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At the Crossroads Between Bankruptcy and Aviation: The Proposed Bankruptcy Venue Reform and the Imperilment of Foreign Airlines' Availment to U.S. Bankruptcy Courts Under Chapter 11

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**AT THE CROSSROADS BETWEEN BANKRUPTCY AND
AVIATION: THE PROPOSED BANKRUPTCY VENUE
REFORM AND THE IMPERILMENT OF FOREIGN
AIRLINES' AVAILMENT OF U.S. BANKRUPTCY
COURTS UNDER CHAPTER 11**

PAULINE HODENCQ*

ABSTRACT

The COVID-19 pandemic has wreaked havoc on several of the nation's industries, aviation being no stranger given the financial difficulties, flight cancellations, and health mandates the sector consequently faced. Despite concerns that a wave of bankruptcy filings would submerge U.S. bankruptcy courts, the domestic need for restructuring did not arise as predicted, the main reason being the federal assistance provided to enterprises in peril. On the contrary, foreign debtor airlines were the ones to avail themselves of the experience and efficiency of magnet districts for restructuring under Chapter 11 of the Bankruptcy Code. Simultaneously, large domestic corporations sought the assistance of New York and Delaware to restructure quite far from their home districts. This phenomenon, known as forum shopping, revived a spirit of congressional reform; proponents sought to condemn forum shopping as undermining the fairness and integrity of the bankruptcy system overall. Thus, Congress introduced a bill to reform bankruptcy venue and ultimately put an end to forum shopping.

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This Comment critically analyzes the arguments by proponents of reform—arguing in favor of a “race to the bottom” theory that condemns the practice of forum shopping—as compared with arguments by opponents of reform—perceiving the current status quo and bankruptcy venue as racing debtors to the top by having magnet districts offer expertise, efficiency, and predictability to entities in need of restructuring. In siding with “race to the top” theorists, this Comment further explains the danger reforming bankruptcy venue could have in undermining the United States’ position as the golden standard in Chapter 11 restructuring, forcing foreign debtor airlines to avail themselves of courts in the United Kingdom (U.K.) or Singapore that are progressively becoming restructuring hotspots. Proposed alternatives to bankruptcy venue reform include remedies limiting forum shopping to protect the United States’ reputation in restructuring and preserve the rights of U.S. creditors.

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I. INTRODUCTION

IT WOULD SEEM ALMOST IMPOSSIBLE not to discuss the COVID-19 pandemic because it has drastically altered the course of people’s lives. In addition to the pandemic’s human

impact, the financial uncertainties that emerged from the pandemic have wreaked havoc on several of the world's industries, one being aviation. Some statistics released by the International Air Transport Association (IATA) reveal the devastating effects the pandemic has had on global air transport, the decline in air passengers for the year 2020 being the largest ever recorded since the 1950s.¹ Aviation experts generally agree that a full recovery ought not to be expected until 2024.² With anticipated financial distress comes bankruptcy. Many experts predicted “a tidal wave”³ of filings and called on Congress to increase the capacity of bankruptcy courts to handle a flood of bankruptcy filings.⁴

Surprisingly, many of the filings that made their way to the United States were not from domestic companies but rather foreign entities availing themselves of the jurisdiction of U.S. courts.⁵ This noted decrease in domestic filings⁶ and absence of U.S. airlines seeking restructuring assistance can be partially explained by the financial assistance of the federal government from the CARES Act, the Consolidated Appropriations Act of

¹ *Airline Industry Statistics Confirm 2020 Was Worst Year on Record*, IATA (Aug. 3, 2021), <https://www.iata.org/en/pressroom/pr/2021-08-03-01> [<https://perma.cc/ZNR6-PQBR>]. IATA recorded 1.8 billion passengers flying in 2020, “a decrease of 60.2% compared to the 4.5 billion” passengers flying in 2019. *Id.* Looking at the industry-wide demand for air travel, IATA recorded a drop by 65.9%, estimating total industry passenger revenues to have fallen by 69% with total net losses of \$126.4 billion. *Id.*

² Madlyn Primoff & Alex Rich, *Why Non-U.S. Air Carriers Avail Themselves of U.S. Chapter 11 to Reorganize*, FRESHFIELDS (Dec. 7, 2020), <https://blog.freshfields.us/post/102gllw/why-non-u-s-air-carriers-avail-themselves-of-u-s-chapter-11-to-reorganize> [<https://perma.cc/7NFS-WANZ>].

³ Mary Williams Walsh, *A Tidal Wave of Bankruptcies is Coming*, N.Y. TIMES, <https://www.nytimes.com/2020/06/18/business/corporate-bankruptcy-coronavirus.html> [<https://perma.cc/VLP4-U6AK>] (Aug. 3, 2020).

⁴ David Skeel, *The Populist Backlash in Chapter 11*, BROOKINGS (Jan. 12, 2022), (citing Letter from Jared A. Elias, Chair, Large Corps. Comm. of the Bankr. & COVID-19 Working Grp., to Sens. McConnell & Schumer, and Reps. Pelosi & McCarthy (June 10, 2020)), <https://www.brookings.edu/research/the-populist-backlash-in-chapter-11> [<https://perma.cc/46SW-WBEQ>].

⁵ Richard J. Cooper & John H. Veraja, *Chapter 11: An Increasingly Popular Tool for Foreign Companies Seeking to Restructure or Liquidate*, FINANCIER WORLDWIDE (Oct. 2021), <https://www.financierworldwide.com/chapter-11-an-increasingly-popular-tool-for-foreign-companies-seeking-to-restructure-or-liquidate#.YeSUnC-B0Ut> [<https://perma.cc/U7U3-HQYY>] (referencing a study published by the Bankruptcy Research Database of the UCLA School of Law demonstrating that the number of large foreign corporations filing for bankruptcy has more than doubled from the previous high).

⁶ See Skeel, *supra* note 4.

2021, and the American Rescue Plan Act of 2021, all providing billions of dollars to passenger and cargo air carriers.⁷ On the contrary, foreign airlines—especially airlines from Latin America—avidly sought the help of U.S. courts given the limited, if not nonexistent, assistance provided to them by their respective governments.⁸ During the course of the pandemic, four airlines have filed in the Southern District of New York to restructure and resume flying operations: Avianca⁹ (having first restructured in 2003),¹⁰ LATAM,¹¹ Aeroméxico,¹² and Philippine Airlines.¹³

Whether coincidental, the increased number of foreign airlines filing for bankruptcy in New York came at an opportune time.¹⁴ In fact, the bankruptcy filings by large U.S. corporations far away from their “home districts,” including Purdue Pharma and several Catholic dioceses, has revived the debate of re-

⁷ See *Airline and National Security Relief Programs*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-industry/airline-and-national-security-relief-programs> [https://perma.cc/K92X-2DA7].

⁸ See Oliver Clark, *Latin American Carriers Put Faith in Chapter 11*, AIRFIN. J., <https://www.airfinancejournal.com/articles/3580392/latin-american-carriers-put-faith-in-chapter-11> [https://perma.cc/YP5F-E2U5] (Sept. 1, 2020, 3:39 PM) (by late May 2020, Latin American governments supported the airline industry with \$300 million, amounting to only 0.8% of the airlines' 2019 revenues).

⁹ *In re Avianca Holdings S.A.*, 618 B.R. 684, 688 (Bankr. S.D.N.Y. 2020).

¹⁰ *In re Aerovias Nacionales de Colom. S.A. Avianca*, 303 B.R. 1, 1–2 (Bankr. S.D.N.Y. 2003) [hereinafter *In re Avianca*].

¹¹ *In re LATAM Airlines Grp. S.A.*, 620 B.R. 722, 731 (Bankr. S.D.N.Y. 2020).

¹² Anthony Harrup, *Aeroméxico Files for Chapter 11 Bankruptcy Protection*, WALL ST. J. <https://www.wsj.com/articles/aeromexico-files-for-debt-restructuring-under-chapter-11-11593560968> [https://perma.cc/FR59-7S7M] (June 30, 2020, 9:53 PM).

¹³ *Philippine Airlines Files for Chapter 11 in U.S. After COVID-19 Crisis*, REUTERS (Sept. 3, 2021, 8:15 PM), <https://www.reuters.com/article/philippine-airlines-bankruptcy/philippine-airlines-files-for-chapter-11-in-u-s-after-covid-19-crisis-idUSL1N2Q600A> [https://perma.cc/L9T7-2Q9U]. Philippine Airlines was the only airline to have restructured successfully within four months despite an outstanding indebtedness of over \$2 billion. Jonathan Burgos, *Billionaire Lucio Tan's Philippine Airlines Exits Bankruptcy, Poised to Recover from Pandemic Losses*, FORBES (Jan. 2, 2022, 9:40 PM), <https://www.forbes.com/sites/jonathanburgos/2022/01/02/billionaire-lucio-tans-philippine-airlines-exits-bankruptcy-poised-to-recover-from-pandemic-losses/?sh=3e0e6a924fd9> [https://perma.cc/Q3HB-57Q3]. LATAM and Aeroméxico filed for extensions to present their restructuring plans, even though both airlines commenced bankruptcy proceedings over a year ago. Daniel Martínez Garbuno, *LATAM and Aeromexico File to Extend Chapter 11 Plan Deadline*, SIMPLE FLYING (June 9, 2021), <https://simpleflying.com/latam-aeromexico-chapter-11-extension> [https://perma.cc/AP8Y-U56C].

¹⁴ See Skeel, *supra* note 4.

forming bankruptcy venue.¹⁵ Unbeknownst to most, this “populist” reform movement emerged in the 1990s and became a renewed topic of discussion following those filings;¹⁶ proponents of reform accused forum shoppers of threatening the integrity and fairness of the bankruptcy system.¹⁷ However, reforming bankruptcy venue as it stands today could bar foreign entities and airlines from accessing U.S. courts altogether. But why should that be of concern, especially when dealing with actors in aviation?

This Comment attempts to answer the aforementioned question. Part I provides an overview of the Bankruptcy Code and specific provisions of Chapter 11 that have made it a global tool of reference for restructuring. Part II offers a discussion of the bipartisan Bankruptcy Venue Reform Act introduced in Congress in June 2021. It further evaluates the debate by scholars and practitioners on the “race to the bottom” versus “race to the top” dichotomy by rejecting the former approach. Lastly, Part III analyzes how reform could develop a global phenomenon of forum shopping, which would likely make foreign airlines reticent to avail themselves of U.S. courts. By arguing against reform, Part III attempts to demonstrate how the project to reform bankruptcy venue would (a) undermine the United States’ place as the global leader in aviation and (b) weaken the protections U.S. laws afford U.S. creditors.

II. THE TOURISM MAGNET AS THE RESTRUCTURING REFERENCE

A. HISTORY OF THE BANKRUPTCY CODE AND MOST NOTABLE PROVISIONS OF CHAPTER 11

The U.S. Bankruptcy Code (Code), specifically its Chapter 11 restructuring provisions,¹⁸ have been described as “one of the strongest and most well developed business reorganization schemes in the world.”¹⁹ When it first enacted the Code, Con-

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ See Adam J. Levitin, *Purdue’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances*, 100 TEX. L. REV. 101, 170 (2022) (discussing the manipulation of venue by larger corporations filing for Chapter 11, undermining confidence in the fairness of the bankruptcy system overall).

¹⁸ *See generally* 11 U.S.C. §§ 1101–1195.

¹⁹ MICHELLE M. HARNER, FINAL REPORT OF THE ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11, at 8 (2014) [hereinafter ABI Report] (citing Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Sys-*

gress intended to allow for the rescue and rehabilitation of “the honest but unfortunate debtor,” which also included the business entity experiencing financial distress.²⁰ This idea of bankruptcy provided a breathing spell—a fresh start to the debtor—which has made the U.S. bankruptcy laws stand out worldwide.²¹

The original 1898 Bankruptcy Act became the subject of reform following the Great Depression, a time when keeping businesses in operation while “restructuring their obligations” became paramount.²² One could argue that the COVID-19 pandemic has embodied similar concerns. After forty years without reform to the Code, the Commission on the Bankruptcy Laws of the United States was officially established in 1970 to make some changes that both Congress and practitioners alike felt were necessary to meet the economic demands of the time.²³ The Bankruptcy Reform Act of 1978 emphasized the legislature’s goal to encourage debtor rehabilitation.²⁴ This “first comprehensive reform of federal bankruptcy law” since the 1930s focused on protecting both debtor and nondebtor interests and was subsequently followed by multiple amendments.²⁵ The last significant amendment to the bankruptcy laws came with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which was passed into law after practitioners and commentators advocated for reform to address the apparent deficiencies in the law in light of the changing economic environment and inequities among different creditor constituencies.²⁶

Presently, air carriers are seeking ways to bolster their liquidity, cure defaults on aircraft leases, and process ticket refunds—all of which can be efficiently accomplished through a Chapter

tems: The Perils of Legal Transplantation, 28 B.C. INT’L & COMPAR. L. REV. 1, 4 (2005)).

