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A COMPARISON OF THE COMPETITION FOR RESTRUCTURING FILINGS IN THE UNITED STATES AND THE EUROPEAN UNION FOLLOWING THE 2019 EU DIRECTIVE FOR PRE-INSOLVENCY PROCEEDINGS

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INSOL International is pleased to present a new technical paper for publication, *A Comparison of the Competition for Restructuring Filings in the United States and the European Union Following the 2019 EU Directive for Pre-Insolvency Proceedings*, written by The Honourable Timothy J. Fox*, Jr., INSOL Fellow and Magistrate in Chancery, the Court of Chancery of the State of Delaware, United States.

In the paper, the author identifies that, in the absence of uniform rules and greater harmonisation either through legislative changes or judicial rulings, there are some key distinctions across jurisdictions in the United States and the European Union that may afford opportunities for companies seeking to restructure to achieve greater success or avoid increased costs. The paper examines how those different substantive rules could drive companies to select one forum over another, and explores how the United States compares and contrasts with the European Union with respect to competition for restructuring filings.

The author notes that, in the European Union, there has been a strong push to harmonise state law among Member States to make strategic filing decisions less attractive. While harmonisation does not eliminate variance entirely, it does suggest a desire to refrain from competition to attract bankruptcy or insolvency tourism. On the other hand, in the United States, circuit differences among courts introduces variance and affords opportunities for debtors to consider whether substantive rules may improve prospects or cause additional difficulties in executing an in-court restructuring.

The author concludes that, in the absence of a United States Supreme Court decision resolving an issue, or Congressional Amendment on substantive points within the Bankruptcy Code, opportunities to seek out more favourable substantive rules will remain more prevalent in the United States than within the European Union.

INSOL sincerely thanks the author for his considerable expertise, time and commitment in writing this paper, which we hope our members will find to be useful.

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1. Introduction

The legal regimes of the United States of America (US) have a long tradition of encouraging innovation and experimentation at lower levels of government, often referred to as “laboratories of democracy” based on the language Justice Louis Brandeis crafted in his famous dissent in the *New State Ice Co. v. Liebmann Supreme Court Decision*.¹ That concept can be applied to legal systems even outside of the legislative process, including the US Bankruptcy Code.² Under the Federal System in the US, absent Supreme Court precedent specifying a specific rule on a question of law, there could be multiple approaches that develop across the judicial circuits of the US.³ Those differing substantive rules, when accompanied by more than one legitimate option for venue, provide potential strategic options in deciding where to commence a corporate restructuring in the US.

Supranational frameworks, like the European Union (EU),⁴ also present fertile areas to explore how differing substantive rules could contribute to parties choosing one forum over another, including with respect to restructuring or reorganising in one jurisdiction over another.⁵ While in some literature this may be described as a “race to the bottom,”⁶ this paper focuses on normative concerns that may prompt different rules,⁷ and how parties might seek to optimise their restructuring based on those different rules.⁸

In the absence of uniform rules and greater harmonisation either through legislative changes or judicial rulings, there are some key distinctions across jurisdictions in the US and EU that may afford opportunities for companies seeking to restructure to achieve greater success or avoid increased costs. This paper examines how those different substantive rules could drive companies to select one forum over another, and explores how the US compares and contrasts with the EU with respect to competition for restructuring filings.⁹ The paper does not seek to evaluate competition between the US and EU for restructuring filings or engagements,¹⁰ but rather focuses on how substantive rule differences within those geographic locations may influence a decision to commence a process in a particular US jurisdiction or EU Member State.

The first section of this paper provides an overview of judicial circuits in the US and a discussion of venue for purposes of bankruptcy filings. It then turns to a discussion of circuit splits¹¹ and another legal phenomenon, “quirks”, that might offer companies additional benefits or burdens when filing a chapter 11 bankruptcy petition in jurisdictions that are part of those circuits. Along the way, this paper examines the potential for those differences with a focus on the progression of the *LTL* and *Red River Talc* filings, which illustrate how even perceived differences in jurisdictions may drive certain strategic decisions.¹²

The second section of this paper then turns to an overview of the current implementation of the 16 July 2019 Directive (the 2019 Directive)¹³ on preventive restructuring frameworks in the EU.¹⁴ The paper concentrates in particular on the implementation and practice in France, Germany and the Netherlands, identifying how the 2019 Directive impacts

1 *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting).

2 11 U.S.C. § 101 et seq. There are variations in application of the Bankruptcy Code by courts in the US notwithstanding the US Constitution requiring a “uniform” Bankruptcy Law. See U.S. Const., art. I, § 8 cl. 4.

3 Peter S. Menell & Ryan Vacca, *Breaking the Vicious Cycle Fragmenting National Law*, 2024 U. Ill. L. Rev. 353, 358-59 (2024) (describing inter-circuit splits among two or more circuits reaching different interpretations of the same law, and intra-circuit splits involving different interpretations by different panels within the same circuit).

4 See e.g. Cesare Cavallini & Marecello Gaboardi, *Towards a Transnational Model of Bankruptcy Law?* 23 U.C. Davis Bus. L.J. 43, 73 (2023).

5 Bo Becker & Martin Oehmke, *ASC Insight - Restructuring and Insolvency - Opportunities for Reform in Europe* (May 2025) - evaluating current regime, insolvency reforms, and proposing an EU-wide opt-in framework to better accommodate multinational restructurings - (available at: <https://www.esrb.europa.eu/pub/asc/insights/shared/pdf/esrb.ascinsight4.en.pdf>); Sigrid Jansen, et al., *INSOL International - Special Report, Reforms in Selected EU Member States in Light of the Directive on Preventive Restructuring Frameworks*, p.1 (April 2020) (discussing divergent national insolvency laws as a barrier to investment).

6 Luca Enriques & Martin Gelter, *How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law*, 81 Tul. L. Rev. 577, 582 (2007) (identifying that a race to the bottom was unlikely to develop in the EU); David A. Skeel, Jr., *Courting Failure? The Effects of Venue Choice on Big Bankruptcies*: Article: European Implications of Bankruptcy Venue Shopping in the U.S., 54 Buffalo L. Rev. 439 (2006); Tobias H. Troger, *Choice of Jurisdiction in European Corporate Law - Perspectives of European Corporate Governance*, E.B.O.R. 2005, 6(1), 3-64 at p10 (2005) (discussing corporate governance in the EU and the US and competition for incorporation or reincorporation of entities).

7 This is especially germane in the EU as different cultural and historical concerns exist for varying approaches on policy concerns. Commission Study on the Issue of Abusive Forum Shopping in Insolvency Proceedings, at 121, Final Report (February 2022) (available at: https://commission.europa.eu/document/download/0664f511-6e09-4751-b7be-421fde651091_en?filename=Final%20Report%20-%20Abusive%20Forum%20Shopping_Feb%202022.pdf). The Study does not consider currently viable the harmonisation of the conditions to access insolvency proceedings across Member States, based in particular on the peculiar diverse basis of values and interests intertwined with insolvency policies in the different countries. [Hereinafter Commission Study Feb. 2022].

8 See Jared A. Elias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. Legal Stud. 119, 119-22 (2018) (discussing forum shopping as a concept and providing empirical conclusions as to outcomes in Delaware and Southern District of New York).

9 For a discussion of whether comparing the EU pre-insolvency regimes to chapter 11 in the US is a worthwhile exercise see Patrick J. Potter, *Assessing the “Logic and Limits” of Comparing European Union Pre-Insolvency Regimes to Chapter 11*, INSOL International (Feb. 2026) (available at: <https://insol.azureedge.net/cmsstorage/insol/media/document-library/technical%20paper%20series/assessing-the-logic-and-limits-of-comparing-eu-pre-insolvency-regimes-to-chapter-11.pdf>).

10 For a discussion of trends in 2025 regarding global competition for restructuring filings see Sara M Tapinekis, et al., *Looking Back at One of 2025’s Hottest Restructuring Trends, Global Forum Shopping - Legal Analysis, Part II*, ION Analytics (available at: <https://ionanalytics.com/insights/debtwire/looking-back-at-one-of-2025s-hottest-restructuring-trends-global-forum-shopping-legal-analysis-part-ii/>) (discussing among other things, German plastic manufacturer Klöckner Pentaplast’s pre-arranged Chapter 11 Case to restructure over €1.3 billion without impairing trade creditors in November 2025; and InterCement’s multijurisdictional formal processes).

11 Three illustrative examples examined in this paper are: (1) assumption and assignment of unexpired leases and executory contracts under the “actual” or “hypothetical” tests; (2) avoidance powers application extraterritorially; and (3) eligibility to file a case under title 11, good faith filings and financial distress.

12 *In re LTL Management, LLC*, Case No. 21-30589 (JCW) (Bankr. W.D.N.C. 2021); *In re LTL Management, LLC*, Case No. 21-30589 (MBK) (Bankr. D.N.J. 2021); *In re LTL Management, LLC*, Case No. 23-12825 (MBK) (Bankr. D.N.J. 2023); *In re Red River Talc LLC*, Case No. 24-90505 (CML) (Bankr. S.D. Tex. 2024); see also Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. Ill. L. Rev. 351, 352-54 (2023) & Adam J. Levitin, *Purdue’s Poison Pill: The Breakdown of Chapter 11’s Checks and Balances*, 100 Tex. L. Rev. 102, 168 (2022). While some liability maneuvering or “Texas-two-step” discussion may occur, that topic is not the focus of this paper, and additional information on those concepts may be found in a body of growing literature. See, e.g., Jason Jia-Xi Wu, *How Do “Bankruptcy Grifters” Destroy Value in Mass Tort Settlements In re Purdue as a Bargaining Failure*, 32 Am. Bankr. Inst. L. Rev. 243 (2024); Jeffrey R. Gleit & Matthew R. Bentley, *The Texas Two-Step: A Problematic Reframing of the Bankruptcy Code Toolkit or an Equitable Solution for Productive Conglomerates and their Mass Tort Claimants?* 31 Nort. J. Bankr. L. & Prac. 148, 150 (2022); David Skeel, *Is the Texas Two-Step a Proper Chapter 11 Dance?* Harv. L. Sch. Bank. Roundtable (Jul. 5, 2022), (available at: <http://blogs.harvard.edu/bankruptcyroundtable/tag/david-skeel/>).

13 Council Directive 2019/1023, 2019 O.J. (L 172) 18.

14 Due to the already broad focus of this paper, only cursory discussion and reference to the Chapter V of the EU Insolvency Regulation and the UNCITRAL Model Law on Enterprise Group Insolvency is possible, but such item is yet another important distinction between very permissive group approach available under the US Bankruptcy Code as compared to the Member States of the EU. See infra section 1.1.2 Venue & Section 2.5 COMI; see also *Commission Study Feb. 2022* at 35 (COMI relocations falling under the scope of the provisions of the EIR (i.e. safeguards) which are analysed under the present Study only concern individual legal entities, and not groups of companies. This means that if the COMIs of the relevant companies are located in two or more Member States, insolvency proceedings would need to be started in each Member State with the appointments of different insolvency practitioners).

perceptions of those jurisdictions. It also gathers information on how each jurisdiction addresses the underlying issues that are the subject of circuit splits in the US.¹⁵

As a corollary to the earlier discussion on US circuit splits and venue in the US, the second section of the paper also provides a brief snapshot of how the concept of “centre of main interests” (COMI) is dealt with in the EU as a basis for commencing a main proceeding.

The proposed 7 December 2022 Directive aimed at further substantive harmonisation among EU Member States¹⁶ – formally approved by the European Parliament and Council on 30 March 2026 (2026 Directive)¹⁷ – is also considered. It is noted that the 2026 Directive further reduces some variance among Member States and adds tools that may have at one time driven decision-makers to consider shifting to a different jurisdiction. The 2026 Directive notably removed a provision harmonising microenterprise liquidation, and used minimum standards on avoidance actions and asset tracing preserving room for national divergence.¹⁸ Member States are required to transpose the 2026 Directive into national law by 22 January 2029.¹⁹

The third section of the paper compares the features of the US federal system with aspects of the domestic laws of the EU Member States. It ultimately finds that variance in US law is often more actively the subject of actions targeted to make use of perceived benefits to a jurisdiction, while activity in the EU seems to be more likely to seek to increase harmonisation and limit so-called bankruptcy tourism, but faces challenges in reaching more than minimum harmonisation.²⁰

Ultimately, the EU’s goals at increasing harmonisation among Member States and preventing abusive forum shopping may operate to reduce opportunities for companies to seek more favourable substantive rules by pursuing strategies to file in one jurisdiction over another.²¹ The US, on the other hand, continues to struggle with whether any venue reform is necessary,²² and the interpretative mechanism of the US Federal Court system will continue to present conflicts across circuits or within them, especially when reasonable minds could differ on the correct outcome of a given issue. While beyond the scope of this paper, in acknowledging the EU has borrowed from US chapter 11, the US may want to consider incorporating procedures for “selective corporate restructuring” from the EU and UK, given complaints about the costs associated with chapter 11 practice.²³

Overall, in the absence of a US Supreme Court decision resolving an issue, or Congressional Amendment on substantive points within the Bankruptcy Code, opportunities to seek out more favourable substantive rules will remain more prevalent in the US than within the EU. This conclusion notes the mechanical similarities between creating an affiliate to establish venue in another US jurisdiction or effecting a COMI shift of an entity located within a Member State of the EU, but because of the flexibility of the venue statute in the US, and attitudes towards group proceedings concerning affiliates, the US affords more flexibility in selecting a forum to permit the debtor to make use of beneficial rules.²⁴ If no controlling circuit law on a substantive issue exists, a party in the US can argue that the approach adopted in another circuit should or should not control depending on the benefit to their interests. The US federal system tolerates these inconsistencies, while in the EU, Member States have sought to actively reduce their scope.²⁵ Skilled professionals will evaluate what tools may be available to solve particular problems, and outlining what tools are available across various locations hopefully has some utility to readers of this paper, or can prompt additional research and discussion.

