001.¹⁰⁶ As a consequence, the company was removed from the register of companies in Italy.¹⁰⁷ Subsequently, Interdil was acquired by another company, and the title to properties that Interdil owned in Italy was transferred to Windomist Ltd.¹⁰⁸ Interdil was removed from the UK register of companies in July 2002.¹⁰⁹ In October 2003, a creditor of Interdil filed a petition to open bankruptcy proceedings against Interdil in Italy.¹¹⁰ Interdil challenged the jurisdiction of the Italian court.¹¹¹

The Italian Supreme Court of Cassation ruled that the Article 3(1) presumption had been rebutted due to various circumstances, including (i) Interdil's ownership of immovable property in Italy; (ii) a lease agreement involving Interdil and two hotel complexes; (iii) a contract involving Interdil and a banking institution; and (iv) "the Bari register of companies had not been notified of the transfer

¹⁰² This is the typical scenario in the United States where a super-majority of Fortune 500 companies are incorporated in Delaware but virtually none have any meaningful business operations in the state. See Delaware Division of Corporations, *supra* note 14.

¹⁰³ Case C-341/04, *Eurofood IFSC Ltd*, 2006 E.C.R. I-3854, para. 27.

¹⁰⁴ *Id.* para. 37.

¹⁰⁵ Case C-396/09, *Interdil Srl (in liq.) v. Fallimento Interdil Srl*, 2012 E.C.R. I-9939.

¹⁰⁶ *Id.* para. 10.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* para. 11.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* para. 12.

¹¹¹ *Id.* para. 13.

of Interdil's registered office."¹¹² The proceedings were stayed in order to direct the jurisdictional questions, *inter alia*, to the CJEU.¹¹³

The CJEU addressed the questions posed by the dispute by first agreeing with the Advocate General's point that the EIR's Recital 13 made clear Parliament's intention to attach greater importance to the place in which a company has its central administration—as opposed to its registered office—as the criterion for determining venue.¹¹⁴ The court then reaffirmed its *Eurofood* ruling, explaining that a debtor's COMI "must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination" of jurisdiction.¹¹⁵ The court noted that the Article 3(1) presumption is well-founded to the extent that "the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken [in that locale and] in a manner ascertainable by third parties."¹¹⁶ But the presumption may be rebutted if central administration is not located in the same venue as the registered office.¹¹⁷

The court emphasized that Article 3(1) is subject to a qualitative assessment,¹¹⁸ which implicitly endorsed real seat theory as opposed to incorporation theory.¹¹⁹ Therefore, in restructuring

¹¹² *Id.* para. 16.

¹¹³ *Id.* para. 17.

¹¹⁴ *See id.* paras. 48, 69 (acknowledging AG Kokott's opinion delivered on March 10, 2011).

¹¹⁵ *Id.* para. 49.

¹¹⁶ *Id.* para. 50.

¹¹⁷ *Id.* para. 51.

¹¹⁸ *Id.*

¹¹⁹ As explained by the European Union's Study on the Law Applicable to Companies, under the incorporation theory

the rules applicable to companies are determined by the law at the place of incorporation, irrespective of the commercial links between the foreign company and the host state. Thus, following this approach, a foreign company will be recognized and retain its legal capacity and internal organization, even where its headquarters or significant parts (or indeed all) of its operations are located or moved to a host state following this approach.

cases, the jurisdictional inquiry must take into account “all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties.”¹²⁰ The court’s interpretation confirms that a significant level of complexity is embedded in the venue question. The court notes that the factors the Italian court considered in finding that Italy was the appropriate venue—including the location of immovable property, lease agreement, and financial contracts—are all meaningful criteria but

cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual center of management and supervision and of the management of its interests is located in that other Member State.¹²¹

The ruling serves to reaffirm *Eurofood’s* qualitative assessment methodology; the effect of which is to subject venue decisions to comprehensive, fact-intensive scrutiny.

iv. The Recast EIR

In 2015, the European Commission revisited the EIR in order to “enhance the effective administration of cross-border insolvency proceedings.”¹²² As a result, the European Insolvency Regulation

The real seat doctrine, on the other hand, attempts to determine the jurisdiction the company is in fact most closely connected with. While there is no single way of determining what constitutes the ‘closest connection’, the central administration or headquarters of a company are often used by Member States following this approach.

CARSTEN GERNER-BEUERLE, FEDERICO M. MUCCIARELLI, EDMUND-PHILLIP SCHUSTER, MATHIAS M. SIEMS, *STUDY ON THE LAW APPLICABLE TO COMPANIES 25* (2017), <https://op.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1> [<https://perma.cc/J6KG-3SD6>].

¹²⁰ Case C-396/09, *Interedil Srl (in liq.) v. Fallimento Interedil Srl*, 2012 E.C.R. I-9939, para. 52.

¹²¹ *Id.* para. 53.

¹²² See Council Regulation 2015/848, 2015 O.J. (L 141) 19, at Recital (1) [hereinafter Recast EIR].

was recast and took effect on June 26, 2017 (the “Recast EIR”).¹²³ The Recast EIR sought to, *inter alia*,

- (i) [address] pre-insolvency or hybrid proceedings, (ii) clarify[] the concept of Center of Main Interests (COMI) [in order to reduce bankruptcy tourism incentives], (iii) strengthen[] the role of the main proceedings when several proceedings are opened against the same debtor in different Member States, (iv) introduce[] new rules on the publication of the proceedings and lodging of claims, (v) and include[] a new chapter for the insolvency of a group of companies.¹²⁴

The Recast EIR adopts many of the general structural adjustments advocated by the Report on the EIR.¹²⁵ However, the Recast EIR implements a more aggressive regulatory approach to bankruptcy tourism.¹²⁶ Primarily, Recital (5) argues that internal markets will not function properly if regulatory incentives¹²⁷ exist for parties to engage in bankruptcy tourism – defined as an attempt by a party to “transfer assets or judicial proceedings from one Member State to another seeking to obtain a more favorable legal position to the detriment of the general body of creditors.”¹²⁸ The Recast EIR is more explicit in Recital (29), which provides that fraudulent or abusive forum shopping should be prevented.¹²⁹ The EIR’s description of COMI is virtually unchanged,¹³⁰ but Recitals (28) and (30) establish a creditor-centric perspective for COMI

¹²³ Francisco Garcimartin, *The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction*, 1 n.1 (Mar. 21, 2016), <https://ssrn.com/abstract=2752412> [<https://perma.cc/3U5Z-FTY2>].

¹²⁴ *Id.* at 2.

¹²⁵ *Id.*

¹²⁶ *Id.* at 13.

¹²⁷ This statement implies that EU regulations should not create incentives to forum shop. Naturally, this implication overlooks the fact that the incentives for forum shopping are created by the bankruptcy market. EU regulations are better positioned to impose legal restrictions to prevent the practice as opposed to attempting to create disincentives.

¹²⁸ See Recast EIR, *supra* note 122, at Recital (5).

¹²⁹ *Id.* at Recital (29).

¹³⁰ COMI is described as “the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.” *Id.* art. 3(1).

assessment.¹³¹ Primarily, courts are instructed that “[w]hen determining whether the center of the debtor’s main interests is ascertainable by third parties, *special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests.*”¹³² Further, the presumption that the location of a debtor’s registered office establishes COMI is portrayed as a weak one. Indeed, notwithstanding the presumption, courts are instructed to

carefully assess whether the cent[er] of the debtor’s main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company’s central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual center of management and supervision and of the management of its interests is located in that other Member State.¹³³

In order to prevent abusive forum shopping, the presumption does not apply at all if the debtor has “relocated its registered office or principal place of business to another Member State within the 3-month period prior to the” case opening.¹³⁴ Further, the Recast EIR instructs judges to assess on their “own motion” whether a debtor’s center of main interests is actually located within the court’s jurisdiction.¹³⁵ And any judgment opening insolvency proceedings must specify its jurisdictional basis.¹³⁶

Article 3 also allows creditors to institute involuntary bankruptcy proceedings, which offers creditors a way to combat

¹³¹ *Id.* at Recitals (28), (30).

¹³² *Id.* at Recital (28) (emphasis added).

¹³³ *Id.* at Recital (30). This provision captures the CJEU’s reasoning in *Interedil*. See MOSS, FLETCHER & ISAACS, *supra* note 45, at 446.

¹³⁴ Recast EIR, *supra* note 122, at Recital (31).

¹³⁵ *Id.* at Recital (27), and art. (4). United States venue provisions do not instruct judges overseeing corporate bankruptcy cases to undertake this inquiry *sua sponte* – and most do not – though some scholars have recommended the change. See Parikh, *supra* note 22, at 201.

¹³⁶ See Recast EIR, *supra* note 122, art. 4(1).

debtor tourism.¹³⁷ Article 5 offers any creditor the ability to challenge the court's jurisdictional decision and seek judicial review of such decision.¹³⁸ Finally, the Recast EIR continues secondary proceedings that may involve courts in numerous other Member States and be overseen by insolvency practitioners.¹³⁹ In such a case, Article 66 provides that in the event at least two-thirds of restructuring practitioners agree that one particular court is the most appropriate court for the opening of group coordination proceedings, then that court shall have exclusive jurisdiction.¹⁴⁰

Ultimately, the desire to aggressively regulate bankruptcy tourism is clear when viewing the recast provisions of Article 3 "with entirely new provisions enacted as Articles 4 and 5 . . . all of which must be read in the light of . . . Recitals (22) to (38)."¹⁴¹

v. A New Study of Business Failure

Despite the Recast EIR's new procedural guidance, substantive restructuring law at the Member State-level remained incongruent. This inaction prompted a more aggressive response. In 2015, the European Commission acknowledged that the EU's fragmented restructuring laws were inhibiting corporate growth and capital market efficiency¹⁴² and commissioned a new comparative study on substantive restructuring law throughout the EU. The study

¹³⁷ *Id.* art. 3(4)(b)(i).

¹³⁸ *Id.* art. 5(1).

¹³⁹ *Id.* at art. 3. The insolvency practitioners overseeing secondary proceedings are akin to Chapter 11 trustees in U.S. bankruptcy courts.

¹⁴⁰ *Id.* art. 66(1).

¹⁴¹ See MOSS, FLETCHER & ISAACS, *supra* note 45, at 64.

¹⁴² See JEAN-CLAUDE JUNCKER, COMPLETING EUROPE'S ECONOMIC AND MONETARY UNION 7 (2015), https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf [<https://perma.cc/5Q26-BHAA>]; see also 2016 COMMISSION STUDY, *supra* note 30, at 25 (noting that "(i) there is a need for greater convergence in insolvency law and restructuring proceedings across Member State, (ii) the inefficiency and divergence of insolvency laws make it harder to assess and manage credit risk, and that (iii) enhancing legal certainty and encouraging the timely restructuring of borrowers in financial distress is particularly relevant for the success of strategies to address the problem of non-performing loans in some Member States." (citing "Towards the Completion of the Banking Union," COM (2015) 587 final (Nov. 24, 2015))).

analyzing business failure in the EU was published in January 2016 (the "2016 Commission Study").¹⁴³

The 2016 Commission Study documented a comparative study on substantive restructuring laws throughout the EU. More specifically, the study delineated the manner in which Member States address a number of fundamental restructuring issues, including director liability, creditor priorities, avoidance, initiation of proceedings, reorganization plans, creditor voting, out-of-court restructuring options, and general procedures.¹⁴⁴ Ultimately, the study highlighted the lack of uniformity for restructuring laws across the EU.¹⁴⁵ The depth of this variance and the ultimate harm the discrepancy could cause the EU's economic policy objectives prompted action.

vi. The Restructuring Directive

A "directive" is a legislative act that sets out broad goals that all Member States must achieve.¹⁴⁶ However, a directive affords Member States flexibility.¹⁴⁷ Individual countries construct their own means to fulfill these goals and draft national laws to implement this design.¹⁴⁸ On November 22, 2016, the EU Commission published its proposal for a new restructuring directive (the "Restructuring Directive").¹⁴⁹ In July 2019, the EU Parliament

¹⁴³ See 2016 COMMISSION STUDY, *supra* note 30.