²⁰ *Id.* (citing Jason J. Kilborn, *Bankruptcy Law*, in GOVERNING AMERICA: MAJOR DECISIONS OF FEDERAL, STATE, AND LOCAL GOVERNMENTS FROM 1789 TO THE PRESENT 41–49 (Paul J. Quirk & William Cunio eds., 2011)).

²¹ *Id.* (citing Kilborn, *supra* note 20, at 41–49).

²² *Id.* at 9 (citing Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 22 (1995)).

²³ *Id.* at 10.

²⁴ See Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 131 (2005).

²⁵ *Id.* at 142, 148.

²⁶ See generally ABI Report, *supra* note 19, at 11.

11 restructuring.²⁷ Their principal goal is to stabilize their business through capital infusion, a “breathing spell” that Chapter 11 can grant.²⁸ The restructuring remedy is often perceived as debtor-friendly in part because of the debtor-in-possession (DIP).²⁹ The DIP, often a member of the company’s management, remains in control of the assets and runs the company in its ordinary course of business while undergoing reorganization.³⁰ Chapter 11 has remained the gold standard for business restructuring over time—setting aside the pandemic and its impact on the aviation industry.³¹ For example, the Colombian airline Avianca first took advantage of U.S. courts in 2003 by using Chapter 11 to restructure.³² The broad scope of what constitutes “property” for eligibility purposes³³ has permitted foreign companies to meet a *de minimis* threshold in getting a “passport” into U.S. courts.³⁴ Extensive case law from magnet districts—the Southern District of New York and Delaware—supports that proposition by showing how permissive certain judges have been in

²⁷ See, e.g., Timothy Graulich, Stephen Piraino & Matthew Masaro, *International Airlines and the Benefits of Chapter 11*, 15 *INSOLV. & RESTRUC. INT’L* 22, 22, 24–25 (2021).

²⁸ *Id.* at 24.

²⁹ See Fredric Sosnick & Ronni Arnold, *Restructuring & Insolvency in the USA*, LEXOLOGY (Sept. 4, 2018), <https://www.lexology.com/library/detail.aspx?g=4cfbd481-874d-4f18-9a2a-4df7e08e352b> [<https://perma.cc/EPY6-EBGW>]; 11 U.S.C. § 1101(1).

³⁰ *Chapter 11 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [<https://perma.cc/6WRB-XKQ6>].

³¹ See, e.g., Bojan Guzina & Andrew O’Neil, *Chapter 11 Cases Soared in 2020, with More Distress Likely in 2021*, WHITE & CASE: DEBT EXPLORER (Feb. 19, 2021), <https://debtexplorer.whitecase.com/leveraged-finance-commentary/chapter-11-cases-soared-in-2020-with-more-distress-likely-in-2021> [<https://perma.cc/8TMW-6N8N>].

³² Judge Gropper’s discussion of the appropriateness of bankruptcy venue in the Southern District of New York for the Colombian airline and his response to creditors will be discussed in detail in Part II, *infra*.

³³ 11 U.S.C. § 109(d).

³⁴ Shana Elberg, *Using the Bankruptcy Code for International Restructuring*, N.Y. L.J. (June 13, 2016).

finding in favor of the debtor's eligibility under § 109(d),³⁵ deeming "a dollar, a dime or a peppercorn" sufficient.³⁶

Some of the Code's provisions are worth revisiting because they are mainly responsible for the United States' status as the tourism magnet for restructuring.³⁷ In addition to a DIP overseeing the whole reorganization process, the global automatic stay is one of the most attractive features of a Chapter 11 reorganization given that the far-reaching provision comes into effect immediately upon filing.³⁸ By encompassing "all legal or equitable interests of the debtor in property,"³⁹ the provision's reach is immense and prevents any creditor from taking any action that could be detrimental to the filing entity absent court approval.⁴⁰ The automatic stay allows for the capture of both tangible and intangible interests of the filing entity and claims against it, regardless of a creditor's location in the world.⁴¹ Some practitioners note that the mere threat of filing for bankruptcy in the United States and the resulting automatic stay have served as powerful negotiating techniques to encourage out-of-court restructuring.⁴² While the automatic stay makes Chapter 11 an op-

³⁵ See, e.g., *In re Berau Cap. Res. PTE Ltd.*, 540 B.R. 80, 84 (Bankr. S.D.N.Y. 2015) (holding indentures with a New York choice of law clause qualified as property in the United States for purposes of filing eligibility); *In re Octaviar Admin. Proprietary Ltd.*, 511 B.R. 361, 369–70 (Bankr. S.D.N.Y. 2014) (stating causes of action against domestic entities were generally recognized as property of a foreign entity for filing eligibility in bankruptcy); *In re Glob. Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (ruling funds in a bank account, irrespective of amount, and undrawn retainers satisfied eligibility requirements for bankruptcy filing).

³⁶ *In re McTague*, 198 B.R. 428, 431–32 (Bankr. W.D.N.Y. 1996) (holding that \$194 in a bank account was "clearly 'property'" despite the foreign entity's operations and assets being mainly located abroad, while noting a bad faith filing could result in a dismissal of the case if property was put in the United States for eligibility purposes).

³⁷ See Clark, *supra* note 8.

³⁸ See generally 11 U.S.C. § 362.

³⁹ 11 U.S.C. § 541(a)(1).

⁴⁰ See U.S. Cts., *supra* note 30.

⁴¹ See *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC* (*In re Bernard L. Madoff Inv. Sec. LLC*), 474 B.R. 76, 84 (Bankr. S.D.N.Y. 2012) (upholding extraterritorial enforcement of the automatic stay against a creditor's lawsuit); *Nakash v. Zur* (*In re Nakash*), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) ("[B]ased upon the applicable Code sections, [and] other indicia of congressional intent . . . the automatic stay applies extraterritorially.").

⁴² Shana A. Elberg, Lisa Laukitis & Liz Downing, *International Companies Continue to Turn to U.S. Restructurings in 2021 for COVID-19 Relief*, REUTERS (Dec. 23, 2021, 9:53 AM), <https://www.reuters.com/legal/transactional/international-companies-continue-turn-us-restructurings-2021-covid-19-relief-2021-12-23>

timal choice, one key consideration is whether U.S. court orders will be enforceable against foreign creditors.⁴³ This is often not of concern because the overwhelming majority of airlines' credit lenders and bondholders have ties to the United States, making them subject to U.S. jurisdiction and remedies for violating the automatic stay.⁴⁴

Another provision to consider is the plan permitting the debtor to restructure over time. Under Chapter 11, voting for plan approval requires two-thirds in claim amounts and at least 51% in numbers for each class of creditors;⁴⁵ in contrast, many foreign countries require a greater percentage of assenting creditors.⁴⁶ While plan confirmation must meet certain statutory requirements, Chapter 11 uniquely provides debtors with a major tool against recalcitrant creditors that, until very recently, was only available in U.S. courts.⁴⁷ The Code's cramdown provision permits courts to disregard creditors' objections by deeming the plan "fair and equitable, with respect to each class [of creditors] . . . [t]hat is impaired under, and has not accepted, the plan."⁴⁸

In addition to letting a DIP run the reorganizational effort, DIP financing⁴⁹ adds to the appeal of Chapter 11.⁵⁰ This provision allows a DIP to seek funds and secure capital deemed essential to a successful restructuring and exiting bankruptcy;⁵¹ both LATAM and Aeroméxico used this feature of the Code.⁵² As an

[<https://perma.cc/LM9A-LPHP>] (noting the efficacy of protecting one's interests by filing in a U.S. court).

⁴³ See, e.g., *In re Madoff*, 474 B.R. at 82 ("[A] bankruptcy court can enforce the automatic stay extraterritorially only against entities over which it has *in personam* jurisdiction.").

⁴⁴ Cf. Elberg, Laukitis & Downing, *supra* note 42 (discussing how Chapter 11 is a viable restructuring tool for foreign entities with U.S. creditors because those creditors are bound by U.S. court orders).

⁴⁵ 11 U.S.C. § 1126(c).

⁴⁶ See, e.g., Wai Yee Wan, Casey Watters & Gerard McCormack, *Schemes of Arrangement in Singapore: Empirical and Comparative Analyses*, 94 AM. BANKR. L.J. 463, 470 (2020) (referencing the United Kingdom and Singapore as two countries with a 75% in value of creditors voting on the plan).

⁴⁷ The new insolvency law enacted in the United Kingdom under the Corporate Insolvency and Governance Act of 2020 (CIGA) offers a similar cramdown provision that will be further discussed in Part III, *infra*.

⁴⁸ 11 U.S.C. § 1129(b)(1).

⁴⁹ *Id.* § 364.

⁵⁰ Clark, *supra* note 8.

⁵¹ *Id.*

⁵² Cooper & Veraja, *supra* note 5. Substantial DIP financing was secured by LATAM (\$2.45 billion), Avianca (\$2 billion), and Aeroméxico (\$1 billion). *Id.*

example of how powerful DIP financing can be, Swissport International, a global cargo and aircraft ground handling company operating in forty-seven countries with two hundred legal entities, added a provision to its lending agreement that would have permitted Chapter 11 reorganization.⁵³ Swissport used DIP financing as a negotiating tool; the leverage of having a possible DIP loan with priming priority was sufficient to convince international creditors to settle—fearing the senior status of DIP financing against their debts in repayment priorities.⁵⁴

While the ability to sell property “free and clear of any interest”⁵⁵ and liens may be another appealing provision, the ability to reject executory contracts (not yet fully performed) and unexpired leases⁵⁶ might come at the top of the list. Section 1110 is specifically relevant to airlines undergoing restructuring since the debtor must agree to perform its obligations and cure any defaults within sixty days of the petition date.⁵⁷ Failing to do so would allow the debtor airline to reject the lease and abandon the leased assets to the lender.⁵⁸ This provision may indeed prove invaluable to fleet rationalization in times of financial distress and drastically reduced airline travel. In addition, because Section 365 further permits the rejection of Collective Bargaining Agreements (CBAs), it is a powerful tool even when dealing with foreign workers’ unions.⁵⁹

B. VENUE, ONCE AGAIN UP FOR DEBATE

Unquestionably, the most controversial provision of the Bankruptcy Code pertaining to Chapter 11 is that of bankruptcy venue, which allows a debtor to file in any district

⁵³ David Turetsky, Will Guerrieri, Aaron Colodny, Livy Mezei & Kathryn Sutherland-Smith, *Using the Chapter 11 Toolkit to Maximise Value in Cross-Border Restructurings*, IFLR (Nov. 17, 2021), <https://www.iflr.com/article/b1vczqskj8crvm/using-the-chapter-11-toolkit-to-maximise-value-in-cross-border-restructurings> [https://perma.cc/J97W-4Q62].

⁵⁴ *Id.*

⁵⁵ 11 U.S.C. § 363(f).

⁵⁶ *Id.* § 365(a).

⁵⁷ *Id.* § 1110(a)(2). Avianca, LATAM, and Aeroméxico all rejected aircraft leases. Graulich, Piraino & Masaro, *supra* note 27, at 24. LATAM specifically rejected nineteen aircraft leases along with some of its Japanese operating leases. Clark, *supra* note 8.

⁵⁸ 11 U.S.C. § 1110.

⁵⁹ See Marco Macca, *Aeromexico Looks to Terminate ASPA/ASSA Collective Agreement*, AIRWAYS MAG. (Jan. 14, 2021), <https://airways.news/airlines/am-terminate-aspa-assa-cba/> [https://perma.cc/V52R-HZUU]. A debtor’s rejection of CBAs is further subject to 11 U.S.C. §§ 1113–14.