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- 15 (1) Assumption and assignment of leases and contracts as part of restructuring practice; (2) the scope of any avoidance powers extraterritorially; and (3) eligibility to use those restructuring tools. Such discussion is limited by the author’s more limited understanding of the legal regimes of France, Germany, and the Netherlands, as well as difficulty obtaining official English language translations of all items.
- 16 Proposal for a Directive of the European Parliament and of the Council Harmonising Certain Aspects of Insolvency Law COM/2022/702 final; Council of the EU, Insolvency Proceedings: Council and European Parliament Agree on Common EU Rules, Press Release (19 November 2025) (available at: <https://www.consilium.europa.eu/en/press/press-releases/2025/11/19/insolvency-proceedings-council-and-european-parliament-agree-on-common-eu-rules/>); Jan Strupczewski, *EU Agrees to Harmonise EU Insolvency Laws to Enhance Cross-border Investments*, Capital Markets, 20 November 2025 (available at: <https://www.reuters.com/business/finance/eu-agrees-harmonise-eu-insolvency-laws-enhance-cross-border-investments-capital-2025-11-20/>).
- 17 Council Directive 2026/799, 2026 O.J. (L series).
- 18 Anastasia Kotowski, *Rethinking Insolvency Fragmentation in the EU: A Structural Reform Strategy for Capital Market Integration*, Centrum für Europäische Politik, cepStudy No. 4, at p. 10 (17 March 2026) (available at: https://www.cep.eu/fileadmin/user_upload/cep.eu/Studien/cepStudie_Insolvenzrecht/cepStudy_Rethinking_Insolvency_Fragmentation_in_the_EU.pdf); Council of the EU, Council Greenlights Common EU Rules for Insolvency Proceedings, Press Release (30 March 2026) (available at: <https://www.consilium.europa.eu/en/press/press-releases/2026/03/30/council-greenlights-common-eu-rules-for-insolvency-proceedings/>); Dr. Josepha Biebl, Christine Borries, & Anna C. Bretting, *EU Adopts Directive on the Harmonization of Insolvency Law: Key Aspects and Implications for Germany*, JONES DAY July 2026 Alert (available at: [https://www.jonesday.com/en/insights/2026/07/eu-adopts-directive-on-the-harmonization-of-insolvency-law-key-aspects-and-implications-for-germany#:~:text=This%20directive%2C%20which%20was%20published,or%20adopt%20more%20protective%20standards](https://www.jonesday.com/en/insights/2026/07/eu-adopts-directive-on-the-harmonization-of-insolvency-law-key-aspects-and-implications-for-germany#:~:text=This%20directive%2C%20which%20was%20published,or%20adopt%20more%20protective%20standards;)); A&O Sherman, *Harmonising EU Insolvency Law: Co-Legislators Reach Agreement on Compromise Text for a New Directive - Key Changes and What is Next* (8 December 2025) (available at: <https://edge.sitecorecloud.io/allenoverlylp1-aoshearnanwe0db-production-ecf3/media/project/aoshearnan/pdf-downloads/insights/2025/12/ao-shearnan-client-bulletin-eu-harmonization-directive-2025.pdf>).
- 19 Dr. Josepha Biebl, Christine Borries, & Anna C. Bretting, *EU Adopts Directive on the Harmonization of Insolvency Law: Key Aspects and Implications for Germany*, JONES DAY July 2026 Alert (available at: <https://www.jonesday.com/en/insights/2026/07/eu-adopts-directive-on-the-harmonization-of-insolvency-law-key-aspects-and-implications-for-germany#:~:text=This%20directive%2C%20which%20was%20published,or%20adopt%20more%20protective%20standards>).
- 20 *Commission Study Feb. 2022* at 111 n. 500.
- 21 *Commission Study Feb. 2022* at 24 & 35 (indicating in survey data, that cost-efficiencies hamper defining “abusive” forum shopping); Saam Golshani, Anne-Sophie Noury, & Alicia Bali, *Legal 500 Country Comparative Guides 2025, France: Restructuring & Insolvency*, p. 19 (available at: <https://www.legal500.com/guides/chapter/france-restructuring-insolvency/export-pdf>). “Finally, it is worth noting that the European Union’s restructuring and insolvency regime tends to gradually harmonise legislation between all Member States, with the aim of safeguarding the interests of both the debtor and the affected creditors through a legally structured and effective framework designed to anticipate and deal with difficulties more efficiently.” *Ibid*.
- 22 Laura N. Coordes & Joan N. Feeney, *The History of Bankruptcy Venue Choices and the Evolution of Magnet Courts for Chapter 11 Cases*, 36 Cal. Bankr. J. 333, 343 (2024) (“Since 2011, venue reform bills have been introduced in Congress six times. These bills would require a business to file its bankruptcy petition where its principal place of business or assets are located. However, no bill has yet passed amending the bankruptcy venue rules. Currently, a bill introduced by Congresswoman Zoe Lofgren (D. Cal.) is pending.”). Nothing beyond referring the bill to the House Judiciary Committee has occurred. See: <https://www.congress.gov/bill/118th-congress/house-bill/1017/all-actions>. During the 119th Congress, Congresswoman Lofgren introduced another bill, which was referred to the House Committee on the Judiciary on 26 March 2026. See <https://www.congress.gov/bill/119th-congress/house-bill/8111/text>.
- 23 Sarah Paterson & Adrian Walters, *Chapter 11’s Inclusivity Problem*, 55 Ariz. St. L.J. 1227, 1285-86 (2023) (comparing the approach to the absolute priority rule under the Dutch WHOA, German StaRUG, and the UK’s Part 26A restructuring plan to cross-class cramdown in the US). Professor Paterson and Professor Walters’s proposals address categories of restructuring problems that might benefit from targeted stakeholder participation, which should be distinguished from the “Subchapter V” amendment to Chapter 11, that sought to reduce administrative burdens, and relax the absolute priority rule in cases of smaller size. See 11 USC. §§ 1181-1195.
- 24 See 11 U.S.C. § 1408; Fed. R. Bankr. P. 1015(b)(D); see also Bo Becker & Martin Oehmke, *supra* n.5 at 13 n.15.
- 25 Bo Becker & Martin Oehmke *supra* n.5 at 9-10 (evaluating current regime and insolvency reforms).

1.1 Judicial circuits and venue in the US

1.1.1 Judicial circuits

With the ratification of the US Constitution by New Hampshire on 21 June 1788, the process of organising a federal presidential republic began, with no doubt that the “new” constitution went into effect on 4 March 1789, with the first US Congress commencing its legislative session.²⁶

Article III, Section 1 of the US Constitution provides that “[t]he Judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish.”²⁷

Currently, there are 13 judicial circuits in the US – one for the District of Columbia, a Federal Circuit and 11 numbered circuits.²⁸ The Tenth and Eleventh Circuits were established in 1929 and 1980 respectively, and were both intra-circuit adjustments carving out territory from pre-existing circuits to deal with excessive caseloads.²⁹

It has been said that “the courts of appeals function today as largely independent adjudicatory bodies, each developing a ‘law of the circuit.’”³⁰ There is, however, no such thing as “law of the district” regarding the states or judicial districts within the states that comprise the circuit.³¹ Even at the circuit level, decisions on the same legal issues can reach opposite results, resulting in “circuit splits.”³² Thus, circuits can be in conflict, and further, the districts within a circuit may have differing approaches until an issue has been elevated and decided upon by the circuit court of appeals.³³ Circuit splits are considered resolved when the US Supreme Court grants *certiorari* for a petition that presents a question of law that has generated a split and issues an opinion on the merits.³⁴

1.1.2 Venue

Venue for cases under Title 11 is controlled by 28 USC. § 1408,³⁵ which permits the commencement of a case in the location of the debtor’s “domicile, residence, principal place of business in the United States, or principal assets in the United States” or “in which there is a pending case under title 11 concerning such person’s affiliate, general partner, or partnership.”³⁶

Section 1408 remains unchanged from its initial adoption, and has always offered a fair amount of flexibility.³⁷ Two of the primary venues for chapter 11 corporate filings became the Bankruptcy Courts of the District of Delaware and the Southern District of New York (S.D.N.Y.).³⁸ Other popular venues have emerged, including the Eastern District of Virginia (E.D. Va.), the District of New Jersey and the Northern and Southern Districts of Texas (N.D. Tex. or S.D. Tex. respectively).³⁹ These have been referred to as “magnet courts” in recent scholarship, which focus less on normative concerns regarding forum shopping activity, and instead look at empirical trends in filings.⁴⁰ Those venues reside in the judicial circuits as follows: S.D.N.Y. – Second Circuit; Delaware and New Jersey – Third Circuit; E.D. Va. – Fourth Circuit; and N.D. Texas and S.D. Texas – Fifth Circuit. Controlling law could differ on the circuit court level, in addition to intra-circuit issues, which could allow for strategic choices in where to file a case.

26 Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?* 78 Notre Dame L. Rev. 35, 35-37 (2002).

27 U.S. Const., art. III, § 1.

28 28 U.S.C. § 41.

29 Martha Dragich, *Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit Structure*, 12 J. App. Prac. & Process 201, 202-03 (2011).

30 Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 Loy. L. Rev. 535, 538 (2010).

31 See Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991) (There is no such thing as “the law of the District”); see also *Seneca Res. Corp. v. Twp. of Highland*, 863 F.3d 245, 257 (3d Cir. 2017) (“[A] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”) (quoting *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)); *In re U.S. Wireless Corp.*, 384 B.R. 713, 723 n.62 (Bankr. D. Del. 2008) (“In the Third Circuit . . . the decision of a district court is not binding on a bankruptcy court,” citing Threadgill). While the foregoing summarises binding law in the Third Circuit specifically, most judges tend to avoid ignoring persuasive authority. See *In re Chodnicki*, No. 02-59210 (RTL), 2008 WL 216318, at *4 (Bankr. D.N.J. Jan. 24, 2008) (asserting decisions by a district court judge are entitled to substantial deference). Other circuits have similar law – see e.g., *Reisman v. Associated Faculties of the Univ. of Me.*, 939 F.3d 409, 414 (1st Cir. 2019); *McKinney v. City of Middletown*, 49 F.4th 730, 746 (2d Cir. 2022); *Planned Parenthood S. Atl. v. Kerr*, 27 F.4th 945, 953 (4th Cir. 2022), vacated on other grounds, 143 S. Ct. 2633 (2023); *Baisley v. Int’l Ass’n of Machinists & Aero. Workers*, 983 F.3d 809, 811 (5th Cir. 2020); *McKinney v. Starbucks Corp.*, 77 F.4th 391, 400 (6th Cir. 2023), rev’d on other grounds, 144 S. Ct. 1570 (2024); *United States v. Rosciano*, 499 F.2d 173, 176 (7th Cir. 1974); 7th Cir. R. 40(e); *Sisney v. Reisch*, 674 F.3d 839, 843 (8th Cir. 2012); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015); *United States v. Begay*, 974 F.3d 1172, 1176 (10th Cir. 2020); *United States v. Daniels*, 97 F.4th 800, 807 n.3 (11th Cir. 2024); *United States v. Mahdi*, 598 F.3d 883, 896 (D.C. Cir. 2010); *Scott Timber Co. v. United States*, 692 F.3d 1365, 1375 (Fed. Cir. 2012).

32 Peter S. Menell & Ryan Vacca, *supra* n.3 at 358-59; Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 Loy. L. Rev. 535, 537 (2010).

33 Peter S. Menell & Ryan Vacca, *supra* n.3, at 360-61. Within Circuits, issues appearing to be in conflict can be resolved through a rehearing en banc. Fed. R. App. P. 40(b)(2)(A) (the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court’s consideration is therefore necessary to secure or maintain uniformity of the court’s decisions). Rehearing is discretionary and requires a majority of circuit judges to seek it, and is “not favoured” – *idem* at 40(c).

34 See 1 Collier on Bankruptcy P 9.06 (16th 2024) (discussing the Supreme Court’s resolution of Circuit Splits relating to the Bankruptcy Judgeship Act on uniformity requirement of the Bankruptcy Clause of the Constitution, identifying *Siegel v. Fitzgerald*, 596 U.S. 464 (2022) and *United States Trustee v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487 (2024).

35 Please note that cases filed under Chapter 15 are excluded from this provision, which are dealt with separately by 28 U.S.C. § 1410.

36 28 U.S.C. § 1408.

37 See Jared A. Elias, *supra* n. 8 at 119-21 (detailing empirical data collected and summarising the venue provision: “[t]he new statute was flexible, providing troubled businesses the choice of the bankruptcy court in their state of incorporation, any jurisdiction that is home to major assets, or the firm’s headquarters.”); 28 U.S.C. § 1408 (Added July 10, 1984, P. L. 98-353, Title I, § 102(a), 98 Stat. 334).

38 Jared A. Elias, *supra* n.8 at 119.

39 Akiko Matsuda, *Bankruptcy Judge Kaplan Walks a Fine Line to Position New Jersey as Top Venue; A Former Bankruptcy Trustee and Small-town Mayor, Michael Kaplan Wants Large Cases Filed in New Jersey But Says Justice Isn’t For Sale*, WSJ Pro Bankruptcy (24 December 2024) (available at: <https://www.wsj.com/articles/bankruptcy-judge-kaplan-walks-a-fine-line-to-position-new-jersey-as-top-venue-7b4e1dfa>). “More recently, companies focused on filing cases in White Plains, N.Y., where a lone judge handled all large cases filed there. Virginia enjoyed a short-lived prominence as lawyers steered cases to Richmond, where one of two judges were likely to preside. Houston also exploded in popularity after Jones launched a complex-case system that assigned all major cases either to himself or another judge. New Jersey’s fortunes changed when J&J decided to use bankruptcy to try to resolve mass lawsuits it faced linking its cosmetic talc products to cancer. The company created a new subsidiary called LTL Management as a vehicle to carry its talc-related liabilities into chapter 11 to sidestep the civil justice system and drive a resolution in bankruptcy court. After LTL’s case was transferred to New Jersey in November 2021, J&J found itself before Kaplan, who declined calls from plaintiffs’ attorneys to dismiss the unprecedented case and said it was filed for a valid reorganisational purpose.” *Ibid*; *Rose Krebs, NJ Won’t Restrict Ch. 11 Cases to Certain Judges, Group Told*, LAW360 (9 February 2024) (available at: <https://www.law360.com/articles/1796234/nj-won-t-restrict-ch-11-cases-to-certain-judges-group-told>).

40 Laura N. Coordes & Joan N. Feeney, *supra* n.22 at 333.

Venue obtained by a pending case by an affiliate affords flexibility in restructuring planning. An enterprise in anticipating the need to access a specific forum could opt to create an affiliated entity organised under the laws of one jurisdiction in the United States for the purpose of establishing venue in that forum. Such practice is limited by the court's discretion to transfer venue, even when proper, which may be raised *sua sponte* by the court.⁴¹ As will be discussed with respect to the EU, the more substantive activity that occurs in the jurisdiction selected for venue, the less skeptical the reviewing court will be of the selection of venue.⁴²

■ Venue dispute – *In re Multi-Color Corporation*

A recent high-profile venue dispute is that of *Multi-Color Corporation*, which filed a bankruptcy petition along with a number of affiliates in the District of New Jersey on 29 January 2026.⁴³ Multi-Color's affiliate, MCC-Norwood, was the first filed debtor, and was used as the basis for venue for the rest of the Multi-Color chapter 11 cases.⁴⁴ Parties seeking to dismiss or transfer the Multi-Color cases pointed out that the petition for MCC-Norwood did not identify a basis for venue in New Jersey – instead identifying 3284 Northside Parkway NW, Suite 400, Atlanta, Georgia 303327 as the “principal place of business” and omitting an alternative “location of principal assets, if different from principal place of business.”⁴⁵

After the Bankruptcy Court overruled objections to the interim financing and denied venue related motions,⁴⁶ four separate appellate matters arose from the disputes.⁴⁷

The Bankruptcy Court opined regarding the venue dispute that “[s]ection 1408 remains broad by congressional design. That breadth is not a defect; it is a policy choice.”⁴⁸ The court noted multiple approaches to determine a debtor's principal assets are plausible under the statutory language in section 1408, evaluating both a “asset-based approach” and a “time-based approach” as to what constituted “principal assets.”⁴⁹

The Bankruptcy Court concluded the “asset-based approach”, which “evaluates the assets that a debtor possesses at the time the petition is filed and where such assets were located for the longer portion of the Venue Period”, is to be taken as “the appropriate approach for determining venue based on principal assets.”⁵⁰

The specific facts in Multi-Color supported venue being proper in New Jersey, in the Bankruptcy Court's analysis.⁵¹ Those appeals involving the Cross-Holder Ad Hoc Group and Excluded First Lien Lenders were ultimately resolved as part of the parties reaching a global Plan Settlement.⁵² The remaining appellate matter raised by the US Trustee was also dismissed upon stipulation.⁵³

As a result of those resolutions, a potentially significant dispute on venue flexibility in the Third Circuit will not receive any further analysis, leaving open to what extent Bankruptcy Courts may be constrained in deciding to retain a case where an affiliate has not comprehensively established a basis for venue in the future.