¹⁴⁴ *Id.* at i-vi.

¹⁴⁵ See *id.* at 2-8.

¹⁴⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 172.

¹⁴⁷ See *Id.*

¹⁴⁸ See *Id.* ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."). For example, on April 17, 2019, the European Council adopted a Copyright Directive that had 4 broad goals: (i) protecting press publications; (ii) reducing the value gap between the profits made by internet platforms and by content creators; (iii) encouraging collaboration between these two groups; and (iv) creating copyright exceptions for text- and data-mining. See Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

¹⁴⁹ See *Restructuring Directive*, *supra* note 34.

adopted the Restructuring Directive.¹⁵⁰ Member States have two years from the adoption date to pass national law tailored to fulfill these goals.¹⁵¹

The Restructuring Directive seeks to remove various obstacles inhibiting a well-functioning single market.¹⁵² The discrepancy in substantive restructuring law across Member States is the fountainhead for most of these obstacles. The Restructuring Directive acknowledges the limitations of the Recast EIR—namely, that the regulation standardizes a few procedural matters at the periphery of restructuring conflicts but fails to tackle significant discrepancies in substantive law that eclipse procedural alignment.¹⁵³ The directive provides structural guidance as to various administrative and non-core matters, including out-of-court restructurings,¹⁵⁴ review of bankruptcy professionals and their services,¹⁵⁵ bankruptcy jurist training,¹⁵⁶ and data collection.¹⁵⁷ More importantly, the directive also seeks to establish minimum standards as to the hydraulics of restructuring laws, including the automatic stay, debtor financing, restructuring plans, valuation methodologies, case appeals, and discharge.¹⁵⁸ Unfortunately, the establishment of minimum standards represents only incremental improvement.

Collectively, the EU's regulatory framework and CJEU case law create the EU's design for corporate restructuring ("EU Restructuring Law"). As noted above, the design seeks to fulfill lofty economic policy objectives. However, as explored in the

¹⁵⁰ Patrick J. Potter, Dania Slim, & Jihyun Park, *The European Union Restructuring Directive*, pillsbury (July 17, 2019), <https://www.pillsburylaw.com/en/news-and-insights/european-union-restructuring-directive.html> [<https://perma.cc/MP5M-5AF5>].

¹⁵¹ Alexandra Schluck-Amend, *EU Parliament Adopts Directive on Preventive Restructuring Frameworks*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=4e2895c0-7f81-41b9-8033-4dbf769a3089> [<https://perma.cc/T9YQ-YREA>]. Note that the implementation period can be extended by one year on request, but such requests are rarely granted.

¹⁵² See *Restructuring Directive*, *supra* note 34, at 14.

¹⁵³ See *id.* at 9-10.

¹⁵⁴ *Id.* at 25.

¹⁵⁵ *Id.* at 35.

¹⁵⁶ *Id.* art. 24(1).

¹⁵⁷ *Id.* art. 29.

¹⁵⁸ See *id.* at 21-22.

following section, intractable problems embedded in the EU restructuring framework preclude progress toward these objectives.

III. INTRACTABLE PROBLEMS EMBEDDED IN THE EU'S RESTRUCTURING FRAMEWORK

The previous section explored the European Union's economic policy objectives and how its corporate restructuring framework is being modified to advance these objectives. Despite these changes, the framework is plagued by two intractable problems: 1) significant divergence of substantive restructuring law across Member States that undermines predictability and promotes disparate treatment; and 2) lack of restructuring experience in the judiciary that suppresses efficient and successful restructurings.

a. The Harmonization Quandary

The EU recognizes that uniform restructuring laws can bolster capital markets and improve the probability of meaningful creditor recoveries and successful corporate restructurings, both within and without judicial proceedings.¹⁵⁹ Harmonization of restructuring laws is essential for a well-functioning EU single-market.¹⁶⁰ Unfortunately, the divergence of substantive restructuring law across Member States is significant. Debtors face disparate treatment on fundamental issues, including (i) the ability to file for

¹⁵⁹ See *id.* at 2-3.

¹⁶⁰ See *id.* at 2; see also 2014 INSOL STUDY *supra* note 59, at 176-82; 2016 COMMISSION STUDY, *supra* note 30, at 25 (“[T]here is a need for greater convergence in insolvency law and restructuring proceedings across Member State[s and] the inefficiency and divergence of insolvency laws make it harder to assess and manage credit risk”); GIORGIO CHERUBINI, ET AL., INSOL EUR. HARMONISATION OF INSOLVENCY LAW AT EU LEVEL 7 (2010), https://www.eesc.europa.eu/resources/docs/ipol-juri_nt2010419633_en.pdf [<https://perma.cc/B7PW-R5ER>] (“[D]isparities between national insolvency and restructuring laws create obstacles, competitive advantages and/or disadvantages or difficulties for companies with cross-border activities or ownership within the EU.”).

bankruptcy in advance of an actual insolvency;¹⁶¹ (ii) management of the debtor post-filing and appointment of an insolvency practitioner;¹⁶² (iii) the automatic stay;¹⁶³ (iv) ranking creditor unsecured and secured claims;¹⁶⁴ (v) post-petition super-priority financing;¹⁶⁵ (vi) avoidance actions, including preference¹⁶⁶ and

¹⁶¹ Many countries require that the debtor be insolvent—or at least in the zone of insolvency—and able to establish that fact (e.g. Croatia, Finland, Greece, Hungary, and Italy). See 2016 COMMISSION STUDY, *supra* note 30, at 251-54.

¹⁶² In many countries, debtor-in-possession management is “seldom used”; rather, an insolvency practitioner is appointed immediately upon filing of a case and oversees management (e.g., Germany, Hungary, Lithuania, and Sweden) or assumes some or all management authority (e.g., Malta, Ireland, and Poland). See 2016 COMMISSION STUDY, *supra* note 30, at 256-58; 2014 INSOL STUDY, *supra* note 59, at 26, 30-32. However, in other countries, insolvency practitioners are not appointed automatically (e.g., Belgium, Greece, Netherlands, and Slovenia), but the debtor is often subject to aggressive supervision. See 2016 COMMISSION STUDY, *supra* note 30, at 256-58. Some commentators have argued that a supervisor or bankruptcy trustee should be appointed in all cases in order to play an oversight role and safeguard creditor interests. See, e.g., Horst Eidenmüller & Kristin van Zwieten, *Restructuring the European Business Enterprise: the European Commission’s Recommendation on a New Approach to Business Failure and Insolvency*, 16 EUR. BUS. ORG. L. REV. 625, 660-61 (2015). Naturally, such an approach would contravene a long-standing practice in US bankruptcy cases. I argue that creditor interests can more effectively be protected by other means (e.g., a creditors’ committee or appointment of a trustee upon motion) that are far less disruptive to management during a period where disruption can preclude a successful reorganization. Further, this type of mandatory rule may undermine management autonomy and ultimately encourage management teams to irrationally delay bankruptcy filings to the detriment of all stakeholders. See 2016 COMMISSION STUDY, *supra* note 30, at 228 (“The fact that the management of the debtor will not be displaced in favour of an outside [insolvency practitioner] encourages timely use of the restructuring option.”).

¹⁶³ In a few countries the automatic stay does not restrict all creditor-collection actions (e.g., Austria and Bulgaria). Some countries have a stay, but the stay is limited to unsecured claims (e.g., Poland). See 2016 COMMISSION STUDY, *supra* note 30, at 261-64; see also 2014 INSOL STUDY, *supra* note 59, at 34-35.

¹⁶⁴ For example, employee claims can rank ahead of secured creditor claims in some Member States (e.g., France, Greece, and Spain). See 2016 COMMISSION STUDY, *supra* note 30, at 124-25.

¹⁶⁵ Many countries have no special provisions encouraging post-petition financing (e.g., Austria, Bulgaria, and Sweden). Many of the countries that do encourage the practice, fail to have specific provisions protecting post-petition lenders from clawback actions (e.g., Finland and Ireland). See *id.* at 278-80.

¹⁶⁶ Member States generally allow debtors to pursue preference actions, but some have extremely generous look back periods that extend for multiple years (e.g., Netherlands, Germany, and Lithuania) while others allow for only a 3-month look back period (e.g., Denmark, Finland, and Sweden). See *id.* at 147-53.

fraudulent transfer¹⁶⁷ actions; (vii) appointment of creditor committees;¹⁶⁸ (viii) prepackaged bankruptcy cases;¹⁶⁹ (ix) cramdown of dissenting creditor voting classes and attendant protections, including the best interests test and absolute priority rule;¹⁷⁰ and (x) asset sales.¹⁷¹ Further, the length of time necessary to resolve complex restructuring cases varies significantly.¹⁷²

Variance in substantive law undermines restructuring cases in a material way.¹⁷³ Unpredictability regarding available debtor relief, restructuring pathways, and creditor rights precludes successful restructurings; failures suppress creditor recoveries, which drive up

¹⁶⁷ Fraudulent transfer actions are a meaningful recovery tool in U.S. bankruptcy cases and can represent billion-dollar actions, particularly in bankruptcy cases involving prepetition leveraged buyouts. *See, e.g., In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) (creditors sought to avoid a multi-billion dollar leveraged buyout). However, fraudulent transfer law in the EU is unevenly developed. For example, in many Member States transactions may only be avoided if the debtor intended to damage creditor interests (e.g., Czech Republic, Portugal, and Poland). Further, the statute of limitations varies wildly. "In Austria, Croatia, Germany, and Norway the period in which transactions can be challenged is 10 years," while in other countries it is as short as 2 years (e.g., Portugal and Romania). *See* 2014 INSOL STUDY, *supra* note 59, at 159-60.

¹⁶⁸ The existence, power, and composition of creditor committees varies significantly across Member States. *See* 2016 COMMISSION STUDY, *supra* note 30, at 192-93. Some Member States do not contemplate appointment of a creditors' committee (e.g. Spain, Belgium, and Slovakia). *Id.* at 193-95. In countries that allow appointment, courts rarely do so (e.g. Luxembourg and Netherlands). *Id.*

¹⁶⁹ Aside from France, Greece, Ireland, Netherlands, and Slovenia, Member States fail to offer debtors the option of a prepackaged bankruptcy proceeding. *Id.* at 202.

¹⁷⁰ "There is in fact considerable variation on the conditions necessary for approval of a restructuring plan in the EU Member States . . . [and it] does not appear that the 'absolute priority' principle is expressly incorporated in the laws of many, if any, EU Member States . . ." *Id.* at 239-42.

¹⁷¹ The procedures and requirements of asset sales are inconsistent, often times resulting in "long drawn out and complicated process[es]." *Id.* at 205.

¹⁷² 2014 INSOL STUDY, *supra* note 59, at 39 ("The length of full insolvency proceedings varies considerably in most Member States: in a large number of States the average length is two to three years.") (citation omitted).

¹⁷³ *See Restructuring Directive*, *supra* note 34, at 2 (indicating cross-border insolvencies often result in liquidation rather than restructuring due to inconsistent legal frameworks across Member States); 2016 COMMISSION STUDY, *supra* note 30, at 24 (suggesting "inefficient and divergent insolvency proceedings in the EU prevent[] speedier debt restructuring"); CHERUBINI ET AL., *supra* note 160, at 27 (asserting lack of harmony between Member States' insolvency processes impedes business reorganization).

borrowing costs and limit access to credit.¹⁷⁴ Further, ineffective restructuring laws force potentially viable companies into liquidation where value is lost.¹⁷⁵ As noted above, the coalescence of these factors inhibits capital markets and undermine growth. Without greater harmonization, the EU will not be able to fulfill its goals regarding capital market integration.

b. Experience Deficiencies in the Judiciary

Specialized bankruptcy courts are one of the most distinctive characteristics of the US system.¹⁷⁶ The US federal judiciary is divided into geographic regions. Each region has multiple bankruptcy courts that hear only individual and corporate bankruptcy matters.¹⁷⁷ Further, almost all of these regions have a bankruptcy appellate court that hears only appeals from bankruptcy proceedings.¹⁷⁸ Bankruptcy judges at both of these levels are eminently qualified to handle the nuance of restructuring laws and the minutia of bankruptcy disputes.¹⁷⁹ The depth and breadth of collective experience in the US restructuring system represents an overwhelming asset.¹⁸⁰ Indeed, there exists “substantial empirical evidence to demonstrate that large bankruptcy cases overseen by

¹⁷⁴ See *Restructuring Directive*, *supra* note 34, at 15. Several Member States took or have taken action independently and have recently enacted or started preparatory work to adopt new rules to improve the preventive restructuring and second chance framework. However, these national rules differ widely in content and, as a result, provide an uneven level of transparency and protection for investors. Investors may be obstructed from investing cross-border because the costs of doing so are much higher than they need to be.