(1) in which the *domicile*, residence, principal place of business . . . or principal assets in the United States, of the person or entity . . . [has] been located for the one hundred and eighty days immediately preceding such commencement . . . or

(2) in which there is pending a case . . . concerning such person's affiliate, general partner, or partnership.⁶⁰

While this provision leaves the debtor with a wide array of potential districts to choose from, a change of venue may be prompted “in the interest of justice or for the convenience of the parties.”⁶¹ This venue issue, revived by the COVID-19 pandemic, unleashed a “populist backlash” similar to the reaction to the 2008 financial crisis.⁶² Proponents of venue reform denounced bailouts of large financial institutions and corporations that filed for Chapter 11 in venues far from their home districts.⁶³ Reform proponents claimed that these filings ultimately jeopardized the interests of local parties by allowing forum shopping for favorable precedent.⁶⁴ In this regard, the infamous magnet districts of Delaware and the Southern District of New York⁶⁵ have long been criticized for undermining the fairness of the bankruptcy system. Through this practice, not only are debtors picking a specific venue but also the judge that will hear their case.⁶⁶ One critic of the current system, Professor Lynn LoPucki,⁶⁷ went as far as implying that judges in those districts essentially lured companies, ultimately enticing forum shopping and depriving local venues of the opportunity to hear the case where financial distress might be felt the most.⁶⁸ LoPucki's fervent accusations against New York and Delaware were reprimanded.

⁶⁰ 28 U.S.C. § 1408(1)–(2) (emphasis added).

⁶¹ FED. R. BANKR. P. 1014(a)(1)–(2).

⁶² See Skeel, *supra* note 4.

⁶³ *Id.*

⁶⁴ See *id.* (referencing the controversial filings by Purdue Pharma and several Catholic dioceses); Levitin, *supra* note 17, at 150.

⁶⁵ Jane VanLare & Hugh K. Murtagh, *Chapter 11 Venue—Defending (or Upending) the Debtor's Choice*, 12 PRATT'S J. BANKR. L. 25, 26–27 n.7 (2016) (suggesting that a majority of large Chapter 11 filings over the past thirty years have been in Delaware and the Southern District of New York); see *Trend Tracking*, UCLA-LOPUCKI BANKR. RSCH. DATABASE, https://lopucki.law.ucla.edu/trend_tracking.php [<https://perma.cc/988N-7VDE>].

⁶⁶ See Levitin, *supra* note 17, at 150. Certain districts such as White Plains, New York, only have one sitting bankruptcy judge. *Id.* at 153.

⁶⁷ LoPucki is known to be an avid advocate of universalism and bankruptcy venue reform. See generally LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 123–25 (2005).

⁶⁸ *Id.* at 124–25.

manded as an “offensive fantasy” by some.⁶⁹ Similar to LoPucki, Judge Rhodes, who oversaw the restructuring of the City of Detroit, described the venue selection process as “the single most significant source of injustice in Chapter 11” and denounced the threat it posed to the integrity of the bankruptcy system given how the alleged “bankruptcy system . . . appear[ed] so easily manipulated.”⁷⁰

One example discussing the venue issue and whether venue would have been proper outside of New York is *In re Avianca*.⁷¹ Contrary to some of the positions explored above is Judge Gropper’s take when presiding over the first Avianca filing. Though quite unpopular at the time it was released, his opinion discussed some of the key concerns of proponents of bankruptcy venue reform, concerns that are still present today.⁷² Judge Gropper took a bold position in upholding a debtor’s venue selection when he found venue in the Southern District of New York as proper for a foreign airline incorporated in Colombia despite having most of its assets, employees, and creditors located abroad.⁷³ Noting that insolvency laws in Colombia were relatively new and untested,⁷⁴ the judge concluded that an American venue would be proper considering the airline’s fleet, its largest creditors and lessors, were all “located or doing business in the United States.”⁷⁵ In response to a motion to remove the case to a Colombian venue that many saw as more proper, Judge Gropper explained that cases where such transfer had been allowed were due to an already-existing foreign proceed-

⁶⁹ Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEVS. J. 463, 466 (2021) (quoting Jonathan Randles, *Companies Lease Offices in New York Suburb to Pick Bankruptcy Judge*, WALL ST. J. (August 13, 2020, 5:30 AM), <https://www.wsj.com/articles/companies-lease-offices-in-new-york-suburb-to-pick-bankruptcy-judge-11597311001> [<https://perma.cc/7WRZ-9HCP>]).

⁷⁰ Peter Califano, *Subsidiarity at Work – In Bankruptcy Venue Reform?*, 32 COM. L. WORLD 11, 11 (2018).

⁷¹ *In re Avianca*, 303 B.R. 1, 3–4 (Bankr. S.D.N.Y. 2003).

⁷² *Id.* at 8–14.

⁷³ *Id.* at 3–4, 11.

⁷⁴ *Id.* at 10 (noting filing by a parent company headquartered in Colombia rested on its U.S. subsidiary, Avianca, Inc., for proceedings in an American forum).

⁷⁵ *Id.* at 3. One of Avianca’s American creditors was the Bank of New York, the issuer of notes held by the airline’s creditors, whose agreement was governed by New York law. *Id.* at 10. As previously discussed, the ability of an American bankruptcy court’s judgment to bind foreign creditors, lessors, and financial institutions is central to choosing the United States as a restructuring venue. See Elberg, Laukitis & Downing, *supra* note 42.

ing entitling them to recognition under § 305(a)(2).⁷⁶ In such case, filing in the United States would *solely* be to access certain laws and remedies not available in the foreign home jurisdiction, which would ultimately render U.S. venue improper.⁷⁷

Lastly, Judge Gropper highlighted another key facet of the properness of U.S. venue: the level of contacts the Colombian airline had with American creditors.⁷⁸ He stated that the airline's real assets were its contractual rights such as the aircraft leases, right to use airport facilities, and agreements with travel agents.⁷⁹ In his view, the leased aircraft were the most important assets to the airline.⁸⁰ Due to their mobility, control over the lessors could amount to "the equivalent of control over the assets [themselves]."⁸¹ Considering that Colombian law did not offer an effective mechanism for rejecting leases the way § 1110 might and that Avianca's main creditors were in fact aircraft lessors, Judge Gropper rejected the creditors' motion for change of venue and deemed venue proper in New York.⁸²

This 2003 case touches on certain points of controversy that prompted reform to bankruptcy venue, begging the question of why forum shopping should be tolerated especially in favor of foreign entities with mostly foreign creditors and overseas business. While critics and proponents of reform both raise valid points, a closer look at venue and the "race to the bottom" versus "race to the top" dichotomy undeniably reveals why forum shopping is desirable in bankruptcy, more so than in other areas of the law.

III. BANKRUPTCY VENUE REFORM OF 2021

A. REVIVING THE SPIRIT OF REFORM

The revived call to reform bankruptcy venue came as a bipartisan bill first introduced in the Senate by Senator Elizabeth Warren (D-Mass.) and Senator John Cornyn (R-Tex.), both of whom wished to tighten venue rules for corporate debtors.⁸³

⁷⁶ *In re Avianca*, 303 B.R. at 9.

⁷⁷ *See id.* at 9–10.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 12.

⁸¹ *Id.*

⁸² *Id.* at 13.

⁸³ Stephen Selbst & Rachel Ginzburg, *What the Bankruptcy Venue Reform Act of 2021 Could Mean for Corporate Debtors*, HERRICK RESTRUC. REV. (Oct. 25, 2021), <https://www.herrickrestructuringreview.com/2021/10/what-the-bankruptcy->

The key highlights of the proposed reform include eliminating forum shopping by limiting a bankruptcy filing to the debtor's principal place of business or location of principal assets 180 days prior to filing.⁸⁴ Interestingly, this bipartisan effort to reform venue is not the first of its kind. While Congress successfully achieved the goal of eliminating the state of incorporation as an appropriate venue, the reform was abandoned from 1973 to 1978.⁸⁵ Congress ultimately restored the state of incorporation with the 1978 amendments to the Bankruptcy Code.⁸⁶ More recently, the Bankruptcy Venue Reform Act of 2011 had similar bipartisan support,⁸⁷ and the 2018 reform effort similarly focused on eliminating the state of incorporation as a venue option, with the latter bipartisan bill having the support of then-Vice President Biden in a historic policy reversal.⁸⁸ But ultimately, all prior attempts at reforming bankruptcy venue failed.⁸⁹

The current version of the proposed reform comes at a time of urgency, with many urging caution with a looming recession and the anticipated “avalanche of mega cases” that will likely arise once federal financial assistance ceases.⁹⁰ The Senate⁹¹ and House⁹² bills are virtually identical,⁹³ and both criticize the wide range of permissible bankruptcy venues outside of the debtor's home district. Forum shopping and the inadvertent “concentration of bankruptcy cases in a limited number of districts,”⁹⁴ they argue, prevent stakeholders from “fully participating in bankruptcy cases that have tremendous impacts on their lives, com-

venue-reform-act-of-2021-could-mean-for-corporate-debtors [https://perma.cc/PQW2-FQHD].

⁸⁴ *Id.* For a publicly traded company, the principal place of business would presumably be the location listed on its SEC filings. *Id.*

⁸⁵ Ivan J. Reich, *Making the Case for Bankruptcy Venue Reform*, 28 COM. L. LEAGUE AM. 7, 8 (2013).

⁸⁶ *Id.* at 8, 8 n.14 (2013).

⁸⁷ *Id.*

⁸⁸ Casey & Macey, *supra* note 69, at 467.

⁸⁹ See Skeel, *supra* note 4.

⁹⁰ See Brian Davidoff, Elissa Miller & Zev Shechtman, *It's Time for Congress to Address Bankruptcy Venue*, L.A. & S.F. DAILY J. (Nov. 23, 2020), <https://www.greenbergglusker.com/content/uploads/2021/05/Its-time-for-Congress-to-address-bankruptcy-venue-11.23.2020-2.pdf> [https://perma.cc/GXP8-KK79].

⁹¹ See generally S. 2827, 117th Cong. (2021). Only the Senate Bill's provisions will be referenced throughout this discussion for ease of reading.

⁹² See generally H.R. 4193, 117th Cong. (2021).

⁹³ Compare S. 2827, with H.R. 4193.

⁹⁴ S. 2827 § 2(a)(4).

munities, and local economies.”⁹⁵ The drafters of the bills boldly proclaim that this much-needed reform to bankruptcy venue would reduce “forum shopping . . . [and] strengthen the integrity of, and build public confidence and ensure fairness in, the bankruptcy system.”⁹⁶ Under the current venue provision, the definition of domicile allows the state of incorporation to be a possible venue for the debtor.⁹⁷ The bills, mainly targeting corporate debtors, propose to eliminate the state of incorporation and curtail the use of affiliate filings to confer venue in favor of prescribing venue solely through the principal place of business or location of principal assets.⁹⁸ One last proposed modification to the existing text is the substitution of the word “may” in favor of “shall” in mandating the court to dismiss or immediately transfer the case upon finding venue is improper, removing any discretionary power of the court in that regard.⁹⁹

While some of the changes might appear subtle, removing the state of incorporation would, in essence, drastically reshape the bankruptcy landscape and partially bar entry into the courts of Delaware and the Southern District of New York, despite Delaware being the favored place of incorporation for corporate entities nationwide. The National Association of Attorneys General welcomed this reform and showed great support across state lines and political parties.¹⁰⁰ The attorneys similarly denounced “rampant forum shopping” and more specifically, the incorporation of a single subsidiary by a parent company in a favored jurisdiction exclusively for filing purposes.¹⁰¹ A compelling point they raise, which does not appear in either bill, is that the debtor’s “ability to control the law to be applied to one’s affairs” and the “releases . . . to provide to its officers, insiders, and non-debtor third parties . . . [are] not allowed *in any other area of the law*.”¹⁰² Nonetheless, while agreeing that judges in other districts are as competent as those in magnet districts, their letter contrasted with comments made by some proponents of reform

⁹⁵ *Id.* § 2(a)(5)(A).

⁹⁶ *Id.* § 2(a)(6).

⁹⁷ *See* 11 U.S.C. § 1408(1).

⁹⁸ *See, e.g.*, S. 2827 § 1408(a)–(b).

⁹⁹ *See id.* § 1412(b).

¹⁰⁰ Letter from National Association of Attorneys General to U.S. House of Representatives and U.S. Senate (Nov. 9, 2021) [hereinafter NAAG Letter], <https://www.naag.org/policy-letter/naag-endorses-bankruptcy-venue-reform-act-of-2021> [<https://perma.cc/CZ5R-JWPX>].