1.2 Circuit splits on bankruptcy issues and other “quirks”

While up-to-date empirical figures are difficult to isolate,⁵⁴ there are at least 36 topical items tracked by Westlaw in its Practical Law content offering that are considered to be bankruptcy “splits” within the US, with many of those topics including multiple subtopics where circuit or intra-circuit disputes exist.⁵⁵

41 See *In re B.L. of Miami, Inc.*, 294 B.R. 325, 330 (Bankr. D. Nev. 2003) (transferring case filed in Nevada where debtor was incorporated to Florida which the factors for interests of justice and convenience of the parties favoured); *In re LTL Management, LLC*, Case No. 21-30589 (JCW) (Bankr. W.D.N.C. 2021) (D.I. 208) (Order to Appear and Show Cause Why Venue Should Not Be Transferred to Another District). Venue may also be raised by creditors. See Alicia McElhaney, *Multi-Color, Lenders Gear Up for Bankruptcy Venue Fight; A Bankruptcy Judge Could Open the Door for the Label Maker's Chapter 11 Case to be Moved or Dismissed at a Tuesday Hearing*, WSJ Pro Bankruptcy (10 February 2026) (available at: <https://www.wsj.com/articles/multi-color-lenders-gear-up-for-bankruptcy-venue-fight-9d6ada30>); see also *In re Multi-Color Corp.*, Case No. 26-10910-MBK, (Bankr. D.N.J. Jan. 30, 2026) (D.I. 71) (The Cross-Holder Ad Hoc Group's Motion to Dismiss or, in the Alternative, Transfer the Chapter 11 Cases).

42 See *infra* section 2.5 (discussing COMI in the EU).

43 *In re Multi-Color Corp.*, Case No. 26-10910-MBK, (Bankr. D.N.J. Jan. 29, 2026) (D.I. 1) (Petition).

44 *In re Multi-Color Corp.*, Case No. 26-10910-MBK, (Bankr. D.N.J. Jan. 30, 2026) (D.I. 71) (The Cross-Holder Ad Hoc Group's Motion to Dismiss or, in the Alternative, Transfer the Chapter 11 Cases).

45 See *In re MCC-Norwood, LLC*, Case No. 26-10909-MBK, (Bankr. D.N.J. Jan. 29, 2026) (D.I. 1) (Petition).

46 *In re Multi-Color Corp.*, Case No. 26-10910-MBK, (Bankr. D.N.J. March 18, 2026) (D.I. 494) (Order Denying (A) The Crossmotion To Dismiss Or, In The Alternative, Transfer The Chapter 11 Cases And (B) The Motion Of The United States Trustee To (I) Dismiss Case Of Debtor MCC-Norwood, LLC Pursuant To 11 U.S.C. § 1112(B) and (II) Transfer Venue Or Dismiss All Cases Of All Debtors Pursuant To 28 U.S.C. §§ 1406, 1408, 1412 and Fed. R. Bankr. P. 1014(A)).

47 See *Excluded First Lien Lenders v. Multi-Color Corp.*, Case No. 3:26-cv-01152-ZNQ (D.N.J. Feb. 4, 2026); *Cross-Holder Ad Hoc Group v. Multi-Color Corp.*, Case No. 3:26-cv-03540-ZNQ (D.N.J. Apr. 2, 2026); *Cross-Holder Ad Hoc Group and Excluded First Lien Lenders v. Multi-Color Corp.*, Case No. 3:26-cv-03691-ZNQ (Apr. 8, 2026); *United States Trustee v. Multi-Color Corp.*, Case No. 3:26-cv-03848-ZNQ (Apr. 13, 2026).

48 *In re Multi-Color Corp.*, No. 26-10910 (MBK), 2026 WL 735405, at *3 (Bankr. D.N.J. Mar. 16, 2026).

49 *Idem* at *4-6.

50 *Idem* at *6 (emphasis removed).

51 *Idem* at *7 (“[b]ecause those assets were located longer in this district than in any other during the Venue Period—venue is proper in this district”).

52 See *Excluded First Lien Lenders v. Multi-Color Corp.*, Case No. 3:26-cv-01152-ZNQ (D.N.J. May 12, 2026) (D.I. 13) (citing Case No. 26-10910 (Bankr. D.N.J.), (D.I. 753) (Apr. 15, 2026)).

53 *United States Trustee v. Multi-Color Corp.*, Case No. 3:26-cv-03848-ZNQ (D.I. 3 & 4) (May 14 & 15, 2026).

54 Up to date comprehensive tracking of current splits is not readily maintained. Study of splits and their utility in evaluating Judicial Performance provided a baseline search for when the Supreme Court decides to resolve such questions. See Eric Hansford, *Note: Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 Stan. L. Rev. 1145, 1175 (2011) (using query <division divide! conflict! split inconsistent differ! disagree! uncertain! /p (“courts of appeals” circuits lower)> in Westlaw's Supreme Court Database to track resolution of splits from 2005 to 2008). Using Mr. Hansford's query, the Supreme Court decided 42 Circuit Split related questions in its 2023-2024 Term, including two key Bankruptcy issues, *Siegel v. Fitzgerald*, 596 U.S. 464 (2022) and *United States Trustee v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487 (2024). For the 2024-2025 Supreme Court term, the Court acted on 51 cases, including denying certiorari in several, while resolving a conflict among the circuits as to whether section 106(a) of the Bankruptcy Code waives the Government's sovereign immunity with respect to a state-law claim that provides the “applicable law” for a trustee's section 544(b) claim. *U.S. v. Miller*, 604 U.S. 518, 526-27 (2025). For the 2025-2026 term, the Court acted on 41 matters that addressed circuit split issues, one involved a question of bankruptcy law and application of judicial estoppel. *Keathley v. Buddy Ayers Constr., Inc.*, 608 U.S. ___, 146 S. Ct. 1532, 1538 (2026) (“Much like the Fifth Circuit, the Tenth Circuit also considers an omission to be inadvertent only if the debtor lacked knowledge of the underlying claim or had no potential motive to conceal the claim. But five other Courts of Appeals conduct a more fact-specific inquiry and do not so stringently limit the analysis. We granted certiorari to resolve this conflict.”) (footnotes omitted).

55 *Bankruptcy: Splits of Authority Among Circuit, District, and Bankruptcy Courts Tracker*, Practical Law Practice Note Overview w-013-0444 (accessed 2 March 2026).

This section of the paper focuses on three specific split items⁵⁶ that could affect where a debtor chooses to file its case, and then discusses two other quirks of the bankruptcy system in the US – the absence of the US Trustee Program in Alabama and North Carolina,⁵⁷ and local rules governing judicial assignments.⁵⁸

1.2.1 Circuit splits with substantive implications

There are three substantive circuit splits that could present strategic considerations for management to select one forum over another when choosing to file a chapter 11 petition, as outlined below.

- *Assumption and assignment under the actual and hypothetical tests*

The first is the law of assumption and assignment under section 365 of the Bankruptcy Code and the split among circuits regarding the use of the “actual test” versus the “hypothetical test” when analysing the propriety of assuming and assigning an executory contract or unexpired lease.⁵⁹

The assumption and assignment of executory contracts and unexpired leases is governed by section 365(c) of the Bankruptcy Code, which provides in relevant part that the debtor:

“[M]ay not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

*(B) such party does not consent to such assumption or assignment”.*⁶⁰

Two tests have been adopted across judicial circuits in the United States. The more stringent test (which is the majority rule) is termed the “hypothetical test.”⁶¹ In the Third, Fourth, Ninth and Eleventh circuits, a debtor or trustee cannot assume and assign a contract or lease if, hypothetically, the counterparty could refuse consent to assignment of the contract under other applicable non-bankruptcy law to any third party, regardless of whether the debtor or the counterparty *actually* contemplate the assignment.⁶²

The practical result of this view is that a debtor can be prohibited from assuming valuable contracts even if the debtor (as opposed to a third party that would receive assignment) intends to perform the obligations in the future, because other applicable law requires the counterparty’s consent to assignment of the agreement. This is true under the hypothetical test even when the parties are not presently seeking to transfer rights under the contract to a third party. The mere *possibility* of a third party that the contract counterparty does not consent to receiving performance from will prevent the debtor from realising value from the contract.

In contrast, the minority view among the circuits is the “actual test”, which is embraced by the First and Fifth Circuits.⁶³ In those circuits, the court analyses whether the debtor *actually* intends to assign the contract in determining if it may be assumed.⁶⁴

Areas where this issue may drive filing decisions of a debtor include instances involving franchisees,⁶⁵ intellectual property licensees⁶⁶ and other regulated industries.⁶⁷

If a debtor anticipates a problem with the hypothetical test if it intends to maintain valuable contracts, it may be wise to form an affiliate in either the First or Fifth Circuit to establish venue and avoid application of the hypothetical test in the other judicial circuits. As noted above, the judicial districts in Texas are in the Fifth Circuit, and would present a viable forum for a complex chapter 11 filing when the debtor’s need to assume contracts that might be restrained from assignment under other applicable law are at issue.

- *Avoidance powers application extraterritoriality*

While not yet a full circuit split (i.e. there are not circuit decisions reaching actual inconsistent outcomes), there are intra-circuit conflicts that exist regarding the extraterritorial applicability of the avoidance powers of the Bankruptcy Code,⁶⁸ pitting the Fourth Circuit and Bankruptcy Courts in Delaware, Florida and the Southern District of New

⁵⁶ See the fuller discussion that follows in section 1.2.1.

⁵⁷ See *Siegel v. Fitzgerald*, 596 U.S. 464, 468-69 (2022).

⁵⁸ See *Roy M. Terry, Jr. & Klementina V. Pavlova, Litigator’s Perspective, Local Ch. 11 Rules for Complex Cases and Venue Selection Emerge from the Pandemic*, 42-2 ABIJ 36 (2023).

⁵⁹ Ulysses N. Jaen, *Assignment of Franchise Agreements: Balancing Interests and the Consequences of Section 365(c)(1) of the Bankruptcy Reform Act and Judicial Interpretations*, 20 Rutgers Bus. L. Rev. 1, 9 (2024).

⁶⁰ 11 USC. § 365(c).

⁶¹ *RCI Tech. Corp. v. Sunterra Corp.* (In re *Sunterra Corp.*), 361 F.3d 257 (4th Cir. 2004); *In re Catapult Entm’t, Inc. v. Perlman* (In re *Catapult Entm’t, Inc.*), 165 F.3d 747 (9th Cir. 1999); *In re James Cable Partners*, 27 F.3d 534, 537 (11th Cir. 1994); *In re West Elecs., Inc.*, 852 F.2d 79 (3d Cir. 1988).

⁶² See e.g., *In re West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988).

⁶³ *In re Mirant Corp.*, 440 F.3d 238 (5th Cir. 2006); *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997).

⁶⁴ *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493-95 (1st Cir. 1997) (holding that to the extent the Debtor remains materially the legal entity with which the counterparty freely contracted, such entity may assume the agreement was it does not deprive the counterparty the benefit of its bargain).

⁶⁵ *In re Pinnacle Foods of Cal. LLC*, Nos. 24-11015-B-11, KCO-4, 2024 Bankr. LEXIS 2521, at *6-7 (Bankr. E.D. Cal. Oct. 10, 2024) (discussing the Ninth Circuit’s following the hypothetical test, notwithstanding devastating effects on the debtor’s reorganisation, in the context of a franchisee); see also David Gamble, *Bankruptcy Decision Exemplifies Venue Issue for Franchisees*, LAW360 (29 October 2024), <https://www.law360.com/bankruptcy/articles/2251871/bankruptcy-decision-exemplifies-venue-issue-for-franchisees>.

⁶⁶ *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493-95 (1st Cir. 1997) (involving licensees).

⁶⁷ *In re West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988) (involving arms manufacturing).

⁶⁸ 11 USC. § 544 through 549.

York against contrary decisions from the District Court in S.D.N.Y. and a Bankruptcy Court in the Central District of California regarding the reach of avoidance powers.⁶⁹

The only circuit decision squarely addressing the issue at the circuit level, and thus mandatory authority for lower courts in that circuit, is in the Fourth Circuit – namely, the decision *In re French*.⁷⁰ The Fourth Circuit, in evaluating the property of the estate concept, has concluded that property “wherever located” is covered by the *in rem* jurisdiction of the Bankruptcy Court, and therefore applies to property that would have been property of the estate but for the transfer in question.⁷¹

For potential debtors with international operations, following the Fourth Circuit, as well as lower courts that have ruled similarly, presents an expanded set of tools to seek the return of preferential payments or other transfers that lacked reasonably equivalent value. By contrast, a debtor in New York may have to distinguish the District Court authority, *Maxwell Communication Corp. plc*,⁷² limiting the application of the avoidance powers to far-flung jurisdictions within the enterprise,⁷³ and may face uncertainty in achieving results that could bring value back to the estate. This could prove more substantial if contrary authority following *Maxwell Communication Corp. plc* were to be decided in the Second Circuit, or elsewhere, to call into question the Fourth Circuit and lower courts following *In re French*.

■ Good faith filings and financial distress

Driven in large part by “Texas two-step” transactions, the potential for a circuit split among the Third, Fourth and Fifth Circuits has loomed as to whether a bankruptcy petition is filed in good faith and whether a Bankruptcy Court has jurisdiction over a case filed by a solvent entity.⁷⁴

Bestwall LLC, pending in the Fourth Circuit, could have given rise to a resolution at the US Supreme Court as to eligibility to file if the Supreme Court had granted *certiorari* (discussed further below). However, a split still remains as between the Third and Fourth Circuit’s standards definitively, and there is potentially additional room to explore the standard in the Fifth Circuit.⁷⁵

Foreclosed by the US Supreme Court’s denial of *certiorari* in *Bestwall* is an even more stringent jurisdictional bar to solvent entities. The appellant’s position regarding subject matter jurisdiction provided a second opportunity to argue *Bestwall* should not be a debtor, having once failed to obtain dismissal on the statutory basis of good faith, and appeal that as a matter of statutory interpretation.⁷⁶

The Third Circuit has twice required dismissal of affiliates of Johnson & Johnson created for the express purpose of managing tort liabilities related to talcum powder and health conditions resulting from baby powder previously sold by Johnson & Johnson and its affiliates.⁷⁷ The Third Circuit has identified that, for a company to avail itself of “[c]hapter 11’s ability to redefine fundamental rights of third parties, only those facing financial distress can call on bankruptcy’s tools to do so.”⁷⁸

The Fourth Circuit reviewed the Bankruptcy Court’s denial of a similar motion to dismiss in *Bestwall*, which also features a divisional merger / “Texas Two-Step” transaction, relating to Georgia-Pacific’s asbestos liabilities.⁷⁹ The appellants in *Bestwall*, having lost on an earlier issue for dismissal,⁸⁰ reframed the dispute over solvency as a jurisdictional matter.⁸¹ The appellate panel considering the jurisdictional question issued three opinions: (1) the opinion of the court by Judge Quattlebaum joined by Judge Agee; (2) a concurrence by Judge Agee; and (3) a dissent by Judge King.⁸²

69 *French v. Liebmann (In re French)*, 440 F.3d 145, 151-52 (4th Cir. 2006); *Emerald Cap. Advisors Corp. v. Bayerische Motoren Werke Aktiengesellschaft (In re FAH Liquidating Corp.)*, 572 B.R. 117, 124-26 (Bankr. D. Del. 2017); *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127, 148-55 (Bankr. S.D.N.Y. 2016); *Sherwood Inv. Overseas Ltd. Inc. v. Royal Bank of Scot. N.V. (In re Sherwood Inv. Overseas Ltd. Inc.)*, 2016 WL 5719450 at *10-12 (M.D. Fla. Sept. 30, 2016) (acknowledging the split of decisions and noting that the Eleventh Circuit has not ruled on the extraterritoriality of the Bankruptcy Code’s avoidance statutes).