¹⁷⁵ See *id.* at 2-3.

¹⁷⁶ See generally Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012) (describing the structure of the U.S. bankruptcy system and its central institutions and actors).

¹⁷⁷ See UCLA-LoPucki Bankr. Rsch. Database, *supra* note 13.

¹⁷⁸ See *Court Insider: What is a Bankruptcy Appellate Panel?*, U.S. CTS. (Nov. 26, 2012), <https://www.uscourts.gov/news/2012/11/26/court-insider-what-bankruptcy-appellate-panel> [<https://perma.cc/VMV5-FU4Y>].

¹⁷⁹ See VENUE REPORT, *supra* note 39, at 77.

¹⁸⁰ *Id.*

experienced judges have higher success rates.”¹⁸¹ The prospect of a successful restructuring is dimmed without an experienced jurist formulating necessary relief after weighing competing interests among all stakeholders and encouraging settlements, when necessary.¹⁸²

Member States do not have specialized bankruptcy courts comparable to what exists in the United States.¹⁸³ With limited exception, judges overseeing restructuring cases are not specialists.¹⁸⁴ Further, the few judges who do regularly oversee restructuring cases invariably lack a comprehensive understanding of restructuring concepts because almost all bankruptcy cases in their courts are liquidation proceedings or asset sales.¹⁸⁵ For example, from 1990 to 2012, restructurings—as opposed to liquidations or going concern sales—occurred in Germany in only 2% of all business insolvencies.¹⁸⁶ This phenomenon was duplicated across Member States.¹⁸⁷

¹⁸¹ *Id.* (citing Benjamin Charles Iverson, Joshua Madsen, Wei Wang & Qiping Xu, *Practice Makes Perfect: Judge Experience and Bankruptcy Outcomes*, 28 (July 16, 2018), <https://ssrn.com/abstract=3084318> [<https://perma.cc/WM7W-EAC4>]); see also Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 990, 1014 (2015) (concluding that the judge’s experience is “strongly correlated” with the survival of the debtor and that “bankruptcy system participants can increase the likelihood of the debtor company’s survival simply by shifting cases to more experienced judges.”).

¹⁸² Empirical research supports this conclusion. Local bankruptcy courts that Megacases eschewed in order to forum shop to Delaware had historically heard far less chapter 11 bankruptcy cases than local bankruptcy courts in which Megacases filed without forum shopping. Kenneth Ayotte & David A. Skeel Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 461–63 (2006).

¹⁸³ 2016 COMMISSION STUDY, *supra* note 30, at 94. As noted above, due to Brexit uncertainty, I have excluded the UK from Member State discussions and assumed that the English courts may not be a viable restructuring venue option in upcoming years.

¹⁸⁴ See *id.* (noting that German restructuring judges are some of the few judges in the EU that frequently have documentable knowledge in the area).

¹⁸⁵ Eidenmüller, *supra* note 70, at 15.

¹⁸⁶ *Id.*

¹⁸⁷ Italy (~5% in 2014), Spain (~10% in 2015), and the UK (~10% in 2016), face similar limitations. *Id.*

The EU acknowledges that a lack of experience across the judiciary compromises the bankruptcy system.¹⁸⁸ The inexperience effect is decidedly negative: due to a lack of confidence in the system, many companies will delay a bankruptcy filing until such time as liquidation is the only viable option; the percentage of successful restructurings decline and capital markets continue to resist cross-border lending. Further, to the extent that tourism regulations limit companies to regions with inexperienced judges, those companies will be subject to disparate treatment vis-à-vis companies whose central administration happens to be located in a Member State with more experienced judges. This discrepancy further undermines the system and the EU's economic policy objectives.

c. The Bankruptcy Tourism Lever

Scholars have suggested various means to address the harmonization quandary and reorganization inexperience within Member States' judiciary.¹⁸⁹ Though these proposals are meaningful, any belief that these issues can be addressed in the foreseeable future is misguided. The EU works through recommendations and directives in order to encourage Member States to make substantive changes to national law. The EU has repeatedly attempted to steer Member States to optimal

¹⁸⁸ See *Restructuring Directive*, *supra* note 4, at Recital 39, art. 24 (acknowledging the need for Member States to ensure that its judiciary is properly trained to manage restructuring cases); see also *Reforms to Dutch Bankruptcy Act Take in Force from 1 January 2019*, OSBORNE CLARKE (Nov. 16, 2018), <https://www.osborneclarke.com/insights/reforms-to-dutch-bankruptcy-act-take-in-force-from-1-january-2019/> [<https://perma.cc/UR49-MM8H>] (noting that the Dutch Government sought to address experience deficiencies in their judiciary by allowing a restructuring judge overseeing a proceeding the ability to appoint other judges to the case who may bring special expertise on complex issues).

¹⁸⁹ See, e.g., Eidenmüller, *supra* note 38, at 28 (proposing that process certainty can be bolstered if corporations were allowed to "opt into a European insolvency regime in their charter"); Oren Sussman, *The Economics of the EU's Corporate Insolvency Law and the Quest for Harmonization by Market Forces*, in *HANDBOOK OF EUROPEAN FINANCIAL MARKETS AND INSTITUTIONS* (2008) (arguing to the extent harmonization is sought, harmonization by market forces is preferable to harmonization through legislation and bureaucratic processes).

restructuring law, but these urgings have been met with inaction.¹⁹⁰ And there is no reason to believe that this intransigence will abate. The result is an inherently deficient framework that will preclude progress towards economic policy objectives. It is possible that the framework will ultimately evolve into the intended form, but the timeline for that evolution seems woefully protracted. A widespread financial correction currently consumes Europe and will continue to decimate industries for years.¹⁹¹ The EU's restructuring framework is ill-equipped to offer predictable or comprehensive reorganization outcomes for the myriad corporations that will soon be seeking relief. Government intervention can only stem the tide.

As detailed in Part V, *infra*, I propose a forum shopping model similar to the one currently in place in the United States as a means to address the intractable problems within the EU restructuring framework. I believe the EU can easily facilitate bankruptcy tourism, and the practice offers unique benefits. The proposal is particularly attractive because the changes can be achieved through direct EU action without the need for affirmative legislative action from Member States. I believe the benefits from my proposal can be

¹⁹⁰ See Eidenmüller, *supra* note 70, at 3-4 ("States such as the UK, Germany and Italy, did not even react" to the European Commission's 2014 Recommendation on "a new approach to business failure and insolvency.").

¹⁹¹ See, e.g., EUR. COMM., EUROPEAN ECONOMIC FORECAST 5-11 (July 2020), https://ec.europa.eu/info/sites/info/files/economy-finance/ip132_en.pdf [<https://perma.cc/3H3U-5D5R>] (forecasting an incomplete recovery in GDP growth by the end of 2021 as tourism and other industries struggle to resume in the wake of COVID-19); Hanna Ziady, *Europe's Recession Will be Even Deeper than Expected*, CNN (July 8, 2020), <https://www.cnn.com/2020/07/07/economy/eu-commission-summer-2020-forecast/index.html> [<https://perma.cc/R7DP-YN9L>] (emphasizing continued lockdown restrictions due to the COVID-19 pandemic could further slow economic recovery); Laurence Norman & Mari Martinez, *Coronavirus Projected to Send Eurozone Into Steep Recession*, WALL ST. J. (May 6, 2020), <https://www.wsj.com/articles/coronavirus-projected-to-send-eurozone-into-steep-recession-11588761057> [<https://perma.cc/JQL9-GYSX>] (acknowledging "a growing consensus that the recent plunge in world-wide economic activity will be followed by a slow, halting and uneven recovery"); ORG. FOR ECON. CO-OPERATION AND DEV., CORONAVIRUS: THE WORLD ECONOMY AT RISK 8 (OECD Interim Economic Assessment, 2020), <http://www.oecd.org/berlin/publikationen/Interim-Economic-Assessment-2-March-2020.pdf> [<https://perma.cc/6DH9-RQEN>] (cautioning lingering trade tensions compound downside risk to recovery due to the global pandemic).

realized within a relatively short period of time; as opposed to the current trajectory, which could take decades.

However, before moving to the substance of my proposal, I acknowledge that some scholars may argue that my proposal creates the risk of a pyrrhic victory. Indeed, scholars have argued that bankruptcy tourism is an inequitable practice that undermines restructuring systems and produces suboptimal results for creditors and stakeholders.¹⁹² EU Restructuring Law and, in particular, the Recast EIR aggressively restrict bankruptcy tourism; going so far as to argue that internal markets will not function properly if parties are allowed to engage in the practice.¹⁹³ Ultimately, what is the rationality in facilitating an arguably destabilizing practice?

In order to begin to answer that question, one must first understand the type of controlled tourism that has proliferated in the United States. The next section provides an overview of jurisdictional arbitrage in the United States and the perceived threats and deficiencies of the practice.

¹⁹² See Lynn LoPucki, *Global and Out of Control*, 79 AM. BANKR. L. J. 79, 79-103 (2005) (arguing an international bankruptcy system in which courts hearing forum-shopped cases cannot be checked by competing courts and will result in corruption and displacement of “corporate outsiders who have no means of controlling the debtor’s choice of courts”); Lynn LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143 (2005) (warning under an increasingly universalist regime that creditors of a multinational corporation will be harmed through their inability to determine which country’s bankruptcy laws apply until the corporation has filed); see also Peter Califano, *Bankruptcy Reform – Everything You Need to Know Is in This Article*, 29 COM. L. WORLD 8, 9 (2015) (acknowledging criticism leveled at the potential of bankruptcy tourism in the U.S. to exclude filing companies’ “management, employees, communities, and key constituencies” along with smaller creditors); Parikh, *supra* note 22, at 197 (“[R]ampant forum shopping undermines the perception and integrity of the bankruptcy system” by “erod[ing] public confidence in the bankruptcy courts” and treating similarly situated parties differently); LOPUCKI, *supra* note 6, at 137-81 (asserting courts hungry for large bankruptcy cases cater to case placers at the expense of reaching the most equitable solutions); Lynn LoPucki & William Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 34 (1991) (suggesting case placers “may be able to manipulate the outcome of the case by selecting a forum that will render a favorable decision” while some physically distant parties are effectively excluded through relatively high costs to participate).

¹⁹³ See Recast EIR, *supra* note 122, art. 3 (concentrating most jurisdiction over an insolvent debtor within the Member State containing debtor’s “main interests”), Recital 4 (“It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favorable legal position . . .”).

IV. RECONCEPTUALIZING BANKRUPTCY TOURISM THROUGH THE LENS OF THE U.S. BANKRUPTCY SYSTEM

*a. Controlled Tourism and How Permissive Venue Rules are Exploited in the United States*¹⁹⁴

Bankruptcy Tourism has been ubiquitous in the United States over the last thirty years, and the phenomenon's trend line can be established empirically.¹⁹⁵ From 2007 to 2012, 69% of publicly held companies with approximately \$1.2 billion¹⁹⁶ or more in assets ("Megacases") strategically located bankruptcy cases in jurisdictions that had no connection to their operations or headquarters in order to take advantage of favorable law, court procedures, and jurists perceived to be amendable.¹⁹⁷ That is a 14% increase compared to filings from 1991 to 1996.¹⁹⁸ And the practice is more prevalent now. Forty-eight of the eighty-eight Megacases filed between 1991 and 1996 had forum shopped.¹⁹⁹ From 2007 to 2012, 110 of the 159 filed Megacases had forum shopped.²⁰⁰ Consequently, between the two periods, frequency with which Megacases forum shopped grew at a statistically significant rate (14%) and the absolute number of Megacases that forum shopped grew at a staggering rate (130%).²⁰¹ The practice continues unabated.²⁰² From General Motors filing for

¹⁹⁴ This section is reproduced, in part, from Parikh, *supra* note 22, at 181-92.