¹⁰¹ *Id.*

¹⁰² *Id.* (emphasis added).

such as LoPucki;¹⁰³ the Attorneys General admitted that judges in New York and Delaware were in fact exposed to “heightened scrutiny and criticism,”¹⁰⁴ thus undermining the claim of questionable integrity and motives of judges in handling complex cases.

Two schools of thought have emerged on the need to reform bankruptcy venue.¹⁰⁵ The “race to the bottom” view condemns the current venue statute and denounces its undermining of the bankruptcy system’s overall fairness and integrity.¹⁰⁶ On the other end of the spectrum are “race to the top” theorists who stress the various advantages that current venue offers forum shoppers seeking efficiency, predictability, and expediency in restructuring.¹⁰⁷ A closer look at the debate surrounding bankruptcy venue reform highlights some key features of forum shopping that may appear detrimental to local actors affected by the debtor’s choice of venue.¹⁰⁸ However, this “race to the bottom” theory falls short of the compelling rationale by critics of reform, exemplifying how forum shopping has allowed the United States to acquire expertise and leave a mark on insolvency law worldwide.¹⁰⁹

B. RACE TO THE BOTTOM . . .

The overwhelming concentration of Chapter 11 cases can be found in the magnet districts of Delaware and the Southern District of New York given their ties to corporate law and financial institutions.¹¹⁰ It is important to note that other districts, such as the Southern District of Texas and the Eastern District of Virginia, are also slowly emerging as popular venues for restructuring.¹¹¹ Reform proponents wholeheartedly condemn this “bankruptcy à la carte”¹¹² phenomenon created by forum shopping, coining the impact on the bankruptcy system as a “race to the bottom.”¹¹³ The most recurring arguments against forum

¹⁰³ See Casey & Macey, *supra* note 69, at 465.

¹⁰⁴ See NAAG Letter, *supra* note 100.

¹⁰⁵ See Casey & Macey, *supra* note 69, at 465, 472.

¹⁰⁶ *Id.* at 465.

¹⁰⁷ *Id.* at 472.

¹⁰⁸ *Id.* at 465.

¹⁰⁹ *Id.* at 506.

¹¹⁰ See Skeel, *supra* note 4.

¹¹¹ *Id.*

¹¹² Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 YALE L.J.F. 409, 419 (2021).

¹¹³ ABI Report, *supra* note 19, at 311.

shopping are the increased costs of litigating in limited venues, the decrease in competition and the lagging variety in precedent, the “cherry-picking” of judges, and the inability of local parties of interest to participate in the process—overall, critics allege that forum shopping negatively impacts public confidence in the bankruptcy system.¹¹⁴ While those arguments are not without merit, a closer look at the scholarly debate in juxtaposition to skeptics of reform will demonstrate why forum shopping is in fact beneficial to the bankruptcy system.¹¹⁵

One of the first facets of the “race to the bottom” theory is the alleged increase in expenses and fees resulting from debtors picking venues far from their home districts.¹¹⁶ The increased cost of litigating a Chapter 11 case does not stand on its own, but rather, it is directly tied to the financial cost to local parties of interest.¹¹⁷ This due process argument mainly rests upon the idea that bankruptcy is not just a private, contractual matter but involves the public.¹¹⁸ Proponents of reform assert that the filing of cases miles away from employees, communities, and key constituencies essentially strips them of a meaningful opportunity to participate in the case, or forces them to do so at a difficult and expensive cost.¹¹⁹ While the theory acknowledges that “rocket docket” in magnet districts permit judges to move through cases quickly, the ability of affected parties to be heard becomes undeniably limited.¹²⁰

Some proponents of reform acknowledge that the technological advances brought by the pandemic have allowed for more virtual hearings and appearances, thus lessening the negative impact on local constituents wishing to participate in Chapter 11 proceedings.¹²¹ However, they caution that the due process issues of forum shopping will reemerge when in-person hearings resume even if some adaptations are retained.¹²² While many courts have resumed in-person hearings, the viability of virtual participation by litigants has proven to be efficient over the past two years and could very well be adopted as a new way of practic-

¹¹⁴ See Casey & Macey, *supra* note 69, at 470.

¹¹⁵ See *id.* at 506.

¹¹⁶ Reich, *supra* note 86, at 9.

¹¹⁷ *Id.*

¹¹⁸ See *id.*

¹¹⁹ ABI Report, *supra* note 19, at 311.

¹²⁰ See Davidoff, Miller & Shechtman, *supra* note 90.

¹²¹ See NAAG Letter, *supra* note 100.

¹²² See *id.*

ing law. While criticizing the effect forum shopping has on local parties, some proponents go as far as claiming that the New York–Delaware “duopoly” stands as an attack on the federal system of bankruptcy altogether.¹²³ As the home to financial institutions and corporate industries, these states’ duopoly is perceived by some as a prominent factor in lessening consideration of other stakeholders, mainly employees, retirees, vendors, and local communities.¹²⁴ Furthermore, proponents of reform denounce those magnet districts as depriving local economies of financial benefits,¹²⁵ and criticize the resulting sharp increase in administrative costs, claiming that the practice forces certain debtors to liquidate to account for fees.¹²⁶

While the overcrowding of those magnet courts may be raised as an additional concern of forum shopping, a debtor’s particular selection, not just of venue but also of judges, is most heavily criticized due to the unfairness it allegedly creates.¹²⁷ Some suggest an implicit distrust emanating from parties of interest, who often feel “victimized;” this feeling is only exacerbated when rulings are issued by a judge who is cautiously picked by the forum-shopping debtor.¹²⁸ In addition, proponents rightfully argue that the fairness of restructuring is further undermined when a debtor’s choice of venue mainly rests on locating favorable precedent on a particular issue.¹²⁹ While predictability sought by the DIP in handling restructuring cases may not be as nefarious as described by reform proponents, one counterargument stresses that judges in magnet districts possess less knowledge on other states’ laws regarding property rights, energy-related issues, or mechanics’ liens.¹³⁰ This further demonstrates how locality is central to resolving many of the issues emerging in a Chapter 11 restructuring, which forum shopping jeopardizes. In addition, the expertise acquired by magnet judges is interpreted by some as increased receptiveness to legal arguments advanced

¹²³ See Reich, *supra* note 86, at 10–11.

¹²⁴ *Id.* at 10.

¹²⁵ *Id.* at 11 (estimating that Wilmington, Delaware, receives a \$100 million economic boost each year from bankruptcy cases).

¹²⁶ *Id.*

¹²⁷ NAAG Letter, *supra* note 100.

¹²⁸ See *id.*

¹²⁹ See Susan Mathews, *Corporate Chapter 11 Bankruptcies: The Case for Venue Reform*, ABEJOURNAL (Sept. 24, 2014), <https://www.abfjournal.com/articles/corporate-chapter-11-bankruptcies-the-case-for-venue-reform> [<https://perma.cc/UG46-R9GR>].

¹³⁰ See *id.*

by sophisticated parties, further undermining the fairness of the bankruptcy process.¹³¹ The lack of meaningful ties to the debtor's business or operations, as well as to the areas where financial distress might be felt the hardest, can be partially supported by empirical data showing an increasing trend in filings outside of the principal place of business in favor of New York and Delaware.¹³² Some proponents of the "race to the bottom" theory reject critics' view that New York and Delaware are picked as venues for efficiency and convenience; rather, they suggest that debtors seek to avail themselves of the expertise of bankruptcy judges and avoid the debtor's local bankruptcy judges.¹³³ While this remark might be partly sustained, it appears difficult to discern a real issue because picking a more neutral forum that is free of local political considerations often would seem to be a more suitable alternative in favor of forum shopping.

A more cynical approach to forum shopping comes from scholar Lynn LoPucki, who infamously questioned the integrity of justices in magnet districts.¹³⁴ Despite having been coined an "offensive fantasy" by a few,¹³⁵ his criticism partly denounces larger restructurings being filed in locations solely for the benefit of a debtor corporation's officers and stakeholders.¹³⁶ As a proponent of the notion that forum shopping poses a threat to the integrity of the bankruptcy system, he further suggests that a liberal construction of venue fosters competition for high-profile cases, leading to the creation of elitist firms.¹³⁷ While not

¹³¹ See Davidoff, Miller & Shechtman, *supra* note 90.

¹³² See Matthews, *supra* note 129 (showing that 70% of public companies during 2009–2014 filed in districts other than the district where their principal place of business or principal assets were located, and 80% of these cases were filed in either the Southern District of New York or the District of Delaware).

¹³³ ABI Report, *supra* note 19, at 311 n.1084 (citing Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 1001–02 (1999) (supporting this view with empirical research)).

¹³⁴ See Casey & Macey, *supra* note 69, at 465 n.5 (citing Randles, *supra* note 69 (quoting LoPucki: "The leading bankruptcy lawyers tell the judges what to do . . . [t]hey're not asking, they're telling.")).

¹³⁵ See *id.* at 466 n.11 (citing Randles, *supra* note 69 (quoting LoPucki: "The leading bankruptcy lawyers tell the judges what to do . . . [t]hey're not asking, they're telling.")).

¹³⁶ See Casey & Macey, *supra* note 69, at 465; Mark Pfeiffer, *Let's Talk About Chapter 11 Venue Again*, ABI J., May 2020, at 20 (citing ABI Report, *supra* note 19, at 312) (stating that creditors filing in New York or Delaware receive 25% less than those filing outside those locations)).

¹³⁷ See Eisenberg & LoPucki, *supra* note 133, at 1001–02.

substantially unfounded, LoPucki's claim would call into question the integrity of bankruptcy judges and the prestige of the federal bench that subjects judges to high moral and ethical principles, but nothing suggests that bankruptcy judges' behavior could reasonably be called into question. Lastly, LoPucki's suggested manipulation of the place of filing to evade one's creditors was strictly rejected by Judge Gropper in his 2003 decision, noting that improper venue could always be fixed by dismissing the case or transferring it in the interest of justice.¹³⁸

One of the most sensible arguments made by "race to the bottom" theorists is the limited diversity in judicial opinions since "complex and novel issues of law" tend to be decided in the same magnet districts.¹³⁹ Some comments further support the congressional findings calling for restoring the bankruptcy system's integrity and the public confidence in it.¹⁴⁰ Reform advocates insist on the inability to assess differing views on appeal as a result of cases being concentrated in the same magnet districts, with debtors picking "the initial . . . [and] the final arbiter of their fate."¹⁴¹ Nonetheless, in contrast, proponents of the "race to the top" put forward a list of factors that demonstrate how forum shopping remains vital to maintaining the attractiveness of Chapter 11, especially when making the case for foreign airlines availing themselves of U.S. courts.

C. . . . OR THE TOP?

Supporters of forum shopping often describe the flexibility in venue selection as facilitating the "most effective and value-maximizing reorganization" to the debtor, arguably the most important objective when assisting a business experiencing financial distress.¹⁴² In addition, the geographic diversity of corporate entities, spread across the country and even the world, makes places like New York and Delaware the obvious choices for restructuring because they are hubs for financial institutions and

¹³⁸ See *id.*; *In re Avianca*, 303 B.R. 1, 13 (Bankr. S.D.N.Y. 2003).

¹³⁹ See Mark A. Salzberg & Kyle F. Arendsen, *Bankruptcy Venue "Reform" – What Are the Odds This Time?*, NAT'L L. REV. (Oct. 5, 2021), <https://www.natlawreview.com/article/bankruptcy-venue-reform-what-are-odds-time> [<https://perma.cc/3LW8-KJ35>].

¹⁴⁰ See S. 2827, 117th Cong. § 2(a)(4)–(6) (2021).

¹⁴¹ See NAAG Letter, *supra* note 100.

¹⁴² See ABI Report, *supra* note 19, at 312 (citing Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 Nw. U. L. Rev. 1357, 1359 (2000)).

corporations.¹⁴³ Overall, those magnet districts offer expediency of cases, strong precedents that coincide with increasing predictability, and judges with expertise. These advantages paired with a lack of national uniformity on key legal bankruptcy issues¹⁴⁴ make the perfect case in favor of forum shopping.