70 *In re French*, 440 F.3d 145, 151-52 (4th Cir. 2006).

71 *In re French*, 440 F.3d 145, 151-52 (4th Cir. 2006) (construing section 541, 548, and *Hong Kong & Shanghai Banking Corp., Ltd. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998)).

72 *In re Maxwell Comm’n Corp. plc*, 186 B.R. 807, 819 (S.D.N.Y. 1995) (“First, nothing in the language or legislative history of § 547 expresses Congress’ intent to apply the statute to foreign transfers.”), *aff’d* sub nom. *In re Maxwell Comm’n Corp. plc* by *Homan*, 93 F.3d 1036 (2d Cir. 1996) (affirming under the laws of comity, and not giving a binding Second Circuit statement on the extraterritoriality question).

73 See *In re Chodnicki*, No. 02-59210 (RTL), 2008 WL 216318, at *4 (Bankr. D.N.J. Jan. 24, 2008) (asserting “decisions by a district court judge are entitled to substantial deference.”). The other cases finding no extraterritorial scope include: *King v. Export Dev. Can. (In re Zetta Jet USA, Inc.)*, 624 B.R. 461 (Bankr. C.D. Cal. 2020); *In re Ampal-Am. Israel Corp.*, 562 B.R. 601, 613-14 (Bankr. S.D.N.Y. 2017); *Barclay v. Swiss Fin. Corp. Ltd. (In re Midland Euro Exch. Inc.)*, 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006).

74 *Compare LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt., LLC)*, 64 F.4th 84 (3d Cir. 2023) with *In re Bestwall LLC*, 148 F.4th 233 (4th Cir. 2025); see also *In re Red River Talc LLC*, 670 B.R. 251 (Bankr. S.D. Tex. 2025).

75 On lack of good faith, the Fourth Circuit requires “subjective bad faith” and “objective futility of any possible reorganization.” *In re Bestwall LLC*, 71 F.4th 168, 182 (4th Cir. 2023), cert. denied sub nom. *Off. Comm. of Asbestos Claimants v. Bestwall LLC*, 144 S. Ct. 2519, 219 L. Ed. 2d 1199 (2024), and cert. denied sub nom. *Esserman v. Bestwall LLC*, 144 S. Ct. 2520, 219 L. Ed. 2d 1199 (2024).

76 The most recent dismissal litigation in *Bestwall* involves whether the bankruptcy court lacks subject matter jurisdiction, which can be raised at any time. 148 F.4th at 239 (4th Cir. 2025).

77 See *In re Red River Talc LLC*, Case No. 24-90505-CML (Bankr. S.D. Tex. 2024), Declaration of John Kim in Support of Chapter 11 Case and Certain First Day Pleadings (D.I. 17) at ¶ 53 (identifying Johnson’s Baby Powder as the basis for claims of ovarian cancer and asbestos-related health conditions); and ¶¶ 100 & 103-116.

78 *In re LTL Mgmt., LLC*, 64 F.4th 84, 110 (3d Cir. 2023); see also *In re Bedmar, LLC*, Case No. 25-11027 (JKS), 2025 WL 2496260, at *12-14 (Bankr. D. Del. Aug. 29, 2025).

79 *The Official Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC (In re Bestwall LLC)*, Case No. 24-1493 (4th Cir. 2024) (D.I. 32 at p. 1-4). The Fourth Circuit previously distinguished an earlier motion to dismiss from LTL, holding the claimants did not raise the same arguments, and the Fourth Circuit has a more comprehensive standard that requires “subjective bad faith” and “objective futility of any possible reorganization.” *In re Bestwall LLC*, 71 F.4th 168, 182 (4th Cir. 2023), cert. denied sub nom. *Off. Comm. of Asbestos Claimants v. Bestwall LLC*, 144 S. Ct. 2519, 219 L. Ed. 2d 1199 (2024), and cert. denied sub nom. *Esserman v. Bestwall LLC*, 144 S. Ct. 2520, 219 L. Ed. 2d 1199 (2024).

80 Laura N. Coordes & Joan N. Feeney, *supra* n.22 at 358 (citing *In re Bestwall, LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019)).

81 *The Official Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC (In re Bestwall LLC)*, Case No. 24-1493 (4th Cir. 2024) (D.I. 32 at p. 4) (“Do the Constitution’s Bankruptcy Clause (Art. I, § 8, cl. 4) and the jurisdiction-conferring statute implementing it (28 U.S.C. § 1334) allow a bankruptcy court, by referral from the district court, to exercise jurisdiction over a voluntary petition filed by a well-funded, financially viable entity that is not actually bankrupt, as ‘bankruptcy’ was understood at the time of the Founding?”).

82 *Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC*, 148 F.4th 233, 236 (4th Cir. 2025).

The opinion by Judge Quattlebaum found that petitions for relief under the Bankruptcy Code, even those filed by solvent debtors, arise under the law of the US, and therefore the Bankruptcy Court was correct in denying a motion to dismiss premised on lack of subject matter jurisdiction.⁸³

Judge King's dissent focused on the constitutional concerns argued by the appellants, which required a finding that the Bankruptcy Court lacked jurisdiction, as "history and tradition" at the time of the Constitution's enactment would not have countenanced a solvent debtor as the "subject of bankruptcies" and therefore Congress by way of statutory jurisdictional provisions could not permit exercise of subject matter jurisdiction over an entity like Bestwall.⁸⁴

The appellants sought rehearing *en banc* by the Fourth Circuit, which was denied on 30 October 2025.⁸⁵ Judge King issued a dissenting opinion to that denial, stating his view that an "[e]n banc rehearing was warranted to correct that erroneous and unconstitutional decision."⁸⁶ Under rules of the Supreme Court, the appellants could file a petition for writ of *certiorari* until 28 January 2026, which upon request of the appellants was extended by the Supreme Court to 20 February 2026.⁸⁷ The appellants filed their petition, framing the question presented as: "Whether a debtor with a conceded ability to pay all liabilities now and in the foreseeable future properly can invoke bankruptcy protection."⁸⁸

Further litigation in *Bestwall* could have impacted on jurisdiction and relatedly eligibility to file across all judicial circuits if the Supreme Court granted *certiorari* in the case.⁸⁹ However, because it did not, there remains a split as between the Fourth Circuit's more strenuous bad faith standard from *Carolin Corp. v. Miller*, 886 F.2d 693, 694 (4th Cir. 1989)⁹⁰ and the Third Circuit's *LTL Management*, financial distress standard.⁹¹

The issue was also presented in the Fifth Circuit, as Red River Talc sought to succeed in the Bankruptcy Court for the Southern District of Texas, while its predecessor LTL failed twice in the Third Circuit in the District of New Jersey, after being transferred from the Fourth Circuit, having originally filed in the Western District of North Carolina.⁹²

At a hearing on 2 December 2024 relating to a request to extend the automatic stay to certain litigation beyond what Red River received in filing its petition, in a colloquy on the procedural history regarding LTL's cases, the S.D. Texas Bankruptcy Court remarked:

*"No, let's take that back. They were initially filed - Judge Kaplan initially found that they were filed in good faith and then the Third Circuit changed its standard, which it had the right to do, and then they went back and applied it and they would dismissed based on that, right? Based on the new ruling. You're right. You're right, they both - and then LTL 2 got dismissed because the same standard applied. I think you're right. I don't know if that means bad faith. In other words, the code doesn't speak of bad faith. I'm trying to be textual, as we're being today."*⁹³

Red River Talc was likewise the subject of several motions to dismiss.⁹⁴ The Red River debtor argued the Fifth Circuit's standard for dismissal for lack of good faith was different than that articulated by the Third Circuit in *LTL*, a proposition the Bankruptcy Court agreed with, but nonetheless found that under Fifth Circuit precedent the case should also be dismissed.⁹⁵ *LTL* and *Red River Talc* also provide a case study for the other "quirks," to be discussed below, as the case originated in North Carolina before a transfer to New Jersey where the merits decisions and appeals occurred.⁹⁶ The *Red River Talc* court denied a motion to transfer venue in that proceeding highlighting the variance that exists on that issue.⁹⁷

83 Ibid.

84 Idem at 251 (King J, dissenting).

85 *Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC*, 157 F.4th 579, 579 (4th Cir. 2025).

86 Idem at 582 (King J, dissenting).

87 See Sup. Ct. R. 13(3) (providing 90 days after the denial of the rehearing).

88 See Sup. Ct. R. 13(3) (providing 90 days after the denial of the rehearing).

89 After the petitioner seeks *certiorari* (often shortened to just cert), the prevailing party below called the Respondent has thirty days to oppose the request, and the Petitioner then may reply, with the Supreme Court considering all the briefing in conference about a month after briefing on the cert petition has occurred. See Amy Howe, 2020 Election Litigation Tracker - Excerpt, SCOTUSblog (available at: <https://www.scotusblog.com/election-law-explainers/the-certiorari-process-seeking-supreme-court-review/>). For *Bestwall*, both the Petition for cert and the response deadlines were extended, with the Respondent's opposition filed on 27 April 2026. See <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/25-1013.html>. The petitioner filed a reply on 12 May 2026, and the Petition was Denied on 1 June 2026. Ibid. As no petition for rehearing was filed within 25 days, as required by Supreme Court Rule 44, the Fourth Circuit's decision is final. S. Ct. R. 44.2.

90 *In re Bestwall*, 71 F.4th 168, 182 (4th Cir. 2023) (citing *Carolin Corp. v. Miller*, 886 F.2d 693, 694 (4th Cir. 1989)).

91 *LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint (In re LTL Mgmt., LLC)*, 64 F.4th 84 (3d Cir. 2023).

92 *In re Red River Talc LLC*, 670 B.R. 251, 305 (Bankr. S.D. Tex. 2025); compare *In re Red River Talc LLC*, Case No. 24-90505-CML (Bankr. S.D. Tex. 2024) with *In re LTL Management, LLC*, Case No. 21-30589 (JCW) (Bankr. W.D.N.C. 2021); *In re LTL Management, LLC*, Case No. 21-30589 (MBK) (Bankr. D.N.J. 2021); *In re LTL Management, LLC*, Case No. 23-12825 (MBK) (Bankr. D.N.J. 2023).

93 *In re Red River Talc LLC*, Case No. 24-90505-CML (Bankr. S.D. Tex. 2024) (Transcript of Hearing, 2 December 2024) Tr. 36:2-12.

94 *In re Red River Talc LLC*, Case No. 24-90505-CML (Bankr. S.D. Tex. 2024) (D.I. 44, 299, 302, 303, 308, 309, 375, 376, 378, and 388).

95 *In re Red River Talc LLC*, 670 B.R. 251, 305-07 (Bankr. S.D. Tex. 2025).

96 *In re LTL Management, LLC*, Case No. 21-30589 (JCW) (Bankr. W.D.N.C. 2021).

97 Compare *In re Red River Talc LLC*, Case No. 24-90505-CML (Bankr. S.D. Tex. Oct. 10, 2024) (D.I. 245); see also (D.I. 284) (Transcript of Hearing October 10, 2024); with *In re LTL Management, LLC*, Case No. 21-30589 (JCW) (Bankr. W.D.N.C. 2021) (D.I. 208) (Order to Appear and Show Cause Why Venue Should Not Be Transferred to Another District).

1.2.2 Quirks in the US

▪ *Bankruptcy administrators in Alabama and North Carolina*

While the US Constitution identifies a requirement of a uniform bankruptcy law, there is a unique feature of the Federal system that uses Bankruptcy Administrators, part of the judicial branch, in Alabama and North Carolina's judicial districts, as compared to the other 48 states, which are overseen by the United States Trustee Program (a component of the Department of Justice and an Executive branch agency).⁹⁸

Bankruptcy Administrators fulfil many of the same functions as US Trustees, but do so in service of the Bankruptcy Court rather than under separate authority or as part of the Executive Branch.⁹⁹ There are only six judicial districts that are covered by the Bankruptcy Administrator program, which was established in 1986 – three in Alabama and three in North Carolina.¹⁰⁰ While academic discussion of this variance is limited,¹⁰¹ there is at least a perception that debtors may be able to push the envelope with a Bankruptcy Administrator further than they would be able to with the US Trustee in the rest of the US,¹⁰² while others have voiced opinions¹⁰³ that the US Trustee Program can be overly bureaucratic and less nimble in its responses due to its size.¹⁰⁴

Because of the drastic differences in size across the US covered by the competing systems, it is difficult to draw conclusions about burdens associated with one over the other, but as demonstrated by the initial *LTL* filing, there may be a preference for one over the other by a particular debtor or its professionals, which may also occasion some level of venue planning.

▪ *Local rules governing judicial assignments*

The speed with which many chapter 11 cases move has resulted in several jurisdictions implementing rules that streamline judicial assignment in an effort to ensure matters can be heard in a timely fashion to preserve value.¹⁰⁵ Practical outcomes of those local rules include an awareness of which judge or judges may be available to take the case, and then tapping into the benefits, or perceived benefits, of intra-circuit decisions endorsed by that judge.¹⁰⁶ While a complex case panel or assignment based on which division of a judicial district a case filed have been features of US practice for almost a decade, other Bankruptcy Courts have considered similar procedures to attract more complex cases.¹⁰⁷

▪ *Circuit split considerations and quirks*

The *LTL* and *Red River Talc* matters provide an example of how such planning can play out in practice. *LTL* initially filed in the Fourth Circuit in one of the Bankruptcy Administrator districts, the Western District of North Carolina. After the transfer of venue to the District of New Jersey in the Third Circuit, *LTL* had two unsuccessful attempts at effectuating its restructuring goals.

LTL in December of 2023 converted into a Texas limited liability company and changed its name to *LLT*.¹⁰⁸ Further corporate transactions occurred in 2024, creating the *Red River LLC* as a Texas LLC, along with two other Texas LLCs.¹⁰⁹ Those transactions created proper venue in the Southern District of Texas,¹¹⁰ where the existence of a complex case panel and knowing which two judges would draw the third case, styled as a US pre-pack plan (voted on creditors before filing), would at least afford an opportunity for a different outcome because of the new judicial circuit and different case law on eligibility to file.