¹⁹⁵ Parikh, *supra* note 22, at 173-92.

¹⁹⁶ This number is measured in 2007 dollars. The benchmark was \$500 million in 1980 and then was adjusted depending on the year the case was filed. For example, a bankruptcy filed in 2007 would qualify as a Megacase if the debtor(s) had assets with a fair market value of at least \$1.2 billion. See UCLA-LOPUCKI BANKR. RSCH. DATABASE, *supra* note 13.

¹⁹⁷ Parikh, *supra* note 22, at 177-81.

¹⁹⁸ See *id.* at 178.

¹⁹⁹ See *id.* at 177.

²⁰⁰ See *id.*

²⁰¹ *Id.*

²⁰² See U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-839, CORPORATE BANKRUPTCY: STAKEHOLDERS HAVE MIXED VIEWS ON ATTORNEYS' FEE GUIDELINES AND VENUE SELECTION FOR LARGE CHAPTER 11 CASES 3 (2015), <https://www.gao.gov/assets/680/672696.pdf> [https://perma.cc/8FJ2-SCF4] (finding "many of the companies" engaged in "large Chapter 11 bankruptcies")

bankruptcy in New York²⁰³ to the Los Angeles Dodgers filing for bankruptcy in Delaware,²⁰⁴ the last thirty years has been a golden age of bankruptcy tourism in the United States.

The freedom to engage in jurisdictional arbitrage is an unintended consequence of permissive venue provisions in the United States. For a corporate debtor, 28 U.S.C § 1408 provides four primary bases for establishing venue in a district: (1) the debtor's principal place of business in the United States is in the district; (2) the debtor's principal assets in the United States are located in the district; (3) the debtor is incorporated in the state in which the district is found;²⁰⁵ or (4) a case concerning an affiliate of the debtor is pending in the district.²⁰⁶

i. Principal Place of Business

A company's principal place of business is invariably the optimal location for that company's bankruptcy proceedings. The selection of this venue engenders certainty and predictability. In the US, the location of a debtor's principal place of business is a question of objective fact, not subjective intention, to be resolved after considering relevant aspects of the debtor's operations.²⁰⁷ The

since October 2009 for which they filed in either the Southern District of New York or Delaware were headquartered elsewhere).

²⁰³ Jon Swartz & Kevin McCoy, *It's Official: GM Files for Bankruptcy Protection*, ABC NEWS (June 1, 2009, 11:36 AM), <https://abcnews.go.com/Business/story?id=7725901&page=1> [<https://perma.cc/2ERN-5TG4>].

²⁰⁴ See Parikh, *supra* note 22, at 162.

²⁰⁵ See *Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, U.S. COURTS, <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> [<https://perma.cc/Z3AM-XQPX>]. Many states have multiple districts in which a debtor can file. *Id.* For instance, California has four districts and multiple bankruptcy courts within each district. *California Bankruptcy Court Directory*, CALIFORNIA BANKRUPTCY.INFO, <http://www.californiabankruptcy.info/court.html> [<https://perma.cc/4YRM-3FNJ>]. Thus, under § 1408, a debtor incorporated in California can file in any one of the four districts based on its place of incorporation.

²⁰⁶ 28 U.S.C. § 1408.

²⁰⁷ See, e.g., *In re Peachtree Lane Assocs.*, 150 F.3d 788, 795 (7th Cir. 1998) (“[T]he principal place of business inquiry is primarily a factual one . . .”); *In re*

overarching question involves where the debtor, in the aggregate, manages and initiates its business.²⁰⁸

Two primary tests are used to answer this question.²⁰⁹ The “nerve center” test advocates a more limited inquiry,²¹⁰ and instructs courts to “look to the place where the debtor’s major, business management decisions are made. Under [this test], wherever the debtor’s primary decision-makers are congregated will be the principal place of business.”²¹¹ In other words, the corporate headquarters and offices are invariably the principal place of business.²¹² The “operational” test probes further.²¹³ This test evaluates the debtor’s day-to-day operations, considering not just where major business management decisions are made but also the location of: (i) the debtor’s books, records, accounting, and other management information; (ii) personnel, equipment, and assets; (iii) income generating activities and where debts were incurred; (iv) bank accounts; and (v) day-to-day activities.²¹⁴ The Recast EIR’s COMI test is similar to the operational test.²¹⁵

In *Hertz Corp. v. Friend*,²¹⁶ the Supreme Court sought to resolve a circuit split concerning the meaning of the phrase “principal place of business” provided in 28 U.S.C. § 1332(c)(1) for purposes of determining whether federal diversity jurisdiction existed.²¹⁷ The Court resolved the split in favor of the nerve center test, a choice that

Condor Expl., LLC, 294 B.R. 370, 374 (Bankr. D. Colo. 2003) (“[W]hat constitutes the principal place of business of a corporation is a question of objective fact, not subjective intention.”) (citing *In re Standard Tank Cleaning Corp.*, 133 B.R. 562, 564 (Bankr. E.D.N.Y. 1991)).

²⁰⁸ See, e.g., *In re Peachtree Lane*, 150 F.3d at 795 (arguing the principal place of business “is likely to be the place where its management decisions are made”); *In re Condor Expl.*, 294 B.R. at 374 (providing factors to determine an entity’s principal place of business).

²⁰⁹ See Parikh, *supra* note 22, at 182-83. A few courts have used the “center of corporate activities” test, which focuses on the center of a corporation’s production or service activities.

²¹⁰ *In re Condor Expl.*, 294 B.R. at 374.

²¹¹ *Id.* (citing *In re Peachtree Lane*, 150 F.3d at 788).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See *id.*; *In re Dock of the Bay, Inc.*, 24 B.R. 811, 815 (Bankr. E.D.N.Y. 1982).

²¹⁵ See Section II.b.iv., *supra*.

²¹⁶ 559 U.S. 77 (2010).

²¹⁷ *Id.* at 80.

the Court believed would engender greater administrative simplicity.²¹⁸ The Court explained that the “[principal place of business] should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination . . . and not simply an office where the corporation holds its board meetings.”²¹⁹ The Court found that the operational test was too complex and forced judges to consider a variety of criteria and “weigh corporate functions, assets and revenues different in kind, one from the other.”²²⁰ The Court concluded that the test led to inconclusive decisions—needlessly complicating cases, fostering disputes and appeals, eating up time and money, and ultimately diminishing “the likelihood that results and settlements [would] reflect a claim’s legal and factual merits.”²²¹

The *Hertz* ruling does not foreclose discussion on the definition of the principal place of business. Courts prior to the *Hertz* ruling noted that differing policy considerations suggest that “tests for a corporation’s principal place of business in diversity cases should not be imported wholesale into bankruptcy venue law.”²²² Nevertheless, notwithstanding the differing policy objectives between § 1332 and § 1408, the Supreme Court’s interpretation of “principal place of business” in § 1332 must inform any interpretation of the identical phrase in § 1408.²²³ The *Hertz* ruling,

²¹⁸ *Id.* at 92–93.

²¹⁹ *Id.* at 93.

²²⁰ *Id.* at 90–92, 96.

²²¹ *Id.* at 94.

²²² *In re Peachtree Lane Assocs., Ltd.*, 206 B.R. 913, 922 (N.D. Ill. 1997) (citing *In re Commonwealth Oil Refining Co.*, 596 F.2d 1239, 1247 n.17 (5th Cir. 1979)), *aff’d* 150 F.3d 788 (7th Cir. 1998). Note that § 1332 and § 1408 have differing policy objectives. Diversity jurisdiction was designed to “provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of Federal courts.” S. REP. NO. 85-1830, at 4 (1958). Supreme Court precedent in this area has often sought to limit a corporation’s ability to manufacture diversity and improperly remove cases to federal court. The language of § 1408 serves not to protect debtors from local courts and local juries, but to allow flexibility in choosing venue. The policy concerns guiding these two sections have “little or nothing in common.” *In re Commonwealth Oil*, 596 F.2d at 1247 n.17.

²²³ See *In re W. Coast Interventional Pain Med., Inc.*, 435 B.R. 569, 575 n.2 (Bankr. N.D. Ind. 2010) (asserting *Hertz*’s nerve center approach to principal place

for all intents and purposes, mandates the nerve center test in evaluating a corporation's principal place of business. This means that corporate defendants have less flexibility in arguing diversity under § 1332, and corporate debtors have slightly less flexibility in attempting to justify their choice of venue under § 1408.

The inquiry under this basis is qualitative and, therefore, limits forum shopping options. A corporate debtor could attempt to move its headquarters and offices of its key decision-makers in anticipation of a bankruptcy filing, but such an undertaking is prohibitively disruptive for entities of any significance. Further, the qualitative nature of the judicial inquiry as to this basis limits this option. Consequently, in the United States, few debtors attempt to alter their principal place of business in order to forum shop.²²⁴

ii. Principal Assets

The term "assets" is undefined in the Bankruptcy Code but has been interpreted broadly²²⁵ to include not only manufacturing facilities, inventory, and equipment, but also rights under a lease or sublease, shares of stock, accounts receivable, net operating losses, and pending lawsuits, *inter alia*.²²⁶ In evaluating this basis for venue, courts consider the geographic location of the assets that are principally used in the operation of the debtor's business.²²⁷ To be considered, the assets must be related to business in which the

of business for the purposes of diversity jurisdiction also applies in bankruptcy cases); *In re Lakota Canyon Ranch Dev., LLC*, No. 11-03739-8-RDD, 2011 WL 5909630, at *1 (Bankr. E.D.N.C. June 21, 2011) (citing the *Hertz* ruling and adopting the nerve center test in determining principal place of business), *as amended* (June 23, 2011).

²²⁴ See Parikh, *supra* note 22, at 179.

²²⁵ See 11 U.S.C. § 541 (2012) (defining property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case").

²²⁶ See *In re Prudential Lines, Inc.*, 928 F.2d 565, 569 (2d Cir. 1991) (including net operating losses as part of bankruptcy property); *In re Houghton Mifflin Harcourt Publ'g Co.*, 474 B.R. 122, 135-36 (Bankr. S.D.N.Y. 2012) (including rights under a lease as bankruptcy assets); *In re J & L Plumbing & Heating, Inc.*, 186 B.R. 388, 392 (Bankr. E.D. Pa. 1995) (including accounts receivable as bankruptcy assets).

²²⁷ See LoPucki & Whitford, *supra* note 192, at 19 (arguing companies move their headquarters in order to obtain a favorable venue).

debtor is engaged.²²⁸ Bankruptcy courts will generally engage in a quantitative and qualitative analysis.²²⁹ A quantitative analysis requires that a court consider the dollar value of the assets in relation to value of the debtor's overall portfolio of assets.²³⁰ A qualitative analysis requires that a court consider the importance of the assets to the debtor's operations and reorganization prospects.²³¹ Only one district can qualify as the place where a company's principal assets are located.²³² Therefore, the bankruptcy courts will often have to compare the assets located in one district with those located in another.²³³

Not coincidentally, this criterion also tends to be the one that is the most difficult to manipulate. Large corporations invariably have assets located in a variety of districts; moving or selling a portion of these assets in order to establish venue in a given district could be difficult and unnecessary considering the other bases available for forum shopping. That being said, because of the broad reading of the term "assets," this basis affords corporations with less fixed assets significant flexibility. For example, a corporation that owns limited assets, of which cash or cash equivalents are a primary part, could simply transfer cash into a bank account located in the desired jurisdiction prior to filing for bankruptcy.

²²⁸ See *In re Newport Creamery, Inc.*, 265 B.R. 614, 616 (Bankr. M.D. Fla. 2001) (stating that either a corporation's principal place of business or its principal assets may be used to establish proper venue).