Magnet districts undeniably excel in their efficient administration of complex cases. While rejecting the argument that judges in other districts are not as competent, opponents of reform acknowledge that judges in New York and Delaware are exposed to “heightened scrutiny and criticism.”¹⁴⁵ Most importantly, they sharply condemn the idea that those same judges might be corrupt or improperly influenced when picking cases to make their district more attractive.¹⁴⁶ Despite the apparent bias that an editorial by the New York City Bar Committee might hold, it does validly support the argument that venue does not play a role in higher professional fees, as LoPucki suggested, by stressing the role of both the U.S. Department of Transportation and the Department of Justice in tracking abuses of power.¹⁴⁷ In addition, the expediency of prepackaged restructuring plans (prepared in cooperation with the debtor’s creditors prior to filing) in Delaware positively contributes to an “economic and efficient administration of the estate,” identified as a key factor by several courts.¹⁴⁸ While an efficient economic administration may be

¹⁴³ See generally William J. Moon, *Delaware’s Global Competitiveness*, 106 IOWA L. REV. 1683, 1685–92 (2021).

¹⁴⁴ See, e.g., Brian Honea & Marcy Ford, *Counsel’s Corner: Lack of Uniformity in Bankruptcy Laws, CFPB Rules Challenging Servicers*, DSNEWS: DAILY DOSE (Feb. 20, 2015), <https://dsnews.com/news/02-20-2015/counsels-corner-lack-uniformity-bankruptcy-laws-cfpb-rules-challenging-servicers> [https://perma.cc/X6VA-ABSB].

¹⁴⁵ NAAG Letter, *supra* note 100; see also N.Y.C. BAR, REPORT ON LEGISLATION BY THE BANKRUPTCY AND CORPORATE REORGANIZATION COMMITTEE 1, 6 (2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-opposing-the-bankruptcy-venue-reform-act-of-2018> [https://perma.cc/2KXE-DMGP].

¹⁴⁶ N.Y.C. BAR, *supra* note 145, at 6.

¹⁴⁷ See *id.* (rejecting the competition argument as unfounded and citing to significant safeguards in the Bankruptcy Code shielding restructuring processes from abuse by unscrupulous judges, if there are any); see also NAAG Letter, *supra* note 100.

¹⁴⁸ See, e.g., VanLare & Murtagh, *supra* note 65, at 28–29 (quoting Puerto Rico v. Commonwealth Oil Refin. Co. (*In re Commonwealth Oil Refin. Co.*), 596 F.2d 1239, 1247 (5th Cir. 1979) (discussing how “[t]he economic administration of the estate” is one the most important factors in considering the appropriateness of venue, even when going counter to the overwhelming majority of stakeholders)).

important when choosing a venue, it can be subject to transfer “in the interest of justice,”¹⁴⁹ especially in cases of “manufactured venue.”¹⁵⁰ In contrast, proponents of reform suggest that the speed with which complex cases are handled in magnet districts leads to less consideration of junior claimants.¹⁵¹ In the absence of priming liens, junior lenders would end up financing senior lenders—who already have a monopoly—and make it less desirable for junior lenders to try to enter the not-so-competitive market of restructuring financing.¹⁵² Nonetheless, counterarguments make the latter claim bear not as much weight.¹⁵³ For example, opponents of reform have advised against the risk of increasing unpredictability and inconsistency by reforming venue as it stands today.¹⁵⁴ The fear of losing good precedent may force creditors to charge higher interest rates and make lenders bear additional costs,¹⁵⁵ which could undermine an efficient restructuring and jeopardize securing DIP financing.

Judges’ expertise is another factor strongly tipping the balance in favor of maintaining the status quo and opposing venue reform. For instance, the complexity and volume of cases in magnet districts allow for partial experimentation with the law and the building of strong precedent, both of which are desirable to DIPs and creditors.¹⁵⁶ A proponent of the bill, although not advocating for strict venue reform, did stress that forcing debtors into districts lacking the experience or resources to efficiently preside over sophisticated reorganizations would completely go against the proposition the Code stands for—to allow for an efficient reorganization accommodating the needs of both debtors and nondebtors.¹⁵⁷ Another practitioner testified that forcing debtors to forgo the “benefits of those sophisticated courts and the investor confidence they bring, in favor of jurisdictions with less predictable and potentially conflicting laws”

¹⁴⁹ See FED. R. BANKR. P. 1014(a)(1).

¹⁵⁰ See VanLare & Murtagh, *supra* note 65, at 32.

¹⁵¹ See Skeel, *supra* note 4.

¹⁵² See *id.*

¹⁵³ See N.Y.C. BAR, *supra* note 145, at 4–5.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.* at 5–6.

¹⁵⁷ See Pfeiffer, *supra* note 136, at 20.

would truly undermine the status and notoriety of Chapter 11.¹⁵⁸

Another benefit of the current rules of bankruptcy venue is the ultimate fairness of debtor choice, notwithstanding the argument that local constituencies might be undermined by forum shopping. In fact, Chapter 11 has been described as having “enduring value as a transparent and neutral multiparty forum,” used in its most efficient way to resolve issues of parties with diametrically opposed interests.¹⁵⁹ That alone ought to stand as an illustration that today, Chapter 11 is a system through which fairness can be achieved. Another important aspect that opponents of reform advocate for is the limitation of local bias.¹⁶⁰ By not having local judges who are more receptive to economic disruptions and local political pressures weigh in on those restructuring cases, magnet districts offer a neutral forum in favor of forum shopping.¹⁶¹ To further undermine the importance that reform proponents give to bankruptcy’s “public” purpose, one must note that the proximity of the debtor to its local constituents lessens insofar as parties of interest support the debtor’s choice of venue or have professional representation.¹⁶² While the due process rights of employees and retirees cannot be ignored, the complexity of entities’ restructuring often warrants their representation by union representatives, especially in larger cases seeking to reject CBAs.¹⁶³

Moreover, the Supreme Court’s failure to address many of the local inconsistencies in applying federal bankruptcy principles exacerbates the lack of nationwide uniformity, further enticing debtors to avail themselves of districts they perceive more predictable and receptive to their needs.¹⁶⁴ One example where disparity among circuits persists is in the adoption or rejection of critical contracts under Section 365. For example, some courts disagree over what a debtor might do when lacking counterparty consent; some courts dispense the debtor of such formality by showing it does not wish to assign the contract to a

¹⁵⁸ Mathews, *supra* note 129, at n.9 (citing to comments made by Michael Luskin for the New York City Bar Association’s Committee on Bankruptcy and Corporate Reorganization).

¹⁵⁹ Miller & Waisman, *supra* note 24, at 169.

¹⁶⁰ See Casey & Macey, *supra* note 69, at 475.

¹⁶¹ See *id.*

¹⁶² See VanLare & Murtagh, *supra* note 65, at 30.

¹⁶³ *Id.*

¹⁶⁴ Andy Dietderich, “Confessions” of a Forum-Shopper: Part I, 40 AM. BANKR. INST. J. 28, 52 (2021).

third party, whereas other courts render the contract nonassignable without counterparty consent.¹⁶⁵ This major difference in interpretation can lead to a massive loss of revenue for the debtor experiencing financial distress, putting critical contracts at risk and preventing the introduction of prepackaged plans shown to contribute to the efficiency of the bankruptcy system overall.¹⁶⁶

Another point of disagreement among circuits shows how forum shopping might be the best alternative absent national consensus. As proponents of reform agree, local constituencies and employees are entitled to due process, and their interest in preserving their employment is key.¹⁶⁷ Nonetheless, circuits rule differently on whether priority should be granted to workers' severance pay.¹⁶⁸ Often, severance becomes an unsecured claim and thus lacks priority in repayment, which might encourage layoffs by enticing certain debtors and secured creditors to favor Delaware as a venue to benefit from this "window of opportunity."¹⁶⁹ In comparison, New York includes severance as a cost of reorganization, making it a key difference between the two magnet districts.¹⁷⁰

Lastly, two substantive issues further illustrate the absence of uniformity in applying bankruptcy provisions nationwide: sales "free and clear" and third-party releases. A split in authority on the meaning of "greater than the aggregate value of all liens on the property"¹⁷¹ may impair the ability to buy a debtor's assets or property when a lien remains. While some courts understand the provision as meaning the proposed purchase price must be less than all liens combined, others interpret it as the value of the business needing to be lower than the amount of secured claims.¹⁷² Furthermore, third-party releases are a system through which parties not having undertaken the burden of bankruptcy are being sheltered from liability by using releases from the

¹⁶⁵ Richard Bernard, Scott Gautier & Vince Slusher, *Important Consideration Regarding Pending Bankruptcy Venue Reform Legislation*, N.Y.L.J. (June 4, 2021), <https://www.bloomberglaw.com/document/X9GR8ROK000000?jcsearch=GLm45eghikh#jcite> [<https://perma.cc/9PLX-Y5XD>].

¹⁶⁶ See Dietderich, *supra* note 164, at 28–29.

¹⁶⁷ See *id.* at 29.

¹⁶⁸ See *id.* at 29–30, 52.

¹⁶⁹ See *id.* at 52.

¹⁷⁰ See *id.*

¹⁷¹ See Bernard, Gautier & Slusher, *supra* note 165; 11 U.S.C. § 363(f)(3).

¹⁷² See Bernard, Gautier & Slusher, *supra* note 165.

debtor's senior creditors to fund mass tort settlements.¹⁷³ This very controversial tool has led to heated debates and discrepancies among courts on how inclined they are to enforce third-party releases.¹⁷⁴ While some unfavorable forums choose not to enforce those releases, others do by considering the value third parties bring to the reorganization and whether such releases may be essential to the restructuring effort.¹⁷⁵

While not devoid of any bias, the discussion of forum shopping and venue reform by the Governor of Delaware and the New York City Bar perfectly concludes the case in favor of the “race to the top” theory.¹⁷⁶ For the proposed Bankruptcy Venue Reform of 2018, Governor Carney cautioned against barring access to Delaware courts, a “world-class bench and bar with exceptional expertise in corporate legal issues and bankruptcy.”¹⁷⁷ He argued that the reform would restrict optional venues to businesses and hurt the U.S. economy, considering that over two-thirds of American businesses in the Fortune 500 are incorporated in Delaware.¹⁷⁸ In addition, bearing the importance of local constituencies in mind, the “blow” to the Delaware economy and the impact on businesses and people serving restructuring would be considerable according to Governor Carney’s statement.¹⁷⁹ Similarly, the New York City Bar emphasized that the Bill represented a “radical departure from longstanding [venue] practice” that would “impair corporate debtors’ ability to maximize their creditors’ recoveries,” and would not act in furtherance of advancing the interests of employees, who are often far from the debtor’s principal place of business or assets.¹⁸⁰ Fur-

¹⁷³ See, e.g., *id.*

¹⁷⁴ Cf. Jacoby, *supra* note 112, at 413 (claiming third-party releases violate the goal of a Chapter 11 filing of “resolving overindebtedness”).

¹⁷⁵ See Bernard, Gautier & Slusher, *supra* note 165 (noting the overwhelming support of the plan by affected creditors is an additional factor in favor of approving third-party releases).

¹⁷⁶ See generally Governor Carney, *Congressional Delegation Respond to Bill That Would Hurt U.S. Economy, Change Bankruptcy Venue Laws*, OFF. OF THE GOVERNOR (Jan. 8, 2018) [hereinafter *Gov. Carney Statement*], <https://news.delaware.gov/2018/01/08/venue-options-bill/> [<https://perma.cc/2LM6-Q3LE>]; N.Y.C. BAR, *supra* note 145, at 1.

¹⁷⁷ See *Gov. Carney Statement*, *supra* note 176.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* (citing to Professor of Law David Skeel, who testified to the House of Representatives that strict venue reform would “undermine the effectiveness of . . . [the] corporate bankruptcy system . . . [and] increase the administrative costs”).

¹⁸⁰ See N.Y.C. BAR, *supra* note 145, at 1.

ther arguing on behalf of bankruptcy's public purpose, the statement stressed local constituents' ample ability to participate in restructuring proceedings through virtual court appearances and case information accessible online.¹⁸¹ This very sharp remark further discredits "race to the bottom" theorists' view that forum shopping undermines the public purpose of the bankruptcy system.¹⁸²

Bankruptcy may not be perceived solely as having a private purpose; in fact, the public facets of restructuring become key to an efficient administration of the debtor's estate. Nonetheless, the "race to the top" theory is directly correlated to the attractiveness of the U.S. system offering predictability, efficiency, and expertise to both domestic and foreign entities seeking restructuring assistance.¹⁸³ Further, an attempt at reforming bankruptcy venue could jeopardize the country's place on the global insolvency stage.¹⁸⁴ The risk of removing the state of incorporation as a proper venue would ultimately bar many foreign entities from accessing U.S. courts. It would present foreign airlines like Avianca or Philippine Airlines with a single alternative—to forum shop globally—harming U.S. creditors and hurting the United States' dominance in aviation.