The endeavor was ultimately unsuccessful for a third time, and Johnson & Johnson as *Red River*'s parent company decided to instead deal with asserted claims in the tort system, rather than with a further bankruptcy filing.¹¹¹ Certain

98 *Siegel v. Fitzgerald*, 596 U.S. 464, 469 (2022). "The Trustee Program and the Administrator Program handle the same core administrative functions, but have different funding sources. Congress requires that the Trustee Program be funded in its entirety by user fees paid to the United States Trustee System Fund (UST Fund), the bulk of which are paid by debtors who file cases under chapter 11 of the Bankruptcy Code. 28 USC. § 589a(b)(5). Those debtors pay a fee in each quarter of the year that their case remains pending at a rate set by Congress. The fee varies according to the amount of funds paid out (disbursed) from the bankruptcy estate to creditors, suppliers, and other parties during that quarter. See § 1930(a)." *Ibid.* "In contrast, Congress does not require the Administrator Program to fund itself. Instead, the Administrator Program is funded by the Judiciary's general budget." *Ibid.*; Lauren Mearns, *Comment: State Bankruptcy, COVID-19, and the United States Trustee Program: The Executive Branch's Role in the Oversight of a State's Financial Restructuring*, 73 Admin L. Rev. 195, 205-07 & 208-11 (2021) (providing a summary of the USTP's role, and describing the Puerto Rico Territorial Bankruptcy).

99 *In re LTL Mgmt., LLC*, 636 B.R. 610, 616 (Bankr. D.N.J. 2022); Laura N. Coordes & Joan N. Feeney, *supra* n.22 at 353 n.115 ("the Bankruptcy Administrator (the BA) who is charged in that state with the same duties as the United States Trustee in other districts.").

100 United States Courts, Trustees and Administrators (available at: <https://www.uscourts.gov/court-programs/bankruptcy/trustees-and-administrators>).

101 Lauren Mearns, *supra* n.98 at 205-07; see also Laura N. Coordes, *Elite Bankruptcy*, 51 B.Y.U. L. Rev. 701, 732-35 (2026) (discussing US Trustee litigation in a number of cases relating to conflicts of professionals involved in large cases).

102 Donald L. Swanson, *Fruit of a Rotten Tree: Bankruptcy Administrator Districts and U.S. Trustee Districts* (*Siegel v. Fitzgerald*) (21 April 2022) (available at: <https://mediabankry.com/2022/04/21/fruit-of-a-rotten-tree-disparate-fees-etc-for-administrator-and-trustee-districts-siegel-v-fitzgerald/>) (referring to the Bankruptcy Administrator system as a vehicle for "cronyism" that is combatted by the US Trustee system).

103 1 National Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years* 1041 (20 October 1997) (statement of Commissioners Jeffery J. Hartley and John A. Gose, discussing the two-system issue in 1997).

104 *Ibid.* (discussing commentary from Judge Bennet of N.D. Ala., and other panellists).

105 Alexander Gouzoules, *The Bankruptcy Judge and the Generalist Tradition*, 51 B.Y.U. L. Rev. 743, 789-90 (2026). "The Southern District of Texas may be an outlier in departing from the norm of random assignment, but doing so has made it into a dominant forum." *Ibid.*; Laura N. Coordes & Joan N. Feeney, *supra* n.22 at 372-73.

106 Akiko Matsuda, *supra* n.39; Alexander Gouzoules, *The Bankruptcy Judge and the Generalist Tradition*, 51 B.Y.U. L. Rev. 743, 790 (2026).

107 Laura N. Coordes & Joan N. Feeney, *supra* n.22 at 334 (noting the C.D. Cal. Bankruptcy Court's adoption of a general order establishing filing procedures for complex chapter 11 cases).

108 *In re Red River Talc LLC*, 670 B.R. 251, 264 (Bankr. S.D. Tex. 2025).

109 *Idem* at 267.

110 *Idem* at 261.

111 *Octus, Johnson & Johnson Returning to Tort System to Litigate Red River Talc Claims; Not Pursuing Appeal of Bankruptcy Court Order Denying Plan Confirmation* (4 April 2025) (available at: <https://octus.com/resources/articles/johnson-johnson-returning-to-tort-system-to-litigate-red-river-talc-claims/>) (quoting Worldwide Vice President of Litigation for Johnson & Johnson, Erik Haas); see also Dietrich Knauth, *J&J Reaches Sweeping Talc Deal that Could End Decade of Litigation* (27 July 2026, updated 28 July 2026) (available at: <https://www.reuters.com/business/healthcare-pharmaceuticals/johnson-johnson-announces-55-billion-settlement-talc-lawsuits-2026-07-27/>).

appellate decisions by the Fifth Circuit suggest proceeding with caution for others attempting to succeed where Red River failed, as even prevailing in the bankruptcy court on certain high profile issues, could be followed by a reversal on appeal in that circuit.¹¹²

2. Background on state insolvency law and 2019 EU Directive implementation in France, Germany and the Netherlands

In undertaking this comparative law exercise, the limitations of understanding jurisdictions outside of one's own practice come into stark focus.¹¹³ However incomplete the following may be, as compared to the consideration of the legal regimes discussed by experts in those jurisdictions, the author hopes to provide a starting point for ongoing scholarship, which will amplify aspects that this paper gets right and correct errors or omissions to improve upon what it does not.

2.1 France

2.1.1 Overview of insolvency law in France

France, as compared to other EU Member States, was an early adopter of a corporate rescue procedure, with the *redressement judiciaire* developing in the 1950s and 1960s,¹¹⁴ and a pre-insolvency process being introduced in 1984.¹¹⁵ Economic crises have contributed to continuous reform activity, as prior reforms fell short of success at avoiding additional formal filings.¹¹⁶ Reform efforts are informed by an acknowledgment that earlier intervention is necessary to avoid value destructive consequences for assets and to facilitate successful restructuring.¹¹⁷ Further, French law sorts companies into either rescue or liquidation by evaluating whether rescue seems possible, and permitting liquidation “where recovery of the company seems manifestly impossible.”¹¹⁸ This is distinct from neighbouring jurisdictions that historically placed companies into a liquidation posture as a default.

While the US Bankruptcy Code adopted the “debtor-in-possession” process in 1978, its formal adoption in France came in 2005 with the “safeguard procedure” (*procédure de sauvegarde*), which was further amended in 2008, and again in 2010 and 2014, introducing variations to deal with financial restructurings, and the “pre-pack” practice.¹¹⁹ In addition to the safeguard, France has a “conciliation” proceeding, which includes a court appointed agent to supervise a workout between the company and its creditors, which will implement additional lending, grant of waivers, rescheduling and / or cancellation of debts.¹²⁰ The conciliation has also increased confidentiality given the consensual agreement among the various parties.¹²¹

On a comparative measure with the rest of the EU, France's insolvency laws are viewed as most favourable to employees, who “are the first group to be paid out.”¹²² Stakeholders that provided information to the European Commission (the Commission) highlighted that “incentives to escape French law are mainly related to labour and the fact that the French regime ... aims primarily at protecting the employees.”¹²³ The overall impression of interviewees was that French insolvency law “is not favourable to creditors.”¹²⁴

Previous studies on forum shopping trends identified individual debtors seeking more favourable treatment, generally with respect to discharge, relocating from Germany to France, but not offering a similar pronouncement as to corporate efforts to avail themselves of the jurisdiction.¹²⁵ France uses the “cessation of payments” and impossibility of meeting current liabilities with available assets as the trigger to formal insolvency.¹²⁶

France considers certain transactions when conducted in the suspect period as automatically void upon motion of specified parties, such as deeds entered into without consideration for movable and immovable property and bilateral contracts where the debtor's obligations significantly exceed the counterparty's obligations.¹²⁷ Other transactions are voidable at the court's discretion upon petition by a specified party when supported by evidence that, at the time of the transaction, the counterparty knew of the debtor's insolvency.¹²⁸ French law presumes knowledge for companies within the same corporate group.¹²⁹

112 See *In re Serta Simmons Bedding, LLC.*, 125 F.4th 555, 577-78, (5th Cir. 2024) (discussing grounds for the Circuit Court's exercise of jurisdiction on bankruptcy court final orders).

113 The author's own ambitions included potentially covering other pathways to uniformity of law in the EU, including discussion of the Court of Justice of European Union's ability to issue preliminary rulings acts. See Court of Justice of the European Union, 14 November 2018, Case C-296/17, *Wiemer & Trachte GmbH (in liquidation) v Zhan Oved Thadzer* (holding courts of the Member State within the territory of which insolvency proceeding have been opened have exclusive jurisdiction to hear actions which derive directly from those proceedings, like avoidance actions). The limitations of the author's own research subscriptions eventually led to that ambition being put aside other than noting that mechanism within this footnote. Similar ambitions regarding other EU member states were also tabled, but with a hope to return to this topic in the future.

114 Emilie Ghio, INSOL International, Foundation Certificate in International Insolvency Law, Module 6A Guidance Text, France, p. 4 (September 2025).

115 Ibid.

116 Ibid.

117 Ibid.

118 *Commission Study Feb. 2022* at 35 (citing French Code of Commerce (L640-1 et seq.)).

119 Emilie Ghio, *supra* n.114 at p. 4 (citing Ordinance No 2008-1345 of 18 December 2008; Law No 2010-1249 of 22 October 2010; and Ordinance No 2014-326 of 12 March 2014); Adam Gallagher & Aude Rousseau, *French Insolvency Proceedings: La révolution A Commencé*, Am. Bankr. Inst. J., November 2014 at 20. UK pre-packs and those in the EU are distinct from those in the US, as sales on a short timeline to be approved, as compared to a full restructuring plan to be approved by a bankruptcy court in the US.

120 *Commission Study Feb. 2022* at 84.

121 Ibid.

122 Idem at 35 & 55 (citing Arts. L622-17, French Code of Commerce for the “*super-privilège des salaires*” which affords protections to 60 days of employee wages before the opening of insolvency proceedings, and implementing wage insurance protection, that will accede to the employee creditors ranking in the event of non-payment by the company).

123 Idem at 53.

124 Ibid (citing Annex A, national country reports, FR interview reports).

125 Idem at 35 (citing *Commission Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings* at ¶ 3.4.1.2. (12 December 2012) (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0416>)).

126 Ibid (citing Article L.631-1 of the French Code of Commerce).

127 *Commission Study Feb. 2022* at 60.

128 Ibid.

129 Ibid.

2.1.2 French implementation of the 2019 Directive

Studies that have been conducted post-2019 Directive suggest that implementation of the Directive is driving a shift towards a more creditor-friendly framework in France.¹³⁰

France implemented reforms in 2021 (the 2021 Reform) mainly targeted at implementing aspects of the 2019 Directive not already covered by existing law.¹³¹ The 2021 Reform did not require any new instruments to be implemented,¹³² but eliminated the court-imposed plan concept (binding on all creditors regardless of dissent) for safeguard proceedings for companies large enough for classes of creditors to be created.¹³³ The 2021 Reform replaced the opportunity to impose a debt rescheduling plan through the court-imposed plan mechanism, in favour of a cross-class cram down mechanism on dissenting creditors, excepting entities that are too small for classes of creditors to be created for the restructuring.¹³⁴ Similarly, shareholders in companies of significant size are also subject to cram down in safeguard and rehabilitation proceedings for debt for equity swaps.¹³⁵

The 2021 Reform impaired existing case law on the enforcement of security, and restricted the scope of existing security interests with respect to assets acquired after the date of commencement of insolvency proceedings.¹³⁶ Recent analysis summarises a view that “the French system is no longer as shareholder-friendly, but remains protective of the debtor’s interests, and now also of the creditors’ interests to the extent they are in the money.”¹³⁷ Relevant to the use of pre-insolvency proceedings promulgated by the 2019 Directive, France requires verification and confirmation through a mechanism called “*exequatur*” to verify a foreign court had proper jurisdiction, and the proceeding was consistent with public policy and without fraud.¹³⁸

Prior analysis of 2019 Directive-related practice in France provided some salient observations. France’s pre-insolvency system is efficient.¹³⁹ France has not faced an instance of remote connection to the jurisdiction or any significant COMI shift tactics.¹⁴⁰ The *Orpéa* case presented an instance of a cross-class cram down against shareholders, and courts have been mindful of common interests in class composition, accounting for cross-holdings.¹⁴¹

A cross-border example of an accelerated safeguard is that of *Altice France S.A.*, and its affiliates, which restructured over €7.5 billion of funded debt, and was recognised under Chapter 15 by the Bankruptcy Court in the S.D.N.Y.¹⁴² France’s history of rescue-oriented practice enhances the attractiveness of the jurisdiction as compared to other Member States of the EU, but with the caveat that employee issues may present a significant hurdle to a successful outcome.

In light of the 2026 Directive, no major upheaval is contemplated by professionals, but the change across the EU may present an opportunity for implementing other reforms of Book VI of the French Commercial Code.¹⁴³ The 2026 Directive’s requirements for directors to institute insolvency proceedings is an expansion beyond prior French action for liability for insufficiency of assets, and so French law will have to provide for a broader scope than a prior “mismanagement” regime.¹⁴⁴

2.1.3 French approach to assumption extraterritoriality of relief and eligibility to commence a safeguard

■ Assumption in France

The commencement of a safeguard proceeding protects a debtor from discontinuation of ongoing contracts, and there is not any specific bar or prohibition on transferring the contract to a buyer if a sale is the basis of an accelerated safeguard, drawing on “pre-pack” sale practice in the UK and Europe.¹⁴⁵ As will be discussed in more detail below,¹⁴⁶ other jurisdictions declined to include provisions for dealing with executory contracts, beyond the 2019 Directive’s requirement that *ipso facto* clauses be restricted.¹⁴⁷

130 Idem at 55.

131 Saam Golshani, Anne-Sophie Noury, & Alicia Bali, *supra* n.21 (citing Ordinance No. 2021-1193 of 15 September 2021 as enacting the 2019 Directive); Gilles Podeur, *After the Implementation of the EU Restructuring Directive, Does France Remain Debtor-Friendly?* (30 September 2021), <https://www.mondaq.com/france/insolvencybankruptcy/1116378/after-the-implementation-of-the-eu-restructuring-directive-does-france-remain-debtor-friendly>.

132 Sigrid Jansen, et al., *supra* n.5 at p. 27 (discussing France’s status to comply with the 2019 Directive in 2020).

133 Gilles Podeur, *supra* n. 131.

134 Ibid.

135 Ibid.

136 Ibid.

137 Saam Golshani, Anne-Sophie Noury, & Alicia Bali, *supra* n.21 at p. 19.

138 Commission Study Feb. 2022 at 99.

139 Ken Baird et al., *The EU Adaption of Important Chapter 11 Provisions*, Global Restructuring Review, LEXOLOGY (Nov. 27, 2023) (available at: <https://www.lexology.com/library/detail.aspx?g=8f5e8846-87ac-4bdd-a785-e4dcc6946ac0>) (citing Pierre et Vacances, Orpéa and, Casino cases for this proposition).

140 Ibid.

141 Ibid.

142 *In re Altice France S.A.*, Case No. 25-11349 (MEW) (Bankr. S.D.N.Y. 2025) (D.I. 24, 25, & 33). Despite that restructuring Altice France faces looming debt repayments in 2028 may require additional restructuring. See Adrienne Klasa & Kiernan Smith, *Altice France Liabilities Add About €1bn to Debt Pile*, Financial Times (21 February 2026) (available at: <https://www.ft.com/content/18c484a8-316e-4c60-84d3-92e92e2015a6>).