²²⁹ See, e.g., *In re Houghton Mifflin*, 474 B.R. at 136 (using both quantitative and qualitative analyses).

²³⁰ See *id.* at 135-36 (emphasizing the importance of properly identifying a debtor company's principal assets to allow for a useful numerical comparison with the company's overall assets).

²³¹ *Id.* at 136.

²³² See *LoPucki & Whitford*, *supra* note 192, at 17 (stating a debtor can only have one principal place of business at any given time).

²³³ See *In re Houghton Mifflin*, 474 B.R. at 136 (determining whether venue was appropriate by comparing the assets of the holding company to those of its subsidiaries that were within different districts).

iii. Place of Incorporation / Registered Office

A corporate debtor's place of incorporation—known as the “registered office” in the EU²³⁴—represents a venue basis that is frequently used to facilitate tourism.

Section 1408 of Title 28 provides that a “person” can rely on domicile or residence in selecting venue.²³⁵ Section 1 of Title 1 of the U.S. Code defines the term “person” to include natural persons as well as fictitious business entities, such as partnerships and corporations.²³⁶ A natural person can clearly have a domicile and a residence. “Residence” is generally where someone is living.²³⁷ “Domicile” is generally understood to refer to the place where one resides coupled with the intention to remain; the term can also refer to the place where one intends to return.²³⁸

However, § 1408's language indicates that these terms can also conceivably apply to a corporate debtor.²³⁹ Though it is unclear how a corporation could have a “domicile” or “residence” aside from its corporate headquarters or location of principal assets, many courts assume that a corporation's domicile is its state of incorporation.²⁴⁰ In these jurisdictions, corporate debtors have immense flexibility. A corporation's state of incorporation can be changed relatively

²³⁴ See MOSS, FLETCHER & ISAACS, *supra* note 45.

²³⁵ 11 U.S.C. § 1408.

²³⁶ See 1 U.S.C. § 1 (“[T]he words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).

²³⁷ See Parikh, *supra* note 22, at 184.

²³⁸ *In re Donald*, 328 B.R. 192, 202 (B.A.P. 9th Cir. 2005).

²³⁹ 28 U.S.C. § 1408.

²⁴⁰ See, e.g., *In re Dunmore Homes, Inc.*, 380 B.R. 663, 670 (Bankr. S.D.N.Y. 2008) (stating a corporation's domicile is its state of incorporation); *In re Innovative Comm'n Co.*, 358 B.R. 120, 125 (Bankr. D. Del. 2006) (“Venue is appropriate in the state of incorporation”); *In re FRG, Inc.*, 107 B.R. 461, 471 (Bankr. S.D.N.Y. 1989) (“[A] corporation's domicile is generally held to be its state of incorporation.”); *In re Del. & Hudson Ry. Co.*, 96 B.R. 467, 467 (Bankr. D. Del. 1988) (finding Delaware to be a proper venue since the debtor was incorporated in that state); *In re EB Capital Mgmt.*, No. 11-12646(MG), 2011 WL 2838115, at *3 (Bankr. S.D.N.Y. July 14, 2011) (“A corporation's domicile is generally held to be its state of incorporation.”).

easily.²⁴¹ Changing a corporation's state of incorporation to secure venue may be worthwhile in cases involving a limited number of high-stakes issues in which the court before which the bankruptcy case is tried may be dispositive. Furthermore, a corporate debtor is generally seen as having the right to file in any district located within its state of incorporation.²⁴² Consequently, this basis for venue is allowing forum shopping not only among states but also among districts within the same state.

The only real constraint on a corporate debtor relying on its state of incorporation is that it must have been incorporated in the state of its bankruptcy case for the 180 days immediately preceding its filing or, in the alternative, the longer portion of such a period.²⁴³ But considering that the vast majority of Megacases involve months and sometimes years of pre-bankruptcy negotiations, the 180-day look-back period poses a minor obstacle. Indeed, in my 2012 study, one-third of the corporate debtors in the study group relied on this basis in establishing venue, and all fifty-three forum shopped.²⁴⁴ Further, these fifty-three forum shoppers represent almost half of the total number of forum shoppers in my study group.

iv. Affiliate Filing

The final basis for a corporate debtor's venue choice is that one of the debtor's "affiliates" has a pending case in the district.²⁴⁵

²⁴¹ See, e.g., Alison Torbitt, *Implementing Corporate Climate Change Responsibility: Possible State Legislative and SEC Responses to Climate Change Through Corporate Law Reform*, 88 OR. L. REV. 581, 595 (2009) (stating a business can easily change its state of incorporation).

²⁴² See Parikh, *supra* note 22, at 186.

²⁴³ See 28 U.S.C. § 1408(1).

²⁴⁴ Parikh, *supra* note 22, at 185.

²⁴⁵ See 28 U.S.C. § 1408(2) (stating that a title 11 case can be brought in a district "in which there is a pending case under title 11 concerning such person's affiliate"). Though not technically binding, § 101 of the Bankruptcy Code defines the term "affiliate" to mean:

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—(i) in a fiduciary or agency capacity without sole discretionary power to vote such

Surprisingly, this venue basis was traditionally one of the least controversial provisions of the venue rules. Without this basis for venue, various companies within the same corporate family could be forced to file for bankruptcy in different districts. A wholesale adjudication of the corporate family's bankruptcy cases would be virtually impossible. There would be considerable waste of judicial resources, not to mention the financial and logistical burden on the debtor's officers and legal counsel. The net result would be a significant reduction in any chance of a meaningful reorganization. Notwithstanding this sound policy, the wording of § 1408(2) provides virtually no restrictions on an affiliate filing, and this has allowed for debtor gamesmanship.

Today, § 1408(2) is used in a manner that bears no relation to the policy basis of the provision. The most common method for abusing this provision is for the corporate debtor to locate a subsidiary that had been incorporated in a favorable district—a district in which the primary corporate debtor could not otherwise file its bankruptcy petition. Legal counsel for the corporate debtor prepares the entire corporate family for bankruptcy. But instead of filing the entire family together, legal counsel files the subsidiary's petition in the favorable district first to establish venue. Then, within a matter of minutes, the rest of the corporate family files their bankruptcy petitions in the same district on the premise that an affiliate's bankruptcy case is pending in the district.

securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or (D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

11 U.S.C. § 101(2). However, this definition is not binding on United States bankruptcy judges because it is limited to sections within Title 11 of the U.S. Code, and venue matters are addressed in Title 28.

Debtor gamesmanship can come in other permutations. In some cases, a corporate family has no subsidiaries that are able to file in the desired district. This is a rare circumstance but one that is easily circumvented because of the permissive language of § 1408(2). In such a case, the company merely creates and incorporates a shell subsidiary in the favorable district and then follows the procedure outlined above. The shell subsidiary has no employees or meaningful operations or assets, but the fact that it is incorporated in the favorable district is sufficient—even when the incorporation occurs in the days immediately before the bankruptcy filing.²⁴⁶ For example, in 2005, Winn-Dixie Stores, Inc., filed for bankruptcy in the Southern District of New York.²⁴⁷ The corporation was headquartered in Jacksonville, Florida, and had no connection to New York.²⁴⁸ The debtor was able to manufacture venue for the case by incorporating a subsidiary in New York twelve days prior to the filing and invoking the so-called “affiliate rule.”²⁴⁹

This basis and the state-of-incorporation basis work together to facilitate forum shopping. Forty-five of the 159 corporate debtors in my 2012 study group (28%) relied on the affiliate filing hook.²⁵⁰

²⁴⁶ Debtors have attempted to use this technique in many instances. See *In re Dunmore Homes, Inc.*, 380 B.R. 663, 667 (Bankr. S.D.N.Y. 2008) (explaining debtor’s only connection to New York was its incorporation in the state on the eve of bankruptcy); United States Trustee’s Omnibus Reply to Objections to United States Trustee’s Motion, Pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014(a), to Transfer Venue of These Cases in the Interest of Justice at 6–7, *In re Patriot Coal Corp.*, 482 B.R. 718 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 12-12900) (arguing that the debtors’ chief financial officer essentially admitted to incorporating two affiliates in the weeks before the bankruptcy filing for the sole purpose of establishing venue in the Southern District of New York); Motion of Buffalo Rock Company to Transfer Venue of the Debtors’ Bankruptcy Cases to the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division or Such Other District Where Venue Would Be Appropriate Under 28 U.S.C. § 1408 at 1, *In re Winn-Dixie Stores, Inc.*, No. 05-11063 (Bankr. S.D.N.Y. Mar. 14, 2005) [hereinafter *Buffalo Rock*] (explaining that debtor had incorporated an affiliate just twelve days before the bankruptcy filing in order to secure venue in the Southern District of New York). But see Memorandum of Law in Support of United States Trustee’s Motion, Pursuant to 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014(a)(1), to Transfer Venue of These Cases in the Interest of Justice at 43-53, *In re Patriot Coal*, 482 B.R. 718 (Bankr. S.D.N.Y.) (No. 12-12900) (arguing that case should not be transferred pursuant to the court’s rationale in *In re Winn-Dixie*).

²⁴⁷ *Buffalo Rock*, *supra* note 246.

²⁴⁸ *Id.* at 11.

²⁴⁹ *Id.* at 1.

²⁵⁰ Parikh, *supra* note 22, at 190-91.

Forty-four of those forty-five debtors forum shopped.²⁵¹ Further, 40% of the forum shoppers in my study group relied on this basis.²⁵²

b. Assessing Bankruptcy Tourism

Tourism's prevalence in the U.S. bankruptcy process is undisputed. However, despite the consistent use of the phrase as a pejorative, the phenomenon's effect on the bankruptcy process is unclear. Bankruptcy scholars have advanced a number of theoretical arguments that support eliminating the practice,²⁵³ three of which are particularly applicable here.

Primarily, bankruptcy tourism can undermine judicial legitimacy and the perception of a restructuring system's integrity. The process appears subject to manipulation when high-profile restructuring cases repeatedly flee to specific courts. In other words, certain courts appear willing to give corporate debtors and other key decision makers the outcomes they seek. This perception erodes public confidence in the court system and affects creditors, employees, unions, and other constituents excluded from the perceived backroom dealings. Many stakeholders face limited visibility into restructuring proceedings when those proceedings occur in jurisdictions far removed from a debtor's central administration. Without transparency, a restructuring system's fairness can be called into question. Judiciaries strive to ensure that similarly situated parties receive similar treatment.²⁵⁴ Bankruptcy tourism may lead to greater discrepancies in substantive laws, which may fuel disparate treatment.

Further, an elevated level of bankruptcy tourism may produce suboptimal laws and legal interpretations. Tourism can incentivize government legislators to enact overly permissive "debtor-friendly"

²⁵¹ *Id.* at 191.

²⁵² *Id.*

²⁵³ *See id.* at 192-98; *see also* sources cited *supra* note 192.

²⁵⁴ *See, e.g.,* Benjamin N. Cardozo, *The Nature Of The Judicial Process* 33-34 (1921).

laws in order to lure companies to their jurisdiction.²⁵⁵ These laws create an imbalance in the restructuring process that favors debtors and insiders in the short-term, but could decimate stakeholder value over the long-term.²⁵⁶ As a corollary, judges in a particular jurisdiction may hold similar objectives and interpret existing laws in a way that is similarly advantageous to debtors and insiders but ultimately harmful to creditors and other stakeholders.²⁵⁷ These dynamics cause a few select courts to be oversubscribed. With permissive venue rules, corporate debtors are able to methodically select courts that rule in ways that further debtor objectives – which can be diametrically opposed to stakeholder objectives. The favored courts gain the power to dictate the interpretation of key provisions because other courts are rarely asked to adjudicate these matters. Ultimately, corporate tourists endorse certain courts’ adjudication of key restructuring issues and, in many cases, are voicing their disapproval of how other courts have resolved – or are expected to resolve – such issues. But the interpretations by the favored courts may be too debtor-friendly and ultimately suppress creditor recoveries and undermine rehabilitation prospects. Without discourse across courts, these inaccuracies remain unchallenged and may be strengthened by repeated application to a canon of cases.