IV. RISK OF GLOBAL FORUM SHOPPING

As the debate on venue shopping reform myopically rages in the United States, its impact could be felt on a global scale. Not only would a reform of bankruptcy venue impact which courts domestic debtors could avail themselves of, but it would risk prompting a phenomenon of global forum shopping. As the field becomes more level and foreign jurisdictions emerge as insolvency hubs, one may wonder not if but rather *when* companies will start restructuring somewhere outside the United States.¹⁸⁵ Note that for the first time in bankruptcy history, a

¹⁸¹ *See id.* at 2.

¹⁸² *See* Casey & Macey, *supra* note 69, at 465 (citing Randles, *supra* note 69 (quoting LoPucki: "The leading bankruptcy lawyers tell the judges what to do . . . [t]hey're not asking, they're telling"))).

¹⁸³ *Id.* at 466.

¹⁸⁴ *Id.* at 467–68.

¹⁸⁵ Michael Berthiaume, *Proposed Legislation May Trip-up International Bankruptcy Filings in the United States*, in INT'L RESTRUC. NEWSWIRE, 25, 25–26 (2021).

U.S.-headquartered company selected the United Kingdom's (U.K.'s) model for restructuring in 2019.¹⁸⁶

A. DOMESTIC VENUE REFORM POSING A THREAT TO FOREIGN ENTITIES

1. *The Rise of Global Forum Shopping*

The proposed bankruptcy venue reform would bar foreign debtors from accessing U.S. courts; those debtors may no longer qualify absent tangible assets in the United States, or they may be forced into unusual and inconvenient districts outside of Delaware and New York.¹⁸⁷ Senator Warren described Chapter 11 as belonging in “the pantheon of extraordinary laws that have shaped the American economy and society [that] then echoed throughout the world . . . [exemplifying the] myth [of] the pioneer making a fresh start on the boundless prairie.”¹⁸⁸ It begs the question of why risk the United States' position as a major force in corporate restructuring and change a system that has worked for decades at a moment of critical uncertainty worldwide. While it may not seem problematic at first, global forum shopping would undermine the position of the United States as the benchmark in restructuring matters, ultimately running the risk of both hurting U.S. creditors and undermining the country's role in the spheres of insolvency and aviation.

Despite the United States remaining the preferred forum for corporate restructuring thus far, practitioners have noted the rise of foreign forums becoming increasingly competitive.¹⁸⁹ One explanation for this trend towards a globalization of the bankruptcy industry comes from those that dictate venue issues globally—not legislatures but jurisdictions controlling “large

¹⁸⁶ Simon Thomas & Oonagh Steel, *Could Syncreon Lead to More U.S. Companies Using English Schemes?*, GLOB. RESTRUC. REV. (Sept. 12, 2019), <https://globalrestructuringreview.com/could-syncreon-lead-more-us-companies-using-english-schemes> [<https://perma.cc/78UF-N2KT>].

¹⁸⁷ See, e.g., Casey & Macey, *supra* note 69, at 468; Berthiaume, *supra* note 185, at 25.

¹⁸⁸ Gerard McCormack, *Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies*, 63 INT'L & COMPAR. L.Q. 815, 827 (2014) (quoting Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 604 (2009)).

¹⁸⁹ See generally Oscar Couwenberg & Stephen J. Lubben, *Good Old Chapter 11 in a Pre-Insolvency World: The Growth of Global Reorganization Options*, 46 N.C. J. INT'L L. 353, 366–74 (2021) (discussing the rise of global alternatives to Chapter 11 emerging as viable alternatives to the English scheme of arrangement, including the systems in Spain, the Netherlands, and Germany).

pools of capital waiting to be deployed in the service of distressed investing.”¹⁹⁰ Certain locations have started to attract a disproportionate share of restructuring cases; larger cities located near large financial centers and capital pools perceived as business friendly have emerged in direct competition with the United States.¹⁹¹ Those larger restructuring cases have progressively parted from an optic towards reorganizing for one of finding a “vehicle for ‘financial play,’” ultimately encouraging a war over venue location.¹⁹² The winner of this forum war is predicted to be the country that (1) controls capital pools and (2) offers a bankruptcy venue with ease of access and predictability,¹⁹³ the second point being undeniably undermined by the U.S. bipartisan bill.

A few examples showcase how many foreign jurisdictions are making a good faith effort in entering the corporate restructuring stage. Under the Canada Business Corporations Act, corporate debtors may get third-party releases,¹⁹⁴ which remains a highly contested issue in the United States and a factor incentivizing domestic forum shopping absent uniformity among circuits. In the Netherlands, the Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans mimics, in many ways, Chapter 11; in addition to a DIP, it offers a stay against certain creditors, permits the invalidation of certain *ipso facto* clauses, authorizes the sale of unencumbered assets, and allows for a cramdown plan of reorganization.¹⁹⁵ Germany, Australia, India, and Italy have also demonstrated their appeal in insolvency matters.¹⁹⁶ Another prominent world player, the European Union (EU), is worth mentioning. Despite not yet catching up to the United States or its direct competitors, the EU’s issuance of its 2019 Restructuring Directive attempts to harmonize insolvency laws between its member states by, for example, (a) introducing a DIP, (b) banning *ipso facto* clauses, and (c) allowing for a cross-

¹⁹⁰ See Bill Brandt, *Forum Shopping on a Global Scale*, COM. L. WORLD, July–Sept. 2019, at 20. Brandt was an advisor to Congress on insolvency policy and the principal author to the Bankruptcy Code’s amendment that allows for the election of trustees in Chapter 11 cases. *Id.* He also served on the American Bankruptcy Institute’s Commission to reform Chapter 11. *Id.* His active involvement in Singaporean courts provides him with a unique perspective on the topic. *See id.*

¹⁹¹ *Id.* at 21.

¹⁹² *See id.* at 20.

¹⁹³ *See id.* at 22.

¹⁹⁴ Berthiaume, *supra* note 185, at 26.

¹⁹⁵ *See id.* at 26–27.

¹⁹⁶ *See id.*

class cramdown mechanism enforceable against dissenting creditors even when they are in separate classes.¹⁹⁷ While certain of the aforementioned reforms might seem attractive to foreign debtors experiencing financial distress, they nonetheless lack the substantial appeal of DIP financing, the automatic stay, and the expertise that an American forum would traditionally provide.

This global forum shopping phenomenon is well at our doorstep and may even be deemed to threaten the prominence of the United States at a time when many nations are evolving in the competitive insolvency marketplace. While domestic districts are limited in their ability to change bankruptcy precedents emanating from federal law, foreign forums are not similarly constrained. Three main localities are on the rise as direct competitors to the United States: the U.K., Hong Kong, and Singapore, with the latter already “stealing” bankruptcy judges from our magnet districts for the benefit of the Singapore International Commercial Court.¹⁹⁸

2. *The United Kingdom and Singapore: The Two Rising Stars*

The first forum presenting a competitive risk to our magnet districts is the U.K., offering to the debtor both liquidation and administrative restructuring alternatives, and keeping the rescue of the company as an ongoing concern.¹⁹⁹ Up until 2020, the U.K. solely offered a scheme of arrangement to the distressed debtor; this insolvency proceeding allowed for the modification of creditors’ rights upon approval by (1) a majority in number of each class of creditors and (2) at least 75% in value of the debt held by the creditors at voting (a form of DIP restructuring) irrespective of the debtor’s solvency or creditors’ unanimity in assenting to secured interests being written off.²⁰⁰ In other words, a debtor not yet experiencing financial distress, but hop-

¹⁹⁷ Matthew Thorn & Manhal Zaman, *And, More Keeping Up with the Joneses: The New EU Restructuring Directive and Reforms in the United Kingdom*, in INT’L RESTRUC. NEWSWIRE 11, 11 (2019).

¹⁹⁸ Daniel Gill, *Judge Christopher Sontchi Retiring from Delaware Bankruptcy Bench*, BLOOMBERG L. (Nov. 15, 2021), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XBUTSJAS000000?bna_news_filter=bankruptcy-law#jcite [<https://perma.cc/Z24T-E9WU>] (Judge Sontchi will leave the Delaware bench for Singapore while retaining a role as a mediator and arbitrator in Delaware).

¹⁹⁹ See McCormack, *supra* note 188, at 824–25.

²⁰⁰ See Casey & Macey, *supra* note 69, at 488–89 (note that the “irrespective of the debtor’s insolvency” qualifier is unique to the U.K. scheme).

ing to avoid such unfortunate event, could avail itself of the U.K. scheme, making it a powerful restructuring tool despite the lack of a cramdown provision.²⁰¹ The high degree of public disclosure, limited judicial oversight, and speedy resolution made the scheme a popular alternative, with the court merely acting as a monitoring body and giving vast flexibility to the negotiating debtor.²⁰² The likelihood that the scheme of arrangement will be recognized and enforced by foreign jurisdictions, including the United States, made it a useful tool to resolve mostly intraclass holdout problems involving labor contracts or discharging environmental obligations.²⁰³ In other words, the U.K. scheme was not a true adversary to the magnet districts, but remained a decent restructuring tool.²⁰⁴

However, the most significant change to British insolvency law unquestionably came in 2020, with the amendment of Part 26A of the U.K. Companies Act of 2006.²⁰⁵ This innovation to the U.K.'s new restructuring plan adds a cross-class cramdown mechanism, vastly mimicking features of Chapter 11's own cramdown provision.²⁰⁶ While a court retains oversight power over the restructuring plan and process through two court hearings pending approval, the new U.K. model bears heavy resemblance to Chapter 11.²⁰⁷ The U.K. DIP is similar to the United States one because directors of the company proposing the plan remain in control during the restructuring process.²⁰⁸ While the United States retains exclusivity in having an automatic stay effective immediately upon filing, the U.K. model offers a moratorium preventing the enforcement of certain legal proceedings, securities, and forfeiture of leases.²⁰⁹

While the new U.K. model offers undeniable benefits, it nonetheless falls short of Chapter 11's superiority. Despite the intro-

²⁰¹ *See id.* at 489.

²⁰² *See* Thomas & Steel, *supra* note 186.

²⁰³ *See* Casey & Macey, *supra* note 69, at 490.

²⁰⁴ *See id.*

²⁰⁵ *See* Judah Frogel, Daniel Guyder, Jennifer Marshall & Shaheen Karolia, *Restructuring Across the Pond and Back: A Comparison of Chapter 11 and the New UK Act*, in *LENDING & SECURED FIN.* 100, 100 (9th ed. 2021), <https://iclg.com/practice-areas/lending-and-secured-finance-laws-and-regulations/15-restructuring-across-the-pond-and-back-a-comparison-of-chapter-11-and-the-new-uk-act> [<https://perma.cc/Y5E4-KY4X>].

²⁰⁶ *Id.*

²⁰⁷ *See id.* at 100–01.

²⁰⁸ *See id.* at 101.

²⁰⁹ *See id.*

duction of a cross-class cramdown provision, a British court retains incredible discretionary power in approving the plan in comparison to its American counterpart.²¹⁰ Whereas Chapter 11 would not permit a junior class of creditors to recover unless all senior claims were satisfied in full, a U.K. plan is not subject to the same absolute priority rule.²¹¹ While the British court must consider principles of equity and fairness, such discretionary power undermines the reliability upon which a foreign debtor may expect confirmation of its plan.²¹² Despite less expensive filing fees, the major flaw of the U.K. restructuring plan rests on its lack of DIP financing alternatives, which has made the United States an attractive venue to foreign entities.²¹³ American bankruptcy courts remain the standard when DIP financing is required because the U.K. model neither provides higher priority to restructuring financing nor imposes new obligations on creditors to advance money.²¹⁴ While subtle differences persist between the new U.K. insolvency cramdown model and the infamous Chapter 11, the U.K. cramdown model's success has already been demonstrated. For example, DeepOcean Group, a popular provider of subsea services in the oil and gas and renewable industries, successfully completed the first reorganization effort using the U.K. cramdown restructuring tool in January 2021, firmly establishing the tool's presence on the international restructuring scene.²¹⁵

The second actor attempting to mimic Chapter 11 and establish its presence as the restructuring hub in the Asia-Pacific region is Singapore, which has strong and efficient insolvency processes.²¹⁶ In its attempt to surpass Hong Kong, which has allegedly lagged in joining modern insolvency trends and parting

²¹⁰ See *id.* at 103.