143 Mohamed Bouzenada, *Insolvency III Directive: Building a More Unified European Insolvency Framework*, Soulier Bunch (23 April 2026) (available at: <https://soulierbunch.com/en/insolvency-iii-directive-building-a-more-unified-european-insolvency-framework/>).

144 Ibid (citing Article L.651-2 of the French Commercial Code on liability for insufficiency of assets (action en responsabilité pour insuffisance d’actif)).

145 See Mylène Boché-Robinet, *Restructuring & Insolvency*, Mondaq Comparative Guide, 3.2 & 4.9 (available at: <https://www.mondaq.com/guides/results/13/173/all/france-restructuring-insolvency>); Ghio *supra* n. 114 at p. 4-5.

146 See section 2.2.3 (discussing the StaRUG’s exclusion of executory contract provisions and avoidance actions).

147 Reinhard Bork, *Pre-insolvency Frameworks: Developments in the European Union*, *International Insolvency Review*, 33(1), 6-22, 18. <https://doi.org/10.1002/iir.1515> (2023) (comparing the different approaches in France, Germany, the Netherlands, and the United Kingdom).

- *Extraterritoriality of avoidance relief*

The scope of avoidance relief is complicated by a number of additional considerations, and is therefore less binary than was discussed with respect to the unsettled principles of the US Bankruptcy Code across circuits.

Articles 14 and 15 of the French Civil Code provide that foreign defendants can be brought before a French court with respect to contractual obligations entered into in France, or with French nationals, and French nationals may bring actions or be brought before a French court regardless of whether the claim is related to France.¹⁴⁸ Further, under the Brussels I-bis Regulation and Lugano Convention, if the place of performance or where a harm occurred is located in France, then French courts have jurisdiction. French courts also have exclusive jurisdiction on real estate claims concerning assets located in France, where an enforceable contract agrees on French jurisdiction over disputes, or where a defendant enters an appearance in the French court.¹⁴⁹

Relating to EU Member States, case law from the Court of Justice of the EU provides that the court of a Member State in which insolvency proceedings have been opened have “exclusive jurisdiction” to hear actions derived directly from the insolvency proceedings and that are closely connected with them, including avoidance actions.¹⁵⁰ Further, “[w]ithin the scope of the EIR, the law of the State of the opening of proceedings (*lex fori concursus*) determines the rules relating to avoidance (Art 7 para 2 sentence 2 lit m EIR).”¹⁵¹

However, this does not apply “if the detrimental act is subject to the law of another Member State (*lex causae*) and if the law of that Member State does not allow any means of challenging that act in the relevant case (Art 16 EIR). With the harmonisation of avoidance actions, such exceptions will become rare.”¹⁵²

- *Eligibility for a safeguard*

Safeguard eligibility requires the company to be facing difficulties that cannot be overcome absent the relief, but not in a state of cessation of payments (insolvency).¹⁵³ The test for safeguard proceedings is construed to allow wide access to the procedure as long as the debtor was not insolvent for more than 45 days when initially applying for the opening of conciliation proceedings, limiting safeguards only to solvent debtors.¹⁵⁴

It has been said that the French Government “opted to use the accelerated safeguard as the main vessel for the transposition of the [2019 Directive].”¹⁵⁵ Safeguards, in practice, have often been used defensively to protect companies with financial difficulties, or as a leverage point in upstream negotiations.

To distinguish between the safeguard and rehabilitation procedures under French law, the safeguard is shorter at 12 months, with other restrictions as discussed in section 2.1.2 above.¹⁵⁶

2.2 Germany

2.2.1 Overview of insolvency law in Germany

Germany maintains strict director duties regarding maintaining a company’s solvency, which is central to a view that the jurisdiction is not “debtor friendly.”¹⁵⁷ Germany only loosened its rigidity in insolvency matters relatively recently, partially in response to the 2019 Directive and the COVID-19 pandemic, enacting the *Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz* (SanInsFoG) as the *Unternehmenstabilisierungs- und -restrukturierungsgesetz* (StaRUG)¹⁵⁸ in December of 2020.¹⁵⁹

Prior to the SanInsFoG, under the German Insolvency Law (*Insolvenzordnung* or InsO), nearly all proceedings commenced as liquidations with a mechanism to convert to a plan-focused proceeding, with the company under the management of an insolvency administrator and creditor’s committee, and strict compliance with filing requirements and limited eligibility for relief were also the norm.¹⁶⁰

The InsO traces its lineage back to the Prussian *Konkursrecht*, and German insolvency law has been domestically cultivated, avoiding importation of another jurisdiction’s law or redesign premised on a model law.¹⁶¹

148 Daniel Kadar & Stephanie Abdesselam, *Asset Recovery in France*, Reed Smith, LEXOLOGY (25 November 2019) (available at: <https://www.lexology.com/library/detail.aspx?g=0c06c7ac-5293-4a41-ae38-347a626cafb1>) (citing Articles 14 & 15 of the French Civil Code).

149 Ibid (citing Articles 4, 24, 25, & 26 of the Brussels I-bis Regulation).

150 See Court of Justice of the European Union, 14 November 2018, Case C-296/17, *Wiemer & Trachte GmbH (in liquidation) v Zhan Oved Thadzer*; Taylor Wessing, *Exclusive Jurisdiction in European Insolvency Law* (29 January 2019) (available at: <https://www.taylorwessing.com/en/insights-and-events/insights/2019/01/exclusive-jurisdiction-in-european-insolvency-law>).

151 Niklas Lutcke & Stephan M Schubert, *German Avoidance Actions Essentially in Line with EU Directive Proposal*, CMS, LEXOLOGY (15 January 2024) (available at: <https://www.lexology.com/library/detail.aspx?g=94aef5a6-e93f-4dc0-ab68-1ea5b9df6170>).

152 Ibid.

153 See *Emilie Ghio*, *supra* n. 114 at p. 15; Saam Golshani, Anne-Sophie Noury, & Alicia Bali, *supra* n.21 at p. 5.

154 Saam Golshani, Anne-Sophie Noury, & Alicia Bali, *supra* n.21 at p. 4-5.

155 Emilie Ghio, *supra* n. 114 at p. 40.

156 Ibid at 40-41.

157 *Commission Study Feb. 2022* at 63.

158 *Gesetz über den Stabilisierungs- und -restrukturierungsrahmen* [StaRUG] [Law on the Stabilization and Restructuring Framework], Dec. 22, 2020, *Bundesgesetzblatt*, Teil I [BGBL. I] at 3256.

159 Andreas Rauch, *Comment: An Innovative Framework: Evaluating the New German Business Stabilization and Restructuring Law (StaRUG)*, 43 Nw. J. Int’l L. & Bus. 93, 95-98 (2022).

160 Idem at 98-101.

161 Reinhard Bork, *INSOL International, Foundation Certificate in International Insolvency Law, Module 6B Guidance Text*, Germany, p. 3 (September 2025).

German insolvency courts are local courts, *Amtsgericht*, covering the territory of the *Landerich* where it is located.¹⁶² Specialised knowledge and experience at the *Amtsgericht* level is complemented by two appellate review levels, allowing for unified jurisprudence when the *Bundesgerichtshof*, the second and final level of appeal (which has jurisdiction throughout the German Republic), resolves disputes.¹⁶³ Legislation in connection with the StaRUG did reduce the available restructuring courts to 24 as compared to 182 insolvency courts.¹⁶⁴ Even with the introduction of a protective umbrella proceeding, reduction of a compliance period from 7 years to 6 years and a protection against attachment, the overall conclusion is that the InsO is a “(slightly) creditor-friendly” regime.¹⁶⁵

German stakeholders identified to the Commission that, in addition to the definition of insolvency, a condition for a formal proceeding is having sufficient resources to pay for the administration.¹⁶⁶ A liquidation must be commenced by directors of German companies “without undue delay,” but in any event within 3 weeks of meeting the applicable tests under the InsO.¹⁶⁷

German rescue plans require provision of information regarding financial position and results of operations, along with recovery information as compared to what would be available in the absence of the plan, and a discussion of actions necessary to complete the plan once it is agreed upon.¹⁶⁸

2.2.2 Implementation of the 2019 Directive in Germany

The analysis regarding use of the StaRUG has been positive, with *LEONI AG*, a publicly listed automotive supplier, an exemplar for success of the proceeding.¹⁶⁹

LEONI AG used the StaRUG to amend and extend its existing financial liabilities, execute a debt to equity swap, delist from the public exchange and use a cross-class cram down on prior equity shareholders.¹⁷⁰ Those participating in the voting meeting and restructuring court approved the plan, and contests from the dissenting shareholders in various courts, including the German Constitutional Court, were promptly dismissed.¹⁷¹ The LEONI AG plan became effective in August 2023, and points toward German courts effectively implementing the new framework and restructuring tool.¹⁷² The various challenges demonstrate the sensitivity in Germany to providing parties affected by a restructuring plan appellate rights against the approval of the plan.¹⁷³

Stakeholders did identify to the Commission that “sham relocations of [a debtor’s] COMI” was a strategy used to benefit from shorter time limits for discharge.¹⁷⁴ Over time, actually shifting COMI, as opposed to doing so on paper, was required as the sham practice became evident.¹⁷⁵ The Commission identifies *Deutsche Nickel AG* as an example of corporate forum shopping, where the German public limited company was sold to a new English private limited company, with a UK registered office.¹⁷⁶ Additionally, foreign law pre-insolvency out of court workouts cannot influence German substantive law without being recognised in some form.¹⁷⁷ Recognition of non-EU insolvency matters has had mixed results at the *Bundesgerichtshof*.¹⁷⁸ Language about exclusive jurisdiction for a StaRUG tethers jurisdiction to the debtor’s seat, place of residence or centre of main activity, making attempts at moving to alternative forums difficult, and positioning the preventive proceeding as not one to attract bankruptcy tourism.¹⁷⁹

Under the 2026 Directive, additional legislative action is expected to be manageable.¹⁸⁰ The two significant areas of implementation include the pre-pack procedure, which will need a new statutory basis,¹⁸¹ and to establish cross-border access to registries for asset tracing.¹⁸² Practitioners view the 2026 Directive’s impact as confirming the high level of creditor protection afforded by German insolvency law, which has been a key point of reference for the EU Council.¹⁸³

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Christoph G. Paulus, *European and Europe’s Efforts for Attractivity as a Restructuring Hub*, 56 Tex. Int’l L.J. 95, 107 n. 83 (2021).

¹⁶⁵ Reinhard Bork, *supra* n.161 at 14.

¹⁶⁶ Commission Study Feb. 2022 at 49.

¹⁶⁷ Idem at 50 (citing *Insolvenzordnung* (Insolvency Statute) of 5 October 1994 (BGBl. I p. 2866), as last amended by Article 35 of the Act of 10 August 2021 (BGBl. I p. 3436) (available at: https://www.gesetze-im-internet.de/englisch_inso/index.html, section 15a).

¹⁶⁸ Idem at 51.

¹⁶⁹ Ken Baird et al., *supra* n.139.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Commission Study Feb. 2022 at 88.

¹⁷⁴ Idem at 67.

¹⁷⁵ Ibid.

¹⁷⁶ Idem at 28-29 (noting this occurred under prior EU regulations and prior to Brexit).

¹⁷⁷ Idem at 99.

¹⁷⁸ Idem at 108 (discussing two diverging results on UK schemes, but successful recognition for US chapter 11 proceedings).

¹⁷⁹ Christoph G. Paulus, *supra* n.164, 105-106. “This concentration on the debtor’s seat, place of residence, or center of main activity makes forum shopping not entirely impossible but yet difficult-and it is definitely not an indication for any competitive ambition.” Ibid.

¹⁸⁰ Dr. Josepha Biebl, Christine Borries, & Anna C. Bretting, *EU Adopts Directive on the Harmonization of Insolvency Law: Key Aspects and Implications for Germany*, JONES DAY July 2026 Alert, (available at: <https://www.jonesday.com/en/insights/2026/07/eu-adopts-directive-on-the-harmonization-of-insolvency-law-key-aspects-and-implications-for-germany#:~:text=This%20directive%2C%20which%20was%20published,or%20adopt%20more%20protective%20standards>).

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

2.2.3 German approach to assumption, avoidance extraterritorially and eligibility for the StaRUG

■ Assumption of executory contracts and leases in Germany

Unlike in France, despite inclusion in the draft legislation for what became the StaRUG, the ability to directly amend, assume or terminate executory contracts was not part of the enacted preventive restructuring framework, leaving that for only liquidation and collective proceedings.¹⁸⁴ Thus, while the focus of this paper is the 2019 Directive and proceedings that satisfy its criteria, for a debtor that needs to seek relief as to executory contracts, those avenues will only be available under the InsO.¹⁸⁵

■ Avoidance scope

As was the case with assumption, the StaRUG did not include any avoidance tools to provide companies with an ability to bring assets back if they would qualify under applicable law like the *Anfechtungsgesetz*.¹⁸⁶

Avoidance law in Germany has multiple avoidance grounds, including transfers for incongruent coverage, transactions that immediately disadvantage insolvency creditors, and transfers that are wilful and for gratuitous benefit.¹⁸⁷

Article 6(1) of the European Insolvency Regulation is also applicable, providing that:

*“The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.”*¹⁸⁸

Those principles are also binding on defendants of avoidance action from non-EU states.¹⁸⁹ So with the StaRUG excluding avoidance powers, a debtor in Germany would have to commence another formal process to take advantage of the ability to avoid transactions more broadly.

The extraterritorial application of avoidance powers of a COMI state is consistent with the principles articulated in the American Law Institute’s 2012 study “Global Rules on Conflict-of-Laws Matters in Insolvency Cases”, as well as earlier research comparing those Global Rules to the 2015 EIR.¹⁹⁰

■ Eligibility for StaRUG

Eligibility for StaRUG is determined as part of a meeting where the court examines the plan for statutory compliance and confirms eligibility for the process.¹⁹¹ Like other proceedings under the InsO, eligibility for a StaRUG depends on “imminent insolvency”, which looks to a timeframe of 2 years for such a prognosis.¹⁹² It further requires a probability more than 50% that the debtor will be unable to pay mature debts within the next 2 years.¹⁹³

In examining the 2019 Directive’s implementation, Professor Reinhard Bork characterised this “imminent” definition as focusing more on the probability of the financial difficulties as opposed to the urgency of such relief,¹⁹⁴ noting that:

*“This is not only consistent, but also consequent, since if an inability to pay debts will occur in, for example, 23 months the problem is likely but not urgent.”*¹⁹⁵

2.3 The Netherlands

2.3.1 Overview of insolvency law in the Netherlands

While subject to many amendments, the Dutch Bankruptcy Act, in Dutch *Faillissementswet* (the DBA), dates back to 1893 and is still in force today.¹⁹⁶ The regime puts creditors’ interests first, looking for the liquidation of assets and distribution of proceeds to creditors as the bedrock, now accounting for rescue, recovery and restructuring of debts as often the preferred alternative.¹⁹⁷

184 Bork *supra* n.147 at 18; Dr. Marco Wilhelm, et al., *The New Act On the Stabilization and Restructuring Framework for Companies*, Mayer Brown (January 2021) (available at: https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2024/07/ger_neugerman-insolvency-law_english.pdf?rev=-1). “The original possibility of terminating contracts that had not yet been completely fulfilled by both parties (e.g. lease agreements) was rejected before the law was passed. Thereby, important areas of a holistic restructuring have been excluded.” Ibid; see also Christoph G. Paulus, *supra* n.164 at 105 (“and was even more diminished in the last sessions before the parliamentary acceptance by abolishing the tool of contract termination and amendment as well as having dropped a new rule regarding directors’ duties”).