²⁵⁵ See Ayotte & Skeel, *supra* note 182, at 434. In the shadow of Brexit, the Dutch government enacted the Modernization Bankruptcy Procedure Act, which offers a more efficient and faster restructuring process that may lure companies unable or unwilling to rely on the English courts in upcoming years. See *Reforms to Dutch Bankruptcy Act Take In Force from 1 January 2019*, OSBORNE CLARK (Nov. 16, 2018), <https://www.osborneclarke.com/insights/reforms-to-dutch-bankruptcy-act-take-in-force-from-1-january-2019/> [https://perma.cc/2VKU-FTBC].

²⁵⁶ For example, a government may ease the requirements for a court to approve a plan of reorganization when multiple classes of creditors object to the plan. This benefits a company that is focused on a reorganization. However, the permissive review could enable the confirmation of a plan that has fundamental defects that increase recidivism risk – the fear that the company will stumble back into bankruptcy within a relatively short period of time – which ultimately wastes resources and destroys value. See Parikh, *supra* note 22, at 192-98.

²⁵⁷ See VENUE REPORT, *supra* note 39, at 33-34. For example, a “debtor-friendly” judge may refuse to allow an insolvency practitioner to investigate alleged malfeasance and embezzlement committed by management, insiders, and senior lenders. The judge may not want her court to have the reputation of allowing these parties – who have significant input in the location of a restructuring proceeding – to face potentially frivolous investigations. However, the decision to protect these parties may preclude the company from recovering funds essential to a successful restructuring, forcing the company to liquidate to the detriment of all other stakeholders. See Parikh, *supra* note 22, at 192-98.

When a company files a restructuring proceeding in a jurisdiction far from its COMI, officials from the government of its central administration, as well as many of its creditors and employees, may be prohibited from participating meaningfully in the case. This disenfranchisement can exclude key stakeholders from a process that most directly impacts them. The result may be inequitable as key stakeholders are subject to dramatic alterations in their rights and benefits but are unable to participate in the process that brings about these effects. Further, regulations and substantive laws from a tourist debtor's home country may be ignored or fail to be properly implemented by the host court for a tourist's restructuring proceeding.²⁵⁸

c. Is Bankruptcy Tourism Deleterious?

EU Restructuring Law and, in particular, the Recast EIR aggressively restrict bankruptcy tourism for the reasons delineated above, among others.²⁵⁹ This posture is premised in large part on objections formulated by bankruptcy scholars and policymakers.²⁶⁰ The fact that these objections are primarily theoretical is extremely revealing. The United States has been in the midst of a 30-year golden age of bankruptcy tourism. If widespread tourism undermines bankruptcy systems and produces suboptimal results for creditors and stakeholders, the phenomenon's deleterious effects should be apparent empirically. But there is no empirical research supporting these criticisms.²⁶¹

²⁵⁸ Some scholars have also argued that case pooling in just a few courts is inefficient. Judges in oversubscribed jurisdictions are overburdened while judges in other courts are underutilized. Further, tourism may create an economic deprivation for certain locales. Large bankruptcy cases create work for local attorneys and fuel dining and hospitality businesses. When large corporations engage in tourism, local communities are deprived of significant revenue. See VENUE REPORT, *supra* note 29, at 50-58 ("Based upon estimates from Bloomberg Businessweek, the flood of companies fleeing their home jurisdictions over the past 13 years has drained nearly \$4 billion from local economies.").

²⁵⁹ See Part IV.b, *supra*.

²⁶⁰ See *id.*

²⁶¹ Professor Lynn M. LoPucki has come the closest to successfully condemning tourism empirically. In *The Failure of Public Company Bankruptcies in*

The lack of identifiable consequences raises an interesting question: could bankruptcy tourism be superlative? Indeed, the practice is a long-standing fixture of the preeminent bankruptcy system in the world.²⁶² The U.S. bankruptcy system is described as “the model to which European restructuring laws should aspire.”²⁶³ How can a central feature of this bankruptcy system be deleterious? At some point, I believe that a study can be designed to empirically test this question. I will not attempt to speculate on the structure of such a study or what the results will indicate. However, it would be indefensible for bankruptcy scholars to refuse to consider that such a study may establish that controlled²⁶⁴ bankruptcy tourism—the phrase I use to describe the type of tourism apparent in the United

Delaware and New York: Empirical Evidence of a “Race to the Bottom”, 54 VAND. L. REV. 231 (2001), Professor LoPucki—along with Sara D. Kalin—established that from 1983 to 1996, the refiling rates for companies that had matriculated through the Delaware bankruptcy courts were significantly higher than for all other bankruptcy courts. LoPucki and Kalin argued that the abnormally high recidivism rates were the product of Delaware courts being too “lax” in their standards for approving plan confirmation—ordering relief and confirming plans that they knew were inappropriate—and the consequence of a blatant design to encourage forum shopping to their courts. Though the findings were quite noteworthy at the time, the data for filings in the following decade established that the recidivism rate regressed to align with national averages. *But see* Ruth Sarah Lee, *Delaware’s Relevance in Chapter 22: Who is “Courting Failure” Now?*, 31 REV. BANK. & FIN. L. 443, 468-73 (2011) (establishing that from 1997 to 2004, Delaware cases had similar failure rates as non-Delaware cases); *see also* Stephen J. Lubben, *Delaware’s Irrelevance*, 16 AM. BANKR. INST. L. REV. 267, 271-72, 279 (2008) (finding that there was no “statistically significant difference in refiling rates” for cases in or outside Delaware based on data of public companies with more than \$100 million in assets who filed bankruptcy cases between 1992 and 2002).

²⁶² *See* DOING BUSINESS REPORT, *supra* note 29.

²⁶³ *See* 2016 COMMISSION STUDY, *supra* note 30, at 219.

²⁶⁴ I describe the brand of tourism found in the United States as “controlled” because—despite the latitude distressed corporations enjoy in selecting a bankruptcy forum—a bankruptcy court enjoys full discretion to transfer a case to another court if the filing is improper or if transfer serves “the interest of justice or . . . the convenience of the parties [in the case].” FED. R. BANKR. P. 1014(a)(2); 28 U.S.C. § 1412. Courts regularly use this transfer power as a check on aggressive forum shopping. *See In re Caesars Ent. Operating Co.*, No. 15-10047, 2015 WL 495259 (Bankr. D. Del. Feb. 2, 2015) (holding case originally filed in Delaware bankruptcy court to be transferred to bankruptcy court in the Northern District of Illinois); *In re Patriot Coal Corp.*, 482 B.R. 718 (Bankr. S.D.N.Y. 2012) (holding case originally filed in the Southern District of New York bankruptcy court to be transferred to bankruptcy court in the Eastern District of Missouri); *see also* Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1995-96 (2002).

States—is a necessary component of an efficient and effective bankruptcy system. If true, the EU's attempt to eliminate the practice may in fact undermine its economic objectives. Further, even if bankruptcy tourism is not superlative, facilitating the practice may represent the most efficient means within the EU's arsenal to address the two primary intractable problems embedded in its restructuring framework. In other words, tourism may be a necessary evil due to the unique vagaries of the EU restructuring framework. By aggressively policing *abusive* tourism, the EU is also restricting *controlled* tourism.

In the following section, I detail how the EU can address structural and legal obstacles by facilitating bankruptcy tourism.

V. THE CATHEDRAL IN ANOTHER LIGHT: FACILITATING CONTROLLED TOURISM IN ORDER TO ADDRESS THE EU'S INTRACTABLE PROBLEMS

Previous sections explored the European Union's economic policy objectives and how its corporate restructuring framework is being modified to advance these objectives. Despite these changes, the framework is plagued by two intractable problems undermining its economic policy objectives: 1) significant divergence of substantive restructuring law across Member States; and 2) lack of restructuring experience in the judiciary. Few scholars have attempted to formulate an optimal means to address these issues.

In the following section, I argue that there is a low likelihood that Member States will modify substantive law to a degree necessary to afford any semblance of certainty for parties drawn into complex restructuring matters. In other words, I argue that the idea of impending harmonization is a myth, and the same bleak outlook applies to the possibility of meaningful judicial training as to fundamental restructuring concepts.

Consequently, I urge the EU to embrace the next best alternative: facilitating controlled bankruptcy tourism in order to allow for the creation of judicial hubs with optimal law and experienced jurists. The following section explains why the increased prevalence of bankruptcy tourism may be particularly appealing in the EU.

a. *The Laboratory Theory and Advancing Restructuring Laws Through Tourism*

As noted above, the harmonization quandary is well known, but the ability to address the problem in a meaningful way is elusive. The EU works through recommendations and directives in order to encourage Member States to make substantive changes to national law.²⁶⁵ However, these urgings have been met with inaction.²⁶⁶ And there is significant variance in substantive restructuring law across Member States.²⁶⁷ The likelihood of any semblance of uniformity in the foreseeable future – even as to basic restructuring provisions – is abysmal. This is a key distinguishing feature between the EU and U.S. bankruptcy systems. The U.S. system is built on one legal code and implemented through courts within one federal judiciary system. Certainly, incongruence does exist across different regional circuit courts in the United States, but the range of variance on substantive legal issues does not materially undermine creditor risk assessment or recoveries.²⁶⁸

The disparity between the EU and U.S. bankruptcy systems may justify the EU embracing controlled tourism. Indeed, it is unlikely that a harmonized restructuring system promulgating optimal law – as defined by the EU itself – will be available to EU companies in most Member States. But the laboratory theory offers a path forward.

The laboratory theory, most succinctly described by Justice Brandeis' dissent in *New State Ice Co. v. Liebmann*,²⁶⁹ provides that states within the U.S. federal system represent laboratories and may choose to develop innovative statutory approaches to social and economic problems.²⁷⁰ To the extent that an approach proves to be optimal, other states and even the federal government may adopt the approach and standardize it. The EU could choose to embrace this theory and afford Member States freedom to explore distinctive

²⁶⁵ See Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 171-72.

²⁶⁶ See Eidenmüller, *supra* note 38, at 3-4.

²⁶⁷ See Section III.a, *supra*.

²⁶⁸ See generally VENUE REPORT, *supra* note 39.

²⁶⁹ 285 U.S. 262, 280 (1932).

²⁷⁰ *Id.* at 82.

restructuring laws. Other scholars have already noted this possibility,²⁷¹ but what the current literature overlooks is that tourism accelerates the laboratory theory's effect in a restructuring marketplace.²⁷²

Imagine an alternative regulatory environment in the EU more akin to what exists in the United States. A progressive Member State—Luxembourg, for example—determines that attracting corporate bankruptcy cases from outside its borders can be extremely beneficial to its local economy. As a result, this Member State enacts a more effective and predictable restructuring system, including changes to substantive law and procedure.²⁷³ As a critical

²⁷¹ See, e.g., David A. Skeel, Jr., *What's So Bad About Delaware?* 54 VAND. L. REV. 309, 314 (2001).

²⁷² I acknowledge that the prevalent practice in the EU over the last few years is to file for bankruptcy only the financial holding company of a corporate family, keeping subsidiaries out of the process and effectuating a deleveraging by relying on applicable intercreditor agreements. However, these types of restructuring cases fail to address many key operational and structural issues, representing half measures that will not be as prevalent as the current economic correction evolves. For example, the finance holding company of a distressed apparel retailer may be able to rely on a restructuring proceeding to gain lender accommodations that allow it to avoid a payment default and improve liquidity, but the retailer will not be able to actually reject commercial leases or make other fundamental changes essential to improving its operations unless it includes its operating subsidiaries in the restructuring process. Without that, the restructuring is one-dimensional and fails to secure many of the benefits that make Chapter 11 proceedings in the US transformative. Further, Article 7 of the Recast EIR provides that the national law of the country hosting the main restructuring proceeding is dispositive as to a number of key issues, including the claims process, the respective powers of the debtor and restructuring practitioner, contract rejection, and avoidance actions, inter alia. See Recast EIR, *supra* note 122, at art. 7. Consequently, imagine a distressed corporate family considering a restructuring proceeding in order to clean up its capital structure but also to renegotiate with commercial landlords across the EU and attack a disastrous leveraged buyout that occurred 3 years ago. The national law of the country in which the main proceeding is opened will be extremely important. In this case—and others like it—the ability to forum shop by changing a registered office would be extremely valuable, at the very least, because Member States have divergent statutes of limitation on fraudulent transfer actions, as well as different criteria in order to establish a claim. See Ayotte & Skeel, *supra* note 182, at 434. Ultimately, there are cases where a COMI shift based on registered office will be the only option because the central administration and assets of the key entity cannot be timely moved. My proposals merely put more jurisdictional options on the table in order to afford debtors flexibility.