²¹¹ See *id.* at 103; 11 U.S.C. § 1129(b)(2).

²¹² Frogel et al., *supra* note 205, at 103–04.

²¹³ See Adam Gallagher, Toby Smyth & Madlyn Gleich Primoff, *Is the New UK Restructuring Plan a Viable Alternative to Chapter 11?*, 39 AM. BANKR. INST. J. 24, 69 (2020).

²¹⁴ See *id.*; see also Frogel et al., *supra* note 205, at 103–04.

²¹⁵ See James Stonebridge, *Deep Ocean – The First UK Cross-Class Cram-Down Case Under the Corporate Insolvency and Governance Act 2020*, in INT'L RESTRUC. NEWSWIRE 9, 10–12 (2021).

²¹⁶ Scott Atkins & Kai Luck, *Cross-Border Insolvency in Hong Kong: Common Law Limitations and How the Model Law Could Drive Foreign Investment and Economic Growth*, in INT'L RESTRUC. NEWSWIRE 11, 13 (2021). Singapore ranks 27th for perceived strength and efficiency of its insolvency laws and processes on the World Bank's 2020 Estimate of Doing Business rankings. *Id.* at 14.

from a common law framework,²¹⁷ Singapore has attracted worldwide business and legal communities, making it one of the top destinations for corporate restructurings.²¹⁸ For the first time, Singaporean law authorizes the protection of new capital in an effort to “prime existing creditors,” creating in effect a lending arrangement unequivocally resembling DIP financing.²¹⁹ Singapore further enhanced its attractiveness as a primary destination for the flow of foreign capital in 2017 by adopting the Model Law, which seeks to permit the recognition of foreign insolvency proceedings, the ability to take control of assets of foreign companies located in Model Law jurisdictions, and the pursuit of investigations and recovery proceedings per local insolvency laws of a member jurisdiction.²²⁰

In conclusion, the similarities Singaporean insolvency laws bear to Chapter 11’s automatic stay, cramdown mechanism, and procedures for approving prepackaged plans²²¹ allow only one conclusion: Singapore is threatening the United States’ place as the golden standard in restructuring. It appears almost impossible to think of a reorganization scheme that would mimic Chapter 11 more, with the exception of Chapter 11 itself. A closer look at the U.K.’s new insolvency law and the Singaporean model of restructuring leaves one wondering what remedies might be available to prevent corporate debtors from fleeing to foreign forums and preserve the United States’ expertise and reputation.

B. SUGGESTED ALTERNATIVES TO VENUE REFORM

As demonstrated, the threat of global forum shopping is well-established because the U.K., Singapore, and (to a certain extent) Hong Kong are progressively emerging as strong alternatives to a Chapter 11 restructuring.²²² Reforming bankruptcy venue could alter the course of restructuring as we know it today. As previously demonstrated, magnet districts offer exper-

²¹⁷ See *id.* at 14; see also Scott Atkins, Camille Jojo, Kai Luck & Daniel Ng, *Hong Kong Advances Its Restructuring Credentials in Its New Cross Border Insolvency Framework with Mainland China*, in INT’L RESTRUC. NEWSWIRE 12, 12 (2021) (discussing Hong Kong increasing its ties to China by starting to recognize their insolvency proceedings by, for instance, staying garnishment by a creditor against a Hong Kong debtor after a liquidation process had been started in China).

²¹⁸ See Brandt, *supra* note 190, at 21.

²¹⁹ See *id.*

²²⁰ See Atkins & Luck, *supra* note 216, at 11, 13.

²²¹ Casey & Macey, *supra* note 69, at 490.

²²² See Brandt, *supra* note 190, at 21.

tise, predictability, and expediency in the administration of complex cases—all desirable to a debtor experiencing financial distress.²²³ Other factors strongly suggest that bankruptcy venue might not be an issue at all. First, venue can be changed, and a case can be dismissed to another jurisdiction in the interest of justice or, in some cases, of the parties of interest.²²⁴ Second, the complex corporate structure of large debtors includes subsidiaries in various locations and a wide array of contracts subject to different forum clauses, making it more practical to handle those cases in districts home to corporations and financial institutions.²²⁵ And third, bankruptcy venue does not usually involve a typical two-party adversarial proceedings where traditional nonbankruptcy venue rules would make sense.²²⁶

Given the ramifications that this bankruptcy venue reform would have on global forum shopping, it is wise to consider other alternatives that would remedy some of the issues that “race to the bottom” theorists have identified while also safeguarding the reputation and desirability of American bankruptcy courts. One proposition would be rather simple: resolve the circuit splits on material issues such as critical contracts and third-party releases.²²⁷ Forum shopping often occurs when a debtor is seeking favorable legal precedent on a particular issue, a practice that proponents of reform have condemned over time.²²⁸ By letting the legislature amend the Code or having the Supreme Court grant certiorari on those particularly contentious issues, debtors would have less incentives to avail themselves of Delaware or New York courts and could keep their restructuring more local.²²⁹ It is important to note that, contrary to venue, third-party releases and severance pay have been subject to less scrutiny and have not particularly garnered the atten-

²²³ See *supra* Section III.C.

²²⁴ Kenneth A. Rosen & Philip J. Gross, *Bankruptcy Venue Reform Bill Needs Amending*, LOWENSTEIN SANDLER (Oct. 12, 2021), <https://www.lowenstein.com/news-insights/publications/articles/bankruptcy-venue-reform-bill-needs-amending-rosen-gross> [<https://perma.cc/67EJ-JCTX>].

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See, e.g., Casey & Macey, *supra* note 69, at 496–98; Bernard, Gautier & Slusher, *supra* note 165; Dieterich, *supra* note 164, at 29, 52.

²²⁸ See Casey & Macey, *supra* note 69, at 496 (citing Karen M. Gebbia, *Certiorari and the Bankruptcy Code: The Statutory Interpretation Cases*, 90 AM. BANKR. L.J. 503, 510 (2016)).

²²⁹ See *id.*

tion of politicians or voters,²³⁰ making it more likely that a successful amendment of the Code would prevail.

Another remedy that has been suggested for decades is the notion of *ex ante* commitment: having debtors and creditors agree to a proper restructuring venue prior to the onset of financial distress.²³¹ Rasmussen and Thomas were the first to suggest that this approach would incentivize parties of interest “to select the venue which promises to maximize the value of the firm as a whole.”²³² Timing is absolutely critical to picking a restructuring venue, since the interest of a corporation’s managers and stakeholders will likely shift as the case progresses and insolvency looms.²³³ Having them commit to a bankruptcy venue before the company becomes financially distressed would shift optics and have them look beyond mere short-term survival.²³⁴ It has been suggested that forward planning might also benefit the company in negotiating with its creditors; lenders would likely be encouraged to charge lower interests rates upon picking a restructuring venue favorable to the interests of all, adding more securities and predictability once financial distress does occur.²³⁵

Objectively speaking, making bankruptcy venue the product of contractual negotiations would be a perfectly acceptable way to fight forum shopping, let parties exercise their right to contract, and allow parties to weigh their interests while doing so. In fact, some practitioners have supported this view and similarly stress the importance of timing by suggesting the incorporation of insolvency forum clauses.²³⁶ While not dispositive, those clauses stand for the proposition that courts would take into consideration the parties’ original intent and expectations “regarding an appropriate forum for insolvency.”²³⁷

The case of *In re Northshore Mainland Services, Inc.*²³⁸ illustrates this point and suggests that the structure of modern-day corporations and parallel insolvency proceedings increase the interconnectedness and complexity of restructuring cases, making

²³⁰ See *id.* at 496–98.

²³¹ See, e.g., Rasmussen & Thomas, *supra* note 142, at 1359.

²³² See *id.* at 1397.

²³³ See *id.* at 1396–97.

²³⁴ See *id.* at 1399.

²³⁵ See *id.* at 1400.

²³⁶ See generally Richard Levin & Carl N. Wedoff, *What Did You Expect? Insolvency Forum Clauses*, 35 AM. BANKR. INST. J. 108, 108 (2016).

²³⁷ See *id.* at 108.

²³⁸ 537 B.R. 192 (Bankr. D. Del. 2015).

forum clauses a useful alternative.²³⁹ The case involved parties located in numerous countries spanning the globe, with different choice of forum clauses for construction contracts, credit agreements, and security interests.²⁴⁰ Despite finding that the case was filed in good faith by a debtor “on the edge of a financial precipice,”²⁴¹ the ultimate dismissal of the case rested solely on the legitimate expectations of the creditor base, pointing at the Bahamas as the only appropriate restructuring venue.²⁴² The bankruptcy judge exemplified the importance that prenegotiated insolvency clauses could offer while remaining dispositive, stating that the “[e]xpectations of various factors—including the expectations surrounding the question of *where* ultimately disputes will be resolved—are important, should be respected, and [should] not [be] disrupted unless a greater good is to be accomplished.”²⁴³ Adding insolvency forum clauses would account for the importance of timing and could discourage courts from hearing cases in unexpected forums, simultaneously incentivizing the dismissal of any case to a “proper” forum agreed to by the parties of interest.²⁴⁴ Nonetheless, as the *In re Northshore* case shows, those clauses are not dispositive; a court retains discretionary power in removing the case, which could still lead to unpredictability.²⁴⁵

Another proposal emanating from Rasmussen and Thomas’s *ex ante* commitment idea is that of Casey and Macey, who suggest the addition of a mechanism for choosing and later amending, when necessary, venue as a pre-insolvency commitment.²⁴⁶ One contentious aspect of agreeing to a forum pre-insolvency is its rigidity.²⁴⁷ Several explanations account for this and a corporate debtor’s desire to amend the originally agreed upon venue: new precedent might emerge and make another venue more attractive; judges’ expertise might wane as they retire; and backlog

²³⁹ *See id.* at 195–96.

²⁴⁰ *Id.* at 195–96.

²⁴¹ *Id.* at 203.

²⁴² *See id.* at 204–07 (holding the case brought by the Delaware LLC could be heard by the Delaware bankruptcy judge despite removal to the Bahamas on the real estate issue following the Bahamian Supreme Court’s refusal to recognize the petitions or enforce the automatic stay).

²⁴³ *See id.* at 206 (second emphasis added).

²⁴⁴ *See* Levin & Wedoff, *supra* note 236, at 108.

²⁴⁵ *See id.* at 108, 110.

²⁴⁶ *See* Casey & Macey, *supra* note 69, at 498.

²⁴⁷ *Id.* at 499.

may arise.²⁴⁸ Adopting a contractual approach to this problem and creating a mechanism to amend that *ex ante* commitment with a majority of creditors and stakeholders would make it as critical as picking an original venue to guarantee a successful restructuring.²⁴⁹ While this approach is sensible, some have rightfully suggested that no corporation contemplates restructuring in its early stages, and as a result, the corporate debtor is unlikely to know what venue will be best until deciding what the business venture will fully entail.²⁵⁰ In addition, once insolvency does become an issue, it might prove beyond difficult to get creditors and stakeholders alike to elect a new venue.²⁵¹ The concern that such clauses might be deemed unenforceable would seriously undermine their reliability, further increasing unpredictability.²⁵² It is worth noting that, just like insolvency forum clauses, this mechanism could provide guidance to bankruptcy judges and weigh heavily in favor of upholding the parties' expectations pre-insolvency insofar as they do not go against the interests of justice.²⁵³

Lastly, another suggested alternative to reforming bankruptcy venue is the creation of regional bankruptcy centers in each circuit,²⁵⁴ arguably the least appealing remedy presented thus far. As debtors seek magnet districts to handle complex cases for the expediency and expertise of judges, one option to counter forum shopping would be to remove the notion of venue having to be assigned to a particular district.²⁵⁵ While not prescribed to a specific district, those regional bankruptcy centers would include judges who are known and recommended for their expertise to assist the centers in adopting efficient rules and ensuring sufficient staffing.²⁵⁶ Thus, cases would be assigned to a judge of the regional bankruptcy center rather than one from a particular district, with appeals being redirected to the district court where the original filing was made.²⁵⁷ While this suggestion does attempt to reduce forum shopping, it begs the question of whether it would ultimately undermine the efficiency of the

²⁴⁸ *See id.*

²⁴⁹ *See id.* at 499.