185 See *Insolvenzordnung* (Insolvency Statute) of 5 October 1994 (BGBl. I p. 2866) as last amended by Article 2 of the Act of 7 May 2021 at §§ 103 et seq. (available at: https://www.gesetze-im-internet.de/englisch_ins_o/index.html).

186 Andreas Rauch, *supra* n.159, 108 n. 108.

187 Oriana Casasola, 29 No. 5 J. Bankr. L. & Prac. NL Art. 3 (2020) (citing Insolvency Order of 5 October 1994 (Federal Law Gazette I p. 2866), which was last amended by Article 24 (3) of the Act of 23 June 2017 (Federal Law Gazette I p. 1693), referred to as InsO, Sections 130, 131, 132, 133, 134).

188 Council Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, 2015/848, 2015 O.J. (L141). Art. 6, ¶ 1 [hereinafter 2015 EIR].

189 See Schmid v. Hertel (Case C-328/12) [2014] 1 WLR 633.

190 David Molton & Jacob Beiswenger, *The Long (or Not so Long) Arm of Avoidance Claims: The Issue of Extraterritorial Application*, INSOL International Technical Series Issue No. 33, at p. 10 (October 2016).

191 Andreas Rauch, *supra* n.159 at 106 (citing StaRUG § 46, 2020 BGBl. I 3267) (StaRUG lays out guidelines for a meeting in which the court examines the plan for statutory compliance and confirms debtor eligibility for restructuring, creditor voting rights, and proper classification).

192 Reinhard Bork, *supra* n.147 at 13.

193 Ibid (citing (§18, InsO; §29, StaRUG)).

194 Ibid. “According to case law of the Bundesgerichtshof, imminent insolvency requires a predominant probability (more than 50%) that the debtor will become unable to pay his or her mature debts within the next 2 years. Given this rather long prognosis period, ‘imminent’ is defined more or less with ‘likely.’ So far, German jurisprudence has not realised the difference between probability and urgency when dealing with the term ‘imminent inability to pay debts,’ since ‘imminent’ is equated with ‘likely’ as a term of probability, not with any term of urgency.” Ibid (footnotes omitted).

195 Ibid.

196 Ferdinand J M Hengst, INSOL International, Foundation Certificate in International Insolvency Law, Module 6E Guidance Text, The Netherlands, p. 3 (September 2025).

197 Ibid.

The development of the *Wet Homologatie Onderhands Akkoord* (WHOA), or the Dutch scheme, in response to the 2019 Directive, has shifted the prime focus of the DBA further towards rescue and preserving value, and endeavours to follow modern insolvency trends globally more fully.¹⁹⁸

The criteria for opening a proceeding in the Netherlands are relatively straightforward, requiring at least two creditors and debts remaining unpaid. Stakeholders have positively viewed conducting proceedings in English as an advantage over other forums within the EU.¹⁹⁹

Prior to the adoption of the WHOA,²⁰⁰ a DBA provided discretion to a trustee to authorise a restart following liquidation being commenced.²⁰¹ A DBA did not provide for additional post-filing financing or bridge lending on a senior basis, even in the context of a restart and rescue.²⁰²

2.3.2 Implementation of the 2019 Directive in the Netherlands

The WHOA's implementation to satisfy the 2019 Directive has been viewed in the scholarship as both promoting restructuring and rescue goals, and as a method of avoiding “bankruptcy tourism.”²⁰³ In a WHOA, “the court can ratify a private debt restructuring agreement informally negotiated between a company and its creditors and shareholders, i.e. without active intervention of a judge along the way.”²⁰⁴

The WHOA also allows for the appointment of restructuring experts to propose a plan upon creditor request, which restrains the debtor from offering a plan, but still keeps the debtor “in possession” (as opposed to being replaced with a trustee).²⁰⁵ While the court appointed restructuring expert is able to propose the plan, the debtor, creditors and equity holders may also hire their own valuation experts to contest the conclusions of the court appointed expert.²⁰⁶ The WHOA's expert appointment focus is in contrast to Dutch courts not featuring specific specialisation as prominently as other EU Member States.²⁰⁷

Stakeholders in the Netherlands have reported to the Commission concerns regarding abusive forum shopping.²⁰⁸ One stakeholder specifically noted that suspect periods for shifting COMI really only affects bona fide debtors who may be able to achieve more favourable results, but will not be an obstacle to mala fide debtors, and at least brings certainty.²⁰⁹ Analysis by the Global Restructuring Review has prominently characterised the WHOA as:

*“Actively seeking to [position the Netherlands as] a cross-border restructuring hub; it has proven to be an effective restructuring instrument not only for small to medium-sized companies, but also for large companies in more complex and international cases.”*²¹⁰

Specifically, *Royal IHC* has developed case law and uniformity in the Netherlands, after the District Court of Rotterdam's confirmation of the WHOA restructuring plan was brought to the Dutch Supreme Court through a “cassation in the interest of the law” by the Procurator General.²¹¹

The District Court decision was characterised prior to reversal as demonstrating “effectiveness and legal certainty of the WHOA” in expanding the amendment of lender consent rights, disposition of subsidiaries in the restructuring (upon finding that the transaction was reasonable, immediately necessary and not “unfair” to creditors), while allowing for the external approval of those items and protecting them from later challenge.²¹² That decision also developed precedent for requiring further financing working capital under existing credit facilities.²¹³

The WHOA on its own terms does not allow parties to appeal confirmation decisions.²¹⁴ A cassation in the interest of the law does not affect the rights of the parties in the litigation below, but creates guidance for future cases and the development of the law.²¹⁵ The two questions presented by the Procurator General of the Dutch Supreme Court were: (1) could creditors be forced to continue providing financing by amending their obligations under the WHOA; and (2) can claims of creditors be non-consensually ranked under the WHOA.²¹⁶

¹⁹⁸ Ibid.

¹⁹⁹ *Commission Study Feb. 2022* at 45 (comparing simplicity of Dutch proceeding conditions with the variety and differing criteria for Italian proceedings, and identifying an English language option).

²⁰⁰ See Marc Broekema & Jan Adriaanse, *Valuation Ambiguities under the European Directive on Preventive Restructuring Frameworks: Insights from the Netherlands*, *The European Business Valuation Magazine* 1(1): 4-10 (2022); see also Baker McKenzie, *Global Restructuring and Insolvency Guide: Netherlands*, <https://resourcehub.bakermckenzie.com/en/resources/global-restructuring-and-insolvency-guide/emea/the-netherlands/topics/effect-of-process> (discussing current Dutch Insolvency Law and contrasting a Faillissement with a WHOA).

²⁰¹ See Tjalling Bosker, *Financing Corporate Rescue – The Dutch Approach. A Cross-Border Comparison*, 5 NIBLeJ 4, 10-13 (2017) (available at: https://www.ntu.ac.uk/_data/assets/pdf_file/0039/488478/A05_NIBLeJ_2017_5_Bosker.pdf).

²⁰² Idem at 16-17 (identifying such obligations would be ahead of pre-existing unsecured claims).

²⁰³ Marc Broekema & Jan Adriaanse, *supra* n. 200 at 5.

²⁰⁴ Idem at 6.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ *Commission Study Feb. 2022* at 46 (noting no specialist courts or chambers, but that regional courts or specific judges developing expertise in an *ad hoc* manner, and further noting, the Netherlands as an expertise leader along with the UK in restructuring matters).

²⁰⁸ Idem at 35.

²⁰⁹ Idem at 36.

²¹⁰ Ken Baird et al., *supra* n.139 (citing successful restructurings of Steinhoff, Diebold Nixdorf, Vroon and Royal IHC).

²¹¹ Omar Salah & Jan de Wit, *The Dutch Supreme Court Judgment on the WHOA Restructuring of Royal IHC*, Norton Rose Fulbright (Q2 2025) (available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/c49dbf13/02-the-dutch-supreme-court-judgment>).

²¹² Ken Baird et al., *supra* n.139 (citing successful restructurings of Steinhoff, Diebold Nixdorf, Vroon and Royal IHC).

²¹³ Ibid.

²¹⁴ Omar Salah & Jan de Wit, *supra* n.211.

²¹⁵ Ibid.

²¹⁶ Ibid.

The Dutch Supreme Court ruled that the WHOA does not provide authorisation to require financiers to provide new financing or keep existing commitments on amended terms, and that the legislature did not intend such relief as part of the WHOA's scope to amend creditors' rights.²¹⁷ Additionally, on non-consensually ranking claims, the ruling permits such relief, whether done contractually, through an intercreditor agreement or through changes to in rem security rights, provided the absolute priority rule is respected.²¹⁸

Another feature of note that was not disturbed going forward by the cassation in the interest of the law was that *Royal IHC* occurred under the private proceeding option of the WHOA, meaning it would not be subject to EU mandatory recognition. It also demonstrated the use of the proceeding when there is "sufficient connection to the Dutch legal sphere" and an exercise of jurisdiction over four English companies in the group.²¹⁹

It has been said that:

*"The Dutch are the ones in Europe who seem to have best understood which chances are inherent in Brexit and the farewell of the English instruments from the European recognition automatism."*²²⁰

The Netherlands can also boast a successful cross-border "inter-conditional process"; as the *Vroon Shipping Group* matter involved a Dutch WHOA and parallel English scheme of arrangement that required both to be sanctioned in order for the restructuring to be implemented.²²¹

Under the 2026 Directive, the Netherlands must adopt formal rules regarding director duties to act, departing from reliance on general duties of care under the Dutch Civil Code and other sources.²²²

2.3.3 Dutch WHOA approach to assumption, extraterritoriality of relief and eligibility to commence a WHOA

▪ Assumption under Dutch bankruptcy law and the WHOA

In a WHOA, with the exception of employment contracts, the company can amend or terminate contracts with counterparties.²²³ Such provision in the WHOA is consistent with the DBA, which provides that:

*"The debtor may, under Article 373, Fw, present a proposal to a contractual partner to amend or terminate the agreement. If the other party does not accept the proposal, the debtor may terminate the agreement early, provided that a restructuring plan has been offered and is confirmed by the court and the court thereby gives its consent to this unilateral termination."*²²⁴

This leaves open the prospect of "terminating unfavourable contracts (particularly long-term contracts such as tenancy, lease, or license agreements) or at least for negotiating better contract terms."²²⁵

This distinguishes the WHOA from the StaRUG in terms of broader tools being available in the preventive restructuring framework than prior bankruptcy or insolvency proceedings pre-dating the 2019 Directive.

▪ Avoidance actions in the Netherlands

Article 6(1) of the European Insolvency Regulation is applicable in the Netherlands as in the rest of EU Member States. The WHOA does not expressly incorporate the avoidance powers under the DBA, and instead includes an amendment to the DBA, article 42a, which protects legal acts performed after the company submits its statement to the court registry or has a plan expert appointed by the court as part of the WHOA.²²⁶

The avoidance powers under the DBA focus on either non-obligatory / gratuitous acts which are avoidable in the period 1 year prior to the bankruptcy when made at less than full value or between related legal persons, and for obligatory / non-gratuitous acts made that prejudice creditors, and the recipient subjectively knew a bankruptcy request had been filed, or colluded with the debtor to the detriment of other creditors.²²⁷ As to how foreign creditors are treated, "form and timeframe for filing claims are the same for foreign creditors as for Dutch creditors"²²⁸ and "[i]f a creditor is located outside of the Netherlands and the bankruptcy trustee knows or suspects that the creditor does not speak Dutch, he or she can correspond with the creditor in English."²²⁹

217 Ibid.

218 Ibid.

219 Ken Baird et al., *supra* n.139 (citing successful restructurings of Steinhoff, Diebold Nixdorf, Vroon and Royal IHC); see also Marc Broekema & Jan Adriaanse, *supra* n.200 at 4-10 (discussing the public and private version of the WHOA).

220 Christoph G. Paulus, *supra* n.164 at 102.

221 Ken Baird et al., *supra* n.139.

222 Martijn Dellebeke, *EU Directive 2026 and Dutch Directors, When to File for Insolvency in the Netherlands (and How to Avoid Personal Liability)*, Global Law Experts (June 2026) (available at: <https://globallawexperts.com/duty-to-file-insolvency-netherlands/>).

223 Sebastiaan van den Berg & Lucas Kortmann, *Restructuring & Insolvency Comparative Guide - Netherlands*, MONDAQ Guide, 3.10 (available at: <https://www.mondaq.com/guides/results/13/1150/all/netherlands-restructuring-insolvency>).

224 Reinhard Bork, *supra* n.147 at 18.

225 Ibid.; see also Christoph G. Paulus, *supra* n.164 at 104 (citing Art. 373, para. 1, Fw).

226 See Art. 42a, Fw (citing Art. 370(3) & 371) (reviewed in English Translation at: https://dwbnxnuhxaozve.cloudfront.net/OLD/pdfs-old/20200526-Unofficial-translation-of-CERP-bill-as-submitted-to-the-Senate_2021-08-27-134958_nuvi.PDF).

227 Sebastiaan van den Berg & Lucas Kortmann, *supra* n.223 at 4.10.

228 Idem at 5.8.

229 Ibid.

The WHOA at article 369 paragraph 8 gives exclusive jurisdiction to the court after the procedure has been commenced that is competent to handle the matter, and permits a group of legal entities to jointly request one court to hear all requests filed in relation to the restructuring plan.²³⁰

- *Eligibility for the WHOA*

The official business website for the Netherlands defines a debtor as: “a person or business that can no longer pay their debts.”²³¹ That lay definition is tempered with a more flexible legal test, which focuses on whether the debtor will be unable to continue paying its debts in the near future, an example being the debtor foresees it will be unable to repay a loan due in a year.²³²

The WHOA as translated into English states:

“If a debtor is in a situation in which it may reasonably be assumed that it will be unable to continue paying its debts, it may offer its creditors and shareholders, or some of them, a restructuring plan providing for an amendment of their rights.”²³³

The 2026 Directive may impose difficult questions as to whether initiating or pursuing a WHOA allows for delay in filing a bankruptcy, or if in pursuing a frivolous WHOA the directors have acted in a manner triggering their liability under the framework the Netherlands must implement.²³⁴

2.4 The 2026 Directive and discussion of the 28th Regime

2.4.1 2026 Directive

In addition to the above, further minimum harmonisation may be achieved after the adoption of the 2026 Directive.

The 2026 Directive does not affect the eligibility questions, allowing variability among the sampled jurisdictions, but each requires a level of difficulty in meeting obligations as they become due in the near term.²³⁵ There are a number of items covered in the 2026 Directive that are relevant to the topics covered in this paper.