²⁷³ Many jurisdictions seek to attract corporate bankruptcy filings in order to boost local economies and professional industries. See *Singapore Enacts New*

mass of companies – including ones from outside the borders of this Member State – secures the benefits of this system, creditor recoveries improve and more financially viable companies are able to successfully reorganize. The migration may also encourage other countries to reform their restructuring laws, further enhancing recoveries.²⁷⁴ Even distressed companies located outside of the progressive Member State are able to rely on more predictable creditor outcomes and initiate meaningful out-of-court negotiations with this baseline. As outcomes improve, borrowing costs decline and credit is more accessible. The possibility of forum shopping encourages corporate managers to initiate restructuring discussions at an earlier stage of deterioration in order to secure a venue in a desirable jurisdiction. More importantly, accelerating restructuring negotiations improves in-court and out-of-court restructuring outcomes and – in some cases – may entirely negate the need for a restructuring filing.

b. Forum Shopping Can Help Address Experience Deficiencies in the Judiciary

With limited exceptions, judges overseeing restructuring cases in Member States are not specialists.²⁷⁵ Further, the few judges who

Corporate Bankruptcy Law in Bid to Become Center for International Debt Restructuring, JONES DAY (May/June 2017), <https://www.jonesday.com/en/insights/2017/05/singapore-enacts-new-corporate-bankruptcy-law-in-bid-to-become-center-for-international-debt-restructuring> [https://perma.cc/K39T-4GBM]; see also McCormack & Wan, *supra* note 29, at 97 (explaining that Singapore's recent reforms to its restructuring laws are a blatant attempt to encourage international companies to locate their restructuring cases in Singapore); VENUE REPORT, *supra* note 39, at 56 ("Based upon estimates from Bloomberg Businessweek, the flood of companies fleeing their home jurisdictions over the past 13 years has drained nearly \$4 billion from local economies.").

²⁷⁴ For example, in 2011 bankruptcy tourism by German companies prompted reform of Germany's restructuring laws. See Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen [BT] 17/5712, <http://dip21.bundestag.de/dip21/btd/17/057/1705712.pdf> [https://perma.cc/2YTH-Y763] (Ger.) (noting that companies relocated their head office to England because of the perception that restructuring the company under English law appeared to be more advantageous; this phenomenon highlighted weaknesses in German law).

²⁷⁵ See 2016 COMMISSION STUDY, *supra* note 30, at 94.

do regularly oversee restructuring cases invariably lack a comprehensive understanding of restructuring concepts because almost all cases in their courts are liquidation proceedings or asset sales.²⁷⁶

As noted above, the EU acknowledges that a lack of experience across the judiciary compromises the bankruptcy system, which undermines the EU's economic policy objectives. Controlled forum shopping would afford a subset of the EU judiciary repeated exposure to complex restructuring cases (the "EU Magnet Judges"). The United States has witnessed this with the bankruptcy courts in New York and Delaware.²⁷⁷ Controlled tourism has allowed judges in these courts to review a significant volume of complex restructuring cases, facilitating familiarity and expertise with hyper-technical issues that could overwhelm judges in other districts.²⁷⁸ The development of these judicial hubs in the EU would instill valuable experience that cannot be replicated through EU training mandates. This is arguably the optimal scenario for the EU because, as noted above, the prospect of developing an experienced restructuring judiciary across the EU is unlikely.

c. Creating Judicial Hubs to Address Intractable Legal and Structural Problems

To the extent that (i) harmonization of substantive restructuring laws; and (ii) an experienced judiciary to implement these laws are both unlikely to materialize across Member States in the foreseeable future, the judicial-hub model described above offers the EU a way to possibly address its intractable legal and structural problems.

Over time, tourism supports the development of hubs for optimal restructuring laws and experienced judges. Countries wishing to host these hubs may be more inclined to adopt EU restructuring policy suggestions. If successful, judges in these hubs will repeatedly encounter meaningful restructuring issues and develop a thoughtful approach to key, case-dispositive issues. As detailed in Part II.a., predictability allows companies and creditors

²⁷⁶ See Eidenmüller, *supra* note 38, at 22-23.

²⁷⁷ See VENUE REPORT, *supra* note 39, at 74-76.

²⁷⁸ See *id.*

to formulate a range of in-court restructuring outcomes with a high degree of certainty. This data informs and facilitates out-of-court restructuring negotiations and improves outcomes. Experienced judges also accelerate case speed, which increases the likelihood of a successful restructuring while also lowering process costs.²⁷⁹ These framework dynamics could allow the EU to enjoy the benefits of the virtuous cycle without actually addressing key legal and structural deficiencies.

In the following section, based on the possibility that controlled bankruptcy tourism may allow the EU to further its economic policy objectives, I propose legislative changes that will encourage the potentially beneficial aspects of tourism but avoid negative externalities that the practice can create.

VI. EU RESTRUCTURING LAW IN A NEW LIGHT

The previous sections detail my novel assessment that controlled bankruptcy tourism may be necessary in the short term to fulfill the EU's economic policy objectives. This section proposes legislative changes to the Recast EIR that will thoughtfully promote the practice but minimize the risk of destructive jurisdictional arbitrage.

a. COMI and Incorporation Theory: Offering Debtors Options and Certainty

A debtor's COMI guides the venue decision in the EU. COMI is described as "the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties."²⁸⁰ The COMI evaluation demands a factually intensive, qualitative assessment.²⁸¹ The import of this demand on the judiciary, debtors, and creditors appears to be softened by the presumption that the location of a debtor's

²⁷⁹ *See id.*

²⁸⁰ Council Regulation 1346/2000, 2000 O.J. (L 160) 3 (EC).

²⁸¹ *See* Section II.b.iii., *supra*.

registered office establishes COMI.²⁸² However, the Recast EIR and CJEU case law make clear that this presumption is a weak one.²⁸³ Various recitals in the Recast EIR emphasize that the genesis for the registered office presumption was the impression that a corporation's central administration would invariably be located in the country of its registered office.²⁸⁴ This premise cannot be reconciled with the structure of modern multi-national corporations.

All dimensions of the modern corporation are designed to optimize operations and revenue, while limiting potential exposure. For example, a corporation's registered office may have been selected to take advantage of favorable laws, but its central administration may be located in a different country due to various operational and business reasons. Freedom of establishment allows EU corporations to migrate within the single market.²⁸⁵ To the extent that controlled bankruptcy tourism is proven advantageous, then EU Restructuring Law should be revised to align with cross-border conversion doctrine and tolerate this migration.²⁸⁶

²⁸² Council Regulation 1346/2000, 2000 O.J. (L 160) 3 (EC).

²⁸³ See Sections II.b.iii & II.b.iv, *supra*.

²⁸⁴ See Section II.b.iv, *supra*.

²⁸⁵ In *Polbud*, the CJEU recognized isolated cross-border conversions—commonly understood to encompass a company migrating its registered office to a new Member State without shifting any of its economic activity—as falling within the freedom of establishment's scope. Case C-106/16, *Polbud – Wykonawstwo sp. z o.o.*, 2017 (Sup. Ct. Pol.), para. 62-63. Member States are entitled to restrict this type of migration if they constitute entirely artificial arrangements designed to circumvent national legislation. However, “the mere fact that a company wished to select the most beneficial legal system . . . does not in itself empower Member States to adopt restrictive measures in order to fight abuses.” See Ariel Mucha & Krzysztof Oplustil, *Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable Company Law: A Discussion After the Judgment of the Court of Justice (Grand Chamber) of 25 October 2017 in Case C-106/16, Polbud*, 15 EUR. CO. & FIN. L. REV. No. 2, 270, 298 (2018), <https://ssrn.com/abstract=3100156> [<https://perma.cc/TA5F-DRM9>].

²⁸⁶ Some commentators have argued that any attempt to restrict bankruptcy tourism may violate the freedom of establishment. See generally Wolf-Georg Ringe, *Forum Shopping under the EU Insolvency Regulation 25-27* (Univ. of Oxford Legal Stud. Rsch. Paper No. 33/2008, 2008), <https://ssrn.com/abstract=1209822> [<https://perma.cc/9W53-REYZ>] (questioning the negative attitude towards forum shopping and suggesting that the current regime be modified to take advantage of beneficial forum shopping). But see Eidenmüller, *supra* note 38, at 12 n.34 (“Ringe does not sufficiently take into account the protection of workers and creditors in

The primary revision is to amend the Recast EIR's conceptualization of venue and registered office. A corporation's registered office in a particular Member State should be sufficient to establish venue.²⁸⁷ The only exception to this strong presumption should be if the registered office was relocated to another Member State within the three-month period prior to the case opening.²⁸⁸ The change would afford corporations flexibility while offering enhanced certainty to all stakeholders, easing the risk of excessive forum shopping,²⁸⁹ and reducing the burden on the judiciary. Judges would no longer undertake the elaborate, real-seat inquiry as to "all the places in which the debtor company pursues economic activities and all those in which it holds assets"²⁹⁰—an inquiry that is further complicated by the requirement that the court speculate as to what is actually ascertainable by third parties. The simplified process avoids draining judicial and stakeholder resources and improves case efficiency.

Further, Article 3 of the Recast EIR should be amended to provide that a debtor may rely on any of the following bases in order to establish that its COMI is located in a particular jurisdiction: (i) the debtor has its registered office in the chosen Member State; (ii) the debtor's central administration is located in the chosen Member State; (iii) the debtor's principal assets are located in the chosen Member State; or (iv) there is a pending restructuring or insolvency

interpreting freedom of establishment and its reach. I agree that abuse of law can only be established on a case by case basis according to the ECJ. However, Member States are entitled to pass general laws in order to protect imperative requirements in the public interest.") (citation omitted).

²⁸⁷ As noted above, I acknowledge that the prevalent practice in the EU over the last few years is to file for bankruptcy only the financial holding company of a corporate family, keeping subsidiaries out of the process and effectuating a deleveraging by relying on applicable intercreditor agreements. However, these types of restructuring cases fail to address many key operational and structural issues, representing a half measure that will not be prevalent as the current economic correction evolves.

²⁸⁸ This maintains the existing restriction found in the Recast EIR, Recital (40), and reflects the fact that restructuring planning for EU companies rarely starts more than six months before the commencement of a proceeding.

²⁸⁹ Naturally, regulatory arbitrage is an inveterate facet of bankruptcy tourism that can be minimized to bolster creditor expectations and improve predictability.

²⁹⁰ Case C-396/09, *Interedil Srl (in liq.) v. Fallimento Interedil Srl*, 2012 E.C.R. I-9939.

case in that Member State concerning at least one of the debtor's corporate affiliates.²⁹¹

Courts should continue to be required to confirm their jurisdictional authority, but Article 4's requirement that each court must *sua sponte* evaluate the basis for venue²⁹² should be amended to explain that a comprehensive evaluation is only necessary if a motion objecting to venue has been filed by a party in interest.

In order to support these changes, Recital (5) of the Recast EIR should be amended to acknowledge that internal markets will not function properly if regulatory incentives exist for parties to engage in *abusive or fraudulent* bankruptcy tourism.²⁹³ In order to promulgate a more debtor-centric ethos, the import of Recital (28) should be amended to eliminate the idea that special consideration is given to creditors' perception of where a debtor conducts the administration of its interests. Recital (30) – which provides that the location of a debtor's central administration overrides the presumption afforded in Article 3(1)²⁹⁴ – should be eliminated entirely.