²⁵⁰ *See* Dietderich, *supra* note 164, at 52 n.7.

²⁵¹ *See* Casey & Macey, *supra* note 69, at 499–500.

²⁵² *See id.* at 503 n.150.

²⁵³ *See id.* at 503.

²⁵⁴ *See* Pfeiffer, *supra* note 136, at 55.

²⁵⁵ *See id.* at 21.

²⁵⁶ *See id.* at 55.

²⁵⁷ *See id.*

bankruptcy system. But most importantly, it seems as if this idea stands for the proposition that only judges deemed experienced enough would be qualified to be appointed to regional centers and, in a sense, to “train” other judges for efficiency and expertise purposes. One might see this proposal as suggesting certain bankruptcy judges outside magnet districts might not be as competent, giving credence to reform proponents and contradicting “race to the top” theorists and their rejection of this unfounded myth.

Most alternatives to reforming bankruptcy venue emphasize the need for a contractual approach to resolve the issue of forum shopping, absent uniformity in bankruptcy precedents.²⁵⁸ While “race to the top” theorists rightfully claim that forum shopping is beneficial to the bankruptcy system overall, the revived push for reform calls for other means to accommodate the private and public purposes of restructuring.²⁵⁹ Given that timing is key to an efficient plan, a pre-insolvency remedy that might prove a viable option is an insolvency forum clause paired with a mechanism for amendment based on shifts in precedents and stakeholders’ objectives.²⁶⁰ Regardless of the means elected, opposing the bankruptcy venue reform becomes critical to retain foreign debtors in U.S. bankruptcy courts.

C. BUT ULTIMATELY, WHY SHOULD WE CARE?

The need to limit venue reform domestically is paramount because leaving the problem unattended would most likely make the issue grow globally. It would risk leaving non-U.S. forums as (1) the sole alternative to foreign debtors lacking assets in the United States and (2) a more attractive venue for domestic debtors with an international presence.²⁶¹ As such, this undesirable outcome would endanger the United States’ place in the world of corporate bankruptcy law because foreign debtors would be forced to avail themselves of less reputable districts for purposes of efficiency, expertise, and expediency.²⁶² As to the risks it would pose to the United States, the answer is quite simple: it would jeopardize the country’s global presence in the aviation industry and undermine the due process rights of U.S. creditors.

²⁵⁸ See, e.g., Rasmussen & Thomas, *supra* note 142, at 1359 n.7.

²⁵⁹ See *id.* at 1382.

²⁶⁰ Casey & Macey, *supra* note 69, at 498–501.

²⁶¹ See *id.* at 482–84.

²⁶² See *id.* at 493–94.

Beyond any doubt, the United States plays a big role in the aviation industry and the several international agencies regulating it by (a) the location of said agencies, (b) the language requirements imposed on pilots flying internationally, and (c) the Cape Town Treaty and its regulation of aircraft leases. For instance, the Federal Aviation Administration (FAA) works in partnership with the International Civil Aviation Organization (ICAO), the latter agency based both in Washington, D.C., and Montreal, Canada, further demonstrating the geographical importance played by the United States.²⁶³ ICAO, a United Nations (U.N.) specialized agency, was founded under the Chicago Convention of 1944 and has been central in implementing “global standards and recommended practices applicable to international aviation [on issues of] safety, security, air traffic management, and environmental standards, among others.”²⁶⁴ As a member of the governing council of ICAO, the United States has weighed heavily on policies and guidance issued to both governments and industry operators to restart the international air transport sector during the pandemic.²⁶⁵ While the U.S. Department of Transportation requires any holder of a FAA certification to “be able to communicate in English in a discernible and understandable manner with air traffic control . . . [and] pilots,”²⁶⁶ ICAO has also imposed similar language requirements, making English the “all pilots” language.²⁶⁷

The United States does not fall short of being the golden standard at the crossroads between insolvency and aviation. For instance, the Cape Town Treaty of 2001 and the immense deference it gives Chapter 11 in matters of aircraft leases further demonstrate the need to preserve the United States’ global presence in the industry.²⁶⁸ A particular article references the phe-

²⁶³ *ICAO and Global Initiatives*, FAA, https://www.faa.gov/about/office_org/headquarters_offices/apl/international_affairs/global_issues [https://perma.cc/4YND-DEHQ].

²⁶⁴ *Id.*

²⁶⁵ *See id.*

²⁶⁶ FAA, ADVISORY CIRCULAR NO. 60-28B, FAA ENGLISH LANGUAGE STANDARD FOR AN FAA CERTIFICATE ISSUED UNDER 14 CFR PARTS 61, 63, 65, and 107 (2017); *see also* 14 C.F.R. §§ 61.65(2), 63.33(b), 65.33(c), 107.61(b) (2022).

²⁶⁷ *ICAO Promotes Aviation Safety by Endorsing English Language Testing*, ICAO (Oct. 13, 2011), <https://www.icao.int/Newsroom/Pages/icao-promotes-aviation-safety-by-endorsing-english-language-testing.aspx> [https://perma.cc/DM9P-KS6C].

²⁶⁸ *See* Karen McMaster, Ben Andrews & James Cameron, *Aviation: Cramming Cape Town Creditors*, GLOB. RESTRUC. REV. (Dec. 15, 2020), <https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/>

nomenon of global forum shopping and comments that “the United States has not yet lost its crown as the preferred [insolvency] safe harbor . . . within the aviation industry.”²⁶⁹ The Treaty introduced the registration of international interests over aircraft to facilitate the financing and leasing of mobile equipment of high value while providing creditors with a uniform, international regime of enforcement.²⁷⁰ The most noteworthy provision from this Treaty is Article XI, listing a creditor’s remedies when facing an insolvent debtor.²⁷¹ While two alternative regimes are made available, Alternative A is substantially the equivalent of Section 1110 of the U.S. Bankruptcy Code, which governs aircraft equipment and vessels.²⁷² The provision offers similar protections and gives the debtor airline the opportunity to either cure all defaults or give possession of the aircraft to the creditor within a sixty-day period to either accept or reject its leasing agreement.²⁷³ However, the provision requires creditors’ consent and does not offer a cramdown provision.²⁷⁴

In addition to the impact that reforming bankruptcy venue could have on the United States and its input in regulating aviation, U.S. creditors and protection of their interests under the Bankruptcy Code could be jeopardized. Indeed, forcing foreign debtors to avail themselves of foreign forums would imperil the enforcement of U.S. court orders and could greatly undermine the applicability of “adequate protection”²⁷⁵ to U.S. creditors’ collateral. While many financial institutions and lenders have ties to American jurisdictions (often New York or Delaware), mobile assets, such as airplanes, pose a great risk to creditors.²⁷⁶ Absent an automatic stay, the planes’ ability to move across jurisdictions could lead a debtor airline to face an ineffective reorganization.²⁷⁷ Attempts by foreign creditors to recapture U.S. aircraft would leave U.S. creditors without the protection of domestic courts to favorably intervene against such practice.²⁷⁸

2020/article/aviation-cramming-cape-town-creditors#footnote-001-backlink
[<https://perma.cc/2V3E-ULUN>].

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*; see also 11 U.S.C. § 1110.

²⁷⁴ See McMaster, Andrews & Cameron, *supra* note 268.

²⁷⁵ See 11 U.S.C. § 361.

²⁷⁶ See Couwenberg & Lubben, *supra* note 189, at 375–77.

²⁷⁷ See *id.*

²⁷⁸ See, e.g., *id.* at 379.

While a U.S. court order would be binding on those financial institutions and lenders having some contact with the United States, wholly foreign-owned creditors would not be bound by a reorganization plan or discharge, which could present another risk to U.S. creditors.²⁷⁹

Despite the importance of ensuring U.S. creditors are adequately protected, a case for American imperialism should not be advocated for when recognizing foreign insolvency proceedings. The U.S. Bankruptcy Code created Chapter 15, a separate mechanism allowing for the recognition of foreign insolvency proceedings and court orders.²⁸⁰ This process permits a non-U.S. court to serve as the main forum to a debtor's restructuring efforts while encouraging courts in other countries, including the United States, to defer to and coordinate implementation.²⁸¹ This principle of comity remains paramount to a nation as greatly involved in world affairs as the United States. In fact, the country has a national interest in facilitating international restructuring, which strengthens cross-border financial markets and encourages cross-border investment.²⁸² It nonetheless remains of concern that, absent local recognition by the foreign court supervising the debtor's restructuring, non-U.S. creditors with few to no ties to the United States could escape from the reach of U.S. courts.²⁸³ In fact, comity would bar U.S. courts from overseeing a case affecting purely local creditors if local courts from the debtor's home country did not actively try to protect the interest of U.S. creditors.²⁸⁴

While the likelihood that a foreign creditor would completely escape from the reach of U.S. courts is slim given the spread of Wall Street financial products and balance sheets abroad,²⁸⁵ Chapter 11 remains highly predictable to international creditors. As it stands today, bankruptcy venue permits U.S. creditors to directly seek help from U.S. domestic courts to secure their

²⁷⁹ See *id.* at 361.

²⁸⁰ See generally 11 U.S.C. §§ 1501–32 (on Ancillary and Other Cross-Border Cases).

²⁸¹ See Jay Lawrence Westbrook, *Bankruptcy Tourism and FNC*, 3 INT'L J. PROCEDURAL L. 159, 161–62 (2013).

²⁸² See Andy Dietderich, “Confessions” of a Forum-Shopper, Part II: Debtors Without Borders, 40 AM. BANKR. INST. J. 28, 62 (2021).

²⁸³ *Id.* at 61.

²⁸⁴ *Id.* (suggesting U.S. courts give deference to foreign jurisdictions in a very federalist fashion, similar to the way they would in respect to states of the union).

²⁸⁵ See *id.*

highly valued mobile aircraft.²⁸⁶ In addition, the prominent role the United States plays in the aviation sphere further strengthens the case in favor of abandoning this reform project.

V. CONCLUSION

The COVID-19 pandemic wreaked havoc on the aviation industry and with it brought the cyclical return of bankruptcy venue reform. The recent Chapter 11 filings by Purdue Pharma and Catholic dioceses provoked the return of a populist backlash, seemingly recurring before each new introduction of reform.²⁸⁷ Nonetheless, some of the support for reform by officials in Congress and practitioners should not disillusion proponents of the bill. They should anticipate strong resistance that could result in the proposal's ultimate demise, similar to other failed attempts on record.²⁸⁸ Amongst those likely to oppose reform is current U.S. President Biden, a former Senator from Delaware, who has traditionally been a strong proponent of the current venue rules.²⁸⁹

While the likelihood of venue reform's success is debatable, the paradigm at issue remains the same: reforming debtors' venue selection and foreclosing their use of the state of incorporation would imperil foreign entities' ability to avail themselves of U.S. bankruptcy courts, ultimately damaging the global prowess occupied by the United States in restructuring and undermining the rights and remedies available to U.S. creditors. While "race to the bottom" proponents allege that current venue might undermine the fairness and integrity of the bankruptcy system, "race to the top" theorists make the case in favor of expediency of cases, precedents increasing predictability, and judicial expertise absent uniformity on key legal bankruptcy issues.²⁹⁰ Furthermore, several remedies have been suggested to address forum shopping (such as *ex ante* agreements, insolvency forum clauses, etc.) that should be submitted to Congress before further amending the Code more drastically.²⁹¹

Beyond the local impact that reforming venue could have, the proposed legislation would endanger the United States' place as

²⁸⁶ See Skeel, *supra* note 4.

²⁸⁷ Salzberg & Arendsen, *supra* note 287 See *id.* at 62.

139, at 3.

²⁸⁹ Rosen & Gross, *supra* note 224.

²⁹⁰ See Casey & Macey, *supra* note 69, at 471–72.

²⁹¹ See, e.g., *id.* at 469.

the global leader in aviation and weaken the protections U.S. laws afford U.S. creditors and aircraft lessors. While an argument for American imperialism is undesirable, maintaining the status quo is of the utmost importance. Cases where a foreign venue remains the best alternative naturally limit foreign debtors' use of U.S. courts in the name of comity but allow the U.S. magnet districts to maintain their reputation, especially when facing increasing competition from the U.K. and Singapore.²⁹²

²⁹² Graulich, Piraino & Masaro, *supra* note 27, at 23 (discussing Virgin Atlantic's recent Chapter 11 filing in the U.K., paired with a Chapter 15 filing in the Southern District of New York).