Article 30 of the 2026 Directive implements assumption and assignment requirements in the case of pre-pack sales.²³⁶ The 2026 Directive affords some flexibility on the topic, as the compromises on the Directive from earlier proposed versions will allow Member States flexibility in rights of counterparties to oppose the assignment of their agreements, some of which may incorporate aspects of US practice under section 365 of the Bankruptcy Code.²³⁷ As a Directive, Member States are always afforded a significant amount of discretion in terms of how to implement the minimum requirements into their national laws, which has been discussed in what practitioners expect with the 2026 Directive.²³⁸

As to avoidance actions, Title II of the 2026 Directive specifically addresses minimum standards for this body of law.²³⁹ As discussed above, case law and construction of the EIR has generally allowed for the extraterritorial application of the avoidance powers, and nothing in the 2026 Directive disturbs that approach.²⁴⁰

2.4.2 28th Regime

In addition to the 2026 Directive, the EU has also been simultaneously pursuing a viable alternative – a so-called “28th Regime” – under which, instead of replacing national laws via mandatory harmonisation, firms would have an opt-in insolvency framework that would provide for an option to address multinational bankruptcy situations.²⁴¹

Messrs. Becker and Oehmke make the case that national insolvency framework reforms have not sufficiently achieved harmonisation or predictability, pointing to firms’ decisions to consider non-European regimes like chapter 11 of the US Bankruptcy Code, and position the 28th Regime as a solution to structural difficulties in achieving full harmonisation across the EU.²⁴²

230 Art. 369, para. 8, Fw. (reviewed in English Translation at: https://dwbxnuhxozve.cloudfront.net/OLD/pdfs-old/20200526-Unofficial-translation-of-CERP-bill-as-submitted-to-the-Senate_2021-08-27-134958_nuvi.PDF); see also Christoph Paulus *supra* n. 151, at 103 (when a substantial part of the assets of the debtor or even group members are located there).

231 KVK Netherlands Chamber of Commerce, *Roles in WHOA Procedures*, Business.gov.<https://business.gov.nl/ending-or-transferring-your-business/bankruptcy/roles-in-whoa-procedures/> (accessed 2 March 2026).

232 Sebastiaan van den Berg & Lucas Kortmann, *supra* n.223 at 3.3.

233 Art. 370, para. 1, Fw. (reviewed in English Translation at: https://dwbxnuhxozve.cloudfront.net/OLD/pdfs-old/20200526-Unofficial-translation-of-CERP-bill-as-submitted-to-the-Senate_2021-08-27-134958_nuvi.PDF).

234 Martijn Dellebeke, EU Directive 2026 and Dutch Directors, *When to File for Insolvency in the Netherlands (and How to Avoid Personal Liability)*, Global Law Experts (June 2026) (available at: <https://globallawexperts.com/duty-to-file-insolvency-netherlands/>).

235 Proposal for a Directive of the European Parliament and of the Council Harmonising Certain Aspects of Insolvency Law COM/2022/702 final [hereinafter 2022 Proposed Directive]; see also Jan Strupczewski, *supra* n.16.

236 2026 Directive Art. 30.

237 See Nick Fortune, et al., *Restructuring – 2025 in Review and Predictions for 2026*, LEXOLOGY, (23 December 2025) (available at: <https://www.lexology.com/library/detail.aspx?g=b775f2b2-f9a8-47ef-9fef-b9613fb6a477>).

238 See *supra* n. 143-44; 180-83; & 234.

239 2026 Directive Tit. II et seq.

240 Ibid; see also 2026 Directive Art. 13 (protecting transfers on account of knowledge of a preventive restructuring process).

241 Bo Becker & Martin Oehmke, *supra* n. 5 at 16-17; Patrick J. Potter, *supra* n.9 at 5.

242 Bo Becker & Martin Oehmke, *supra* n.5 at 14-17.

In looking to a blank slate framework, the drafters could focus on efficiency and tools that prompt the greatest benefits, while still allowing firms to use national frameworks that may serve them well.²⁴³ Still, a potential challenge would be settling upon legal venue, and whether additional specialised courts would be necessary, along with the specifics of how the regime would interact with national insolvency frameworks.²⁴⁴

Dr Kotowski has framed the 28th Regime as an opportunity for a “virtual Delaware” for the EU.²⁴⁵ In recommending a 28th Regime as a broadly accessible option, Dr Kotowski focuses on how such a structure would “enhance legal certainty ex ante, reduce future restructuring costs and facilitate cross-border financing.”²⁴⁶

The proposal is one that provides “a voluntary, competitive, and supranational legal framework that strengthens the internal market and offers a way to combine legal diversity with functional unity.”²⁴⁷ Dr Kotowski views the concept as one that would permit the development of “legal predictability, and the accumulation of expertise.”²⁴⁸

2.5 COMI

In addition to the foregoing brief summaries of substantive law provisions in France, Germany and the Netherlands, a discussion of COMI is needed to understand how a company might avail itself of a jurisdiction based on perceived benefits.

The Commission provides a case study involving the Netherlands and Spain for the purposes of COMI, *Anonymous Party (X) v Apply Digital Systems Holding BV (ADSH)*, which predates implementation of the WHOA.²⁴⁹ As detailed by the Commission, the Court of Appeal of Amsterdam applied the presumption that COMI is where the registered seat is, but is rebuttable where central administration is located in a Member State elsewhere, and in reviewing the facts ascertainable to third parties demonstrates actual management and supervision occur elsewhere.²⁵⁰ The Court found that ADSH had its COMI in the Netherlands, but upheld the denial on grounds of due and payable claims necessary to open the insolvency proceeding.²⁵¹

France, Germany and the Netherlands provide for jurisdiction when the COMI is established by the registered seat of the company.²⁵² However, as discussed above, the Netherlands is broadening access to its jurisdiction, with a “sufficient connection to the Dutch legal sphere” concept to supplement COMI, but one that still appears more restrictive than the broad UK approach allowing jurisdiction when the debt documents are governed by English law.²⁵³ Venue and eligibility in the US are therefore seemingly broader than the EU counterparts discussed in this paper, but not without limits.²⁵⁴

The Commission, in evaluating forum shopping, has provided some additional context on how COMI issues have been addressed.²⁵⁵ The Commission cited a French proceeding that involved subsidiaries based in Belgium as being appropriate when the holding company had headquarters in Paris and the subsidiaries took direction and financing from Paris as well.²⁵⁶

Judicial review has been focused on the legal entities instead of an enterprise group, “requiring the determination of the COMI for each member of the same group of companies separately, and not considering the group as a single economic unit.”²⁵⁷

It has been argued that:

*“[T]he only possibility to concentrate the insolvency proceedings of the various members of the same group of companies in one jurisdiction is to convince the courts of a given Member State that all legal entities have their COMI there.”*²⁵⁸

This stands in considerable contrast to the flexible approach for chapter 11 debtors that was on full display in the *Multi-Color Corporation* case (discussed above).²⁵⁹

3. Comparison of competition for restructuring filings in the US and EU

On a comparative basis, competition for restructuring filings in the US and the EU similarly appears to not be driven by an overt desire to increase filings in a particular jurisdiction.²⁶⁰ However, in the US, local practices appear to have

243 Idem at 17.

244 Ibid.

245 Anastasia Kotowski, *supra* n. 18 at 27.

246 Idem at 28.

247 Ibid.

248 Idem at 27.

249 Commission Study Feb. 2022 at 42-43.

250 Idem at 42.

251 Ibid.

252 Ken Baird et al., *supra* n.139.

253 Ibid.

254 See 11 U.S.C. § 109; 28 U.S.C. § 1408; *In re Multi-Color Corp.*, No. 26-10910 (MBK), 2026 WL 735405 (Bankr. D.N.J. Mar. 16, 2026).

255 Commission Study Feb. 2022 at 38.

256 Ibid (citing Tribunal de Commerce de Paris, 2^{ème} Chambre, 13 mars 2018, n°2019013204 and 2018013207).

257 Ibid.

258 Ibid.

259 See *supra* section 1.1.2. & n. 43-53.

260 Commission Study Feb. 2022 at 12. “The Study considers firstly that the safeguards provided in the EIR, as applied by national courts, seem to have had positive effects in line with the objective of mitigation of (abusive) forum shopping practices. This Study notes this to be even more true where the practical incidence of certain forum shopping practices has diminished as a consequence of national legislative reforms modifying individual debtors’ relief periods in certain countries. Additionally, forum shopping practices in respect of the UK also appeared to be reduced (if not eliminated) as a consequence of Brexit, on one hand, and the enactment of the Preventive Restructuring Directive on the other.” Ibid; Laura N. Coordes & Joan N. Feeney, *supra* n.22 at 343 & 379-80 (“history shows a wide variety of factors can entice debtors to file in a particular district, including the knowledge of the judges, the establishment of rules and procedures for complex cases, and the rulings of both bankruptcy and higher courts.”).

undertones of soliciting business from the bankruptcy bar, which does not have a direct analogue in the EU.²⁶¹ The EU rather seems to be driven to implement more cutting-edge tools to catch up to other jurisdictions, including post-Brexit UK, which has been a market leader for “destination restructurings.”²⁶²

The US circuit differences present a strategic opportunity to benefit reorganisation objectives or at a minimum to avoid certain burdens, especially on the assumption and assignment of contracts and leases, which depending on the nature of a debtor’s business could pose an existential threat if a counterparty could prevent the debtor from retaining a valuable contract under the hypothetical test regime.

In the EU, a COMI shift away from France in the event of employee concerns could be a viable strategy, but is limited by the putative debtor’s factual constraints, and could give up access to more robust contract and avoidance tools in a preventive restructuring posture given the limitations of the StaRUG as to those items, and the WHOA’s exclusion of employment contracts from its amendment or termination powers from actually improving a debtor’s situation. Further, an audacious shift, away from France in particular, has not been attempted following the 2019 Directive, especially on the scale that would have the same illustrative characteristics that *LTL* and *Red River Talc* have shown in the US.

Those cases present a cautionary tale with respect to commencing a case in one venue where its basis is tenuous. Selecting a district within the Fourth Circuit, when venue is better established elsewhere, has prompted the court to transfer a case and altering the eligibility test. Proceeding in the Third Circuit when the entity appears solvent or lacks imminent financial distress is now an uphill task, as compared to the Fourth Circuit’s objective futility and subjective bad faith standard.

With the Supreme Court declining to act in *Bestwall*, the circuit split on eligibility to file will continue as between the Third and Fourth Circuit. While not an exact match for the Third Circuit’s standard, the Fifth Circuit’s case law also provides cause for dismissal when facts and circumstances like those in *Red River Talc* were present, and yielded the same result as its *LTL* styled forerunners. Further exploration of that standard may occur as N.D. Tex. and S.D. Tex. remain popular venues for complex chapter 11 filings.

The Commission, the 2019 Directive and the 2026 Directive strive to harmonise state law among Member States to make strategic filing decisions less attractive, although with minimum harmonisation standards with the 2026 Directive once again. While harmonisation does not eliminate variance entirely, it does suggest a desire to refrain from competition to attract bankruptcy or insolvency tourism. Such competition for filings would be further blunted in the event an EU-wide 28th Regime becomes an option to permit the standardisation of substantive rules for enterprises looking to voluntarily opt in to such a regime.

Until then, Germany, through the StaRUG, has implemented a tool to reduce the persistent stigma associated with restructuring practice, and offers companies an avenue to address financial issues without sacrificing the going concern value of the firm. Similarly, the Dutch WHOA increases the opportunity for Dutch firms to surgically target problems that once might have required pursuing a scheme in the UK.

While beyond the scope of this paper, further clarity on “group” filings would seem to further eliminate strategic advantages present under state law in the EU. The prospect of the 28th Regime for new enterprises could go a long way to reducing the difficulties multiple COMI locations present for multi-national EU enterprises.

By contrast, the US remains a fractured landscape on numerous issues, and restructuring planning accompanied by legitimate commercial activity (sometimes very minimal activity) can afford a group of companies access to whichever jurisdiction it determines has the best mix of substantive rules.²⁶³

261 Laura N. Coordes & Joan N. Feeney, *supra* n.22, at 372-73; Alicia McElhaney, *Companies from Afar Tap Houston Bankruptcy Court Despite Minimal Local Ties*, WSJ Pro Bankruptcy (16 January 2025) (available at: <https://www.wsj.com/articles/sweden-northvot-houston-bankruptcy-court-6ded8b5b>) (accessed 16 January 2025) (identifying establishing venue by setting up co-working addresses or hastily formed entities, to capitalise on debtor-friendly laws).

262 Commission Study Feb. 2022 at 137, citing Peter Mankowski, *The European World of Insolvency Tourism: Renewed, But Still Brave?* 64 Neth. Int’l L. Rev. 95 (2017).

263 See Maurice “Mac” VerStandig, *Bankruptcy Venue Reform Back Before Congress*, 40-DEC Am. Bankr. Inst. J., 8, 8-9 (2021) (quoting *In re Caesars Entm’t Operating Co. Inc.*, Case No. 15-10047 (KG), 2015 WL 495259, at *3. The debtor stated in its briefing prior to the Venue Hearing that it selected the Illinois Court because Chicago is conveniently located at the centre of its operations and because of favourable legal precedents in the Seventh Circuit regarding the assumption of executory contracts and third-party releases (as they relate to a plan of reorganisation); Alicia McElhaney, *supra* n.261 (identifying establishing venue by setting up co-working addresses or hastily formed entities, to capitalise on debtor-friendly laws).

4. Conclusion

Considering the US constitutional requirement for uniformity, there should not be any advantage for filing a bankruptcy in one jurisdiction versus another in the US. However, in practice, the nature of a circuit judiciary introduces variance and affords opportunities for debtors to consider whether substantive rules may improve prospects or cause additional difficulties in executing an in-court restructuring.

The EU, in contrast, has legitimate historical and cultural reasons for substantive differences in insolvency law at the state level. The EU's aims and values²⁶⁴ – such as a common market and free flow of people and capital²⁶⁵ – contribute to Member States continuing work to harmonise the provisions as directed by the EU and eliminate, at least to a minimum standard, what could be attractive variance for strategic action by filing companies.

Those EU initiatives outpace developments in the US to reduce substantive differences among jurisdictions.²⁶⁶ While not entirely eliminating variance, the reform activity in Europe does not seem to be overly targeted at garnering business for EU Member States' restructuring courts, with only the Dutch WHOA introducing a "sufficient-nexus type" approach to access the tools of that proceeding.²⁶⁷ The StaRUG, by contrast, and whatever statutory mechanism is created to allow for pre-pack practice in Germany,²⁶⁸ show an effort to provide new tools to businesses in need of restructuring and to provide the best outcome to creditors when a company faces financial difficulties.

Further study of whether ongoing harmonisation efforts have measurable effects on where either pre-insolvency or more formal proceedings are filed in the EU would provide meaningful data as compared to the generalisations drawn in this paper from the Commission's study and reporting about the 2026 Directive. The disposition of the venue question in the *Multi-Color Corporation* bankruptcy may also have a pronounced effect on how cavalierly potential debtors seek to shift venue in the US. The author has no doubt that, given the prevalence of "forum-shopping" research, academic literature will emerge looking at that issue as well.

²⁶⁴ EU, Aims and Values (available at: https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en).

²⁶⁵ Ibid.

²⁶⁶ *Commission Study Feb. 2022* at 121; see also 2026 Directive.

²⁶⁷ Ken Baird et al., *supra* n.139 (discussing Royal IHC and its four English companies in the IHC Group).

²⁶⁸ Due for implementation in 2029 under the 2026 Directive.



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