I believe that these limited changes offer transformative results and shift the EU restructuring system to one that is more debtor-focused, as opposed to creditor-focused. If implemented, EU corporations would have far more latitude in determining venue and more certainty regarding case-dispositive variables. However, I acknowledge that bad faith actors can exploit this new freedom. In the next section, I discuss means to mitigate the risk of abusive or fraudulent forum shopping contaminating the system.

²⁹¹ The EU will need to determine how to define "affiliate." See *supra* note 245 (quoting definition of "affiliate" that appears in 11 U.S.C. § 101).

²⁹² Recast EIR, *supra* note 122, art. 4.

²⁹³ The current version of the Recital targets all types of bankruptcy tourism.

²⁹⁴ Recast EIR, *supra* note 122.

b. The Darkness of Governance Mismatch and the Need for Risk Mitigation

One of the primary concerns with bankruptcy tourism is that corporate insiders²⁹⁵ will seek to locate a bankruptcy case in a particular jurisdiction for an improper reason; not because the jurisdiction will facilitate a successful restructuring but because the judges or substantive law in that jurisdiction may allow the insiders to avoid civil or criminal liability.

Quite simply, corporations are run to maximize shareholder value.²⁹⁶ Directors, senior officers, and other insiders—who are invariably shareholders as well and receive variable compensation based on company performance²⁹⁷—share in the prosperity of the company for which they work. During times of corporate profitability, these insiders are incentivized—even without internal regulatory controls—to suppress self-interested conduct to the extent that it creates a material risk of harm to their employer. However, once a subject company becomes insolvent, it is often disadvantageous for insiders to suppress their self-interested conduct. There is a high likelihood that the insiders will no longer want to continue their affiliation with the subject company. At the same time, in many cases, these individuals could face criminal actions or civil penalties if a financial restructuring exposes their conduct to review by those with fiduciary obligations to a court or creditor body. This dynamic creates what I describe as a “governance mismatch.” In many cases, insiders attempt to steer a

²⁹⁵ The term “insider” generally refers to individuals or entities for whom there is a heightened risk of information asymmetries or access to financial accounts that can be exploited for gains at the expense of another corporate entity and its stakeholders. In the United States, if the debtor is a corporation, an “insider” would include a “(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; [and] (vi) relative of a general partner, director, officer, or person in control of the debtor.” 11 U.S.C. § 101(31)(B).

²⁹⁶ See JONATHAN MACEY, DOUGLAS K. MOLL & ROBERT W. HAMILTON, *THE LAW OF BUSINESS ORGANIZATIONS* 372 (13th ed. 2017).

²⁹⁷ See *id.*

distressed corporation into a particular jurisdiction in order to escape scrutiny or at least limit their exposure.²⁹⁸

Bankruptcy tourism weaponizes governance mismatch. Consequently, EU Restructuring Law would need to be amended to specifically address cases where bad actors are fleeing to a particular jurisdiction to obfuscate malfeasance or otherwise disadvantage creditors for personal gain.

i. Court Fiduciary with the Power to Investigate Malfeasance

Section 1104(c) of the U.S. Bankruptcy Code authorizes judges to appoint a fiduciary of the court—referred to as an examiner—to conduct an investigation of the debtor, “including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity.”²⁹⁹ The court determines the scope and funding of this investigation.³⁰⁰ However, the subsection mandates the appointment if “(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or (2) the debtor’s fixed, liquidated, unsecured debts,

²⁹⁸ Some scholars believe that this dynamic emerged in the Enron bankruptcy case. In that case, Enron’s management feared that the appointment of a chapter 11 trustee would uncover significant corporate malfeasance. *See* LoPucki, *supra* note 6, at 13-14. Enron’s management believed that if the bankruptcy case could be filed in the Southern District of New York, a bankruptcy judge on that bench—as opposed to one in the Houston bankruptcy court—would be disinclined to displace Enron’s management team by such an appointment. *See id.* Indeed, the standard for appointing a trustee in the circuit in which the S.D.N.Y. bankruptcy courts are located was—and continues to be—much more difficult to satisfy than the standard applicable to a bankruptcy court in Houston. *See In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990) (requiring that a showing in support of an appointment of a trustee must be made by clear and convincing evidence). Enron’s management team was ultimately correct in their assessment. *See* LoPucki, *supra* note 6, at 14-15 (“New York bankruptcy judge Arthur J. Gonzalez drew the Enron case. . . . Several major creditors requested the appointment of a trustee. Gonzalez delayed a hearing until he brokered a deal that left most of Enron’s management in place. . . . [The] directors chosen by [Enron’s CEO] . . . remained in control of the company through the crucial stages of the bankruptcy case. They resigned only after they too had chosen their own successors. As a result, the [federal] investigators remained on the outside. . . . For a management engaged in massive fraud, it was the best bankruptcy result for which one could hope.”).

²⁹⁹ 11 U.S.C. 1104(c).

³⁰⁰ *See id.*

other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.”³⁰¹

Almost all Member States rely on the restructuring practitioner³⁰² (“RP”) model, requiring the appointment of an RP at the time a restructuring case is filed.³⁰³ In some countries, the RP merely assumes an oversight role³⁰⁴ but in others the RP takes over some or all management authority.³⁰⁵ Invariably, the RP is focused on how the business is being run during the restructuring proceeding and ways to facilitate a successful reorganization to improve creditor recoveries.³⁰⁶ Some RPs consider the events that precipitated the bankruptcy filing,³⁰⁷ but that is a secondary or tertiary issue.³⁰⁸

The Restructuring Directive attempts to move Member States towards the U.S. debtor-in-possession model. Article 5 requires Member States to “ensure that debtors accessing preventive restructuring procedures remain totally or at least partially in control of their assets and day-to-day operation of the business.”³⁰⁹ Further, “appointment . . . of a [restructuring practitioner] shall not be mandatory in every case.”³¹⁰ The Restructuring Directive’s shift

³⁰¹ *Id.* In the vast majority of cases, appointment of an examiner is not in the interest of stakeholders or the estate because there is no indication of malfeasance from which the estate can make a financial recovery, or the cost of the examiner would eclipse any potential recovery. However, the second basis for appointment (the “\$5 Million Threshold”) is satisfied in virtually all Megacases. Nevertheless, notwithstanding the subsection’s language, courts that do not believe the appointment of an examiner is appropriate will engage in a number of practices to contravene the subsection, including refusing to hear an appointment motion or providing an examiner with an extremely limited budget and scope.

³⁰² Historically, these individuals were referred to as “insolvency practitioners,” but the Restructuring Directive changed that nomenclature. *See Restructuring Directive, supra* note 34, at Article 2(15). This Article uses the new terminology.

³⁰³ *See* 2016 COMMISSION STUDY, *supra* note 30, at 256-58.

³⁰⁴ *See id.* For example, Germany, Hungary, Lithuania, and Sweden. *See id.*

³⁰⁵ *See id.* For example, Malta, Ireland, and Poland. *See id.*

³⁰⁶ *See id.* at 77-80.

³⁰⁷ *See id.* at 257. For example, Italian RPs attempt to establish the cause of the debtor’s financial difficulties. *Id.*

³⁰⁸ *See id.* at 256-58.

³⁰⁹ *See Restructuring Directive, supra* note 34, at art. 5(1).

³¹⁰ *See id.* at art. 5(2). Article 18 is relevant in this context because it requires Member States to enact national laws that impose various fiduciary duties on

to a more accommodating governance model may ultimately increase the risk of abusive or fraudulent tourism. The directive affords existing management more autonomy, and the appointment of RPs is encouraged in only two extremely specific instances, neither of which involves insider malfeasance.³¹¹ As noted above, in the vast majority of Member States, RPs are afforded broad powers but exploring malfeasance is not a point of emphasis.³¹² Indeed, many RPs' primary task is to achieve a successful outcome in the restructuring case and work with existing management to do so. I argue that it is misguided to expect a party with these responsibilities to also take the lead in investigating management's pre-filing conduct to identify malfeasance. Housing these two divergent responsibilities in one office merely facilitates a dereliction of duty.

I propose an amendment to the Restructuring Directive that would require Member States to provide for the appointment of a court fiduciary to investigate malfeasance and other wrongs committed by a debtor's management or other insiders. The protocol for appointment would diverge from U.S. bankruptcy law because the mandatory language of § 1104(c) coupled with a relatively low threshold for appointment has removed the judiciary's discretion in a way that undermines the restructuring process. Instead, I propose a provision to authorize courts to appoint a fiduciary to investigate fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity involving a debtor's

directors of a corporation facing a likelihood of insolvency. Article 18 provides that "Member States shall lay down rules to ensure that, where there is a likelihood of insolvency, directors have the following obligations: (a) to take immediate steps to minimize the loss for creditors, workers, shareholders and other stakeholders; (b) to have due regard to the interests of creditors and other stakeholders; (c) to take reasonable steps to avoid insolvency; (d) to avoid deliberate or grossly negligent conduct that threatens the viability of business." *Id.* at art. 18. Article 18 helps address the governance mismatch, but there is still a potential enforcement and deterrence gap in the EU.

³¹¹ Article 5 indicates that Member States should mandate the appointment of a restructuring practitioner only where (i) "the debtor is granted a general stay of individual enforcement actions . . . [or (ii)] the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down." *Id.* at art. 5.

³¹² See 2016 COMMISSION STUDY, *supra* note 30, at 256-58. Note that some Member States do instruct restructuring practitioners to consider causes of the debtor's financial collapse (e.g., Italy). See *id.* at 257.

management if the appointment is in the interests of creditors, other key stakeholders, or a government body. This provision would diverge from U.S. bankruptcy law by removing the \$5 Million Threshold and authorizing an appointment if the interests of any prominent stakeholder group would be served by the appointment.³¹³ The court would determine the scope of the examiner's investigation and the allocation of funds and resources.

As a corollary to this provision, the EU should also encourage Member States to mandate aggressive action if an examiner identifies significant misconduct. I propose an amendment to the Restructuring Directive that mandates the appointment of an RP—assuming one has not already been appointed—to assume full management of a debtor if an appointed court fiduciary determines that the debtor's former or current management team or insiders has committed fraud or other significant malfeasance. A court may decline the appointment if (i) in the event a new management team has been appointed, this new team can establish that it has not been involved in the misdeeds identified by the examiner or otherwise influenced by the parties responsible for them; or (ii) displacement of management would be against the interests of prominent stakeholder groups.

These new provisions would create disincentives for directors, officers, or insiders to attempt to forum shop in order to escape civil or criminal liability.

ii. Article 33 and the Refusal to Recognize Judgements

In truly egregious situations involving abusive or fraudulent forum shopping that a court fails to regulate, Article 33 of the Recast EIR allows other Member States to “refuse to recognize insolvency proceedings opened in another Member State or to enforce judgement handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy.”³¹⁴ This threat is yet another check on abusive or fraudulent forum shopping. Insiders wishing

³¹³ 11 U.S.C. § 1104(c) states that an appointment should be undertaken if all prominent stakeholder groups benefit from the appointment.

³¹⁴ See Recast EIR, *supra* note 122, art. 33.

to engage in tourism to escape criminal or civil discipline for corporate malfeasance run the risk of undertaking a long and arduous process only to witness hard-fought relief secured in the main proceeding disregarded by other courts.

VII. CONCLUSION

Divergent substantive restructuring laws and jurists unfamiliar with guiding reorganization cases are two intractable problems embedded in the EU's restructuring framework. The result is a system that is plagued by uncertainty and disparate treatment, suppressing creditor recoveries and undermining capital markets. This Article casts a new light on these problems. Though often vilified, bankruptcy tourism is a practice with uncertain effects. Nevertheless, the current regulatory environment in the EU aggressively restricts the practice. I argue that by doing so the EU is undermining its key economic policy objectives. In fact, controlled bankruptcy tourism—the kind apparent in the United States—would help create judicial hubs of optimal law and experienced jurists. This assessment may appear to be overly optimistic, but this phenomenon has animated the U.S. bankruptcy system over the last thirty years. In fact, tourism's overall benefits may actually be amplified in the EU. To that end, this Article proposes amendments to EU Restructuring Law that will facilitate controlled tourism while minimizing negative externalities that could destabilize the restructuring system.