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THE MYTH (AND REALITIES) OF FORUM SHOPPING IN TRANSNATIONAL INSOLVENCY

John A. E. Pottow*

I. INTRODUCTION

A decade ago, in 1996, the landscape of transnational insolvencies was vastly different from today. The UNCITRAL Model Law had not been finished, the efforts at the E.U. Insolvency Treaty were jeopardized by mad cows, and no one had heard of Chapter 15. Now, all three universalist projects are up and running,¹ putting universalism in a comfortable state of ascendancy. The paradigm has not been without critics, however, the most persistent and eloquent of which has been Professor Lynn LoPucki.² LoPucki has periodically attacked universalism on a number of grounds. These grievances include a sovereigntist complaint of universalism's insensitivity to the differences in local bankruptcy laws³ (a refrain now picked up in the recent writings of John Chung),⁴ as well as an operational skepticism regarding universalism's capacity to consolidate corporate groups⁵ (which is further explored by Irit Ronen-

* Assistant Professor of Law, University of Michigan Law School. Thanks to Lynn LoPucki as well as to Jay Westbrook and the other participants at *Bankruptcy in the Global Village: The Second Decade* at Brooklyn Law School. Adam Deckinger offered invaluable research assistance.

1. See U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3, United Nations Commission on International Trade Law, 30th Sess., at 3, U.C. Doc A/CD.9/442 (1999) [hereinafter UNCITRAL MODEL LAW]; Council Regulation 1346/2000; European Union Regulation on Insolvency Proceedings, 2000 O.J. (L 160) 1–4 [hereinafter EU Regulation]; 11 U.S.C. §§ 1501–1532 (2007) [hereinafter Chapter 15].

2. See, e.g., LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) [hereinafter LOPUCKI, COURTING FAILURE]; Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143 (2005) [hereinafter LoPucki, *Universalism Unravels*]; Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216 (2000) [hereinafter LoPucki, *Cooperative Territoriality*].

3. See, e.g., LoPucki, *Cooperative Territoriality*, *supra* note 2, at 2237–38; see also Frederick Tung, *Passports, Private Choice, and Private Interests: Regulatory Competition and Cooperation in Corporate, Securities, and Bankruptcy Law*, 3 CHI. J. INT'L. L. 369, 375–76 (2002).

4. See John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 90 (2006).

5. See LOPUCKI, COURTING FAILURE, *supra* note 2, at 221–25; Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 716–17 (1999).

Mevorach).⁶ There is also his argument regarding universalism's inability to pick a jurisdiction-selecting choice of law rule,⁷ although the increasing prevalence of the center of main interests (COMI) test has undermined this pessimism somewhat.⁸ But the most vociferous attack of late—perhaps inspired by LoPucki's path-breaking work on domestic forum shopping—revolves around universalism's purported potential to facilitate, and even exacerbate, what he denigrates as transnational bankruptcy “forum shopping.”⁹ Indeed, this allegation prompted a spirited written debate just last year between Professor LoPucki and Ninth Circuit Bankruptcy Judge (and scholarly author) Samuel Bufford in the pages of the *American Bankruptcy Law Journal*.¹⁰

The purpose of this Article is to take issue with LoPucki's characterization of universalism as a harbinger of rampant forum shopping. This is not to imply that Judge Bufford's response was lacking. On the contrary, Bufford makes some excellent points and, even more interestingly, proposes specific doctrinal recommendations to shore up the areas where universalist instruments might tempt forum shoppers.¹¹ The goal of my contribution to the literature is to take a slightly broader, more theoretical response than Bufford's in defending universalism against accusations of

6. See Irit Mevorach, *The Road to a Suitable and Comprehensive Global Approach to Insolvencies Within Multinational Corporate Groups*, 15 *NORTON J. BANK. L. & PRAC.* 455 (2006).

7. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 217–21; LoPucki, *Universalism Unravels*, *supra* note 2, at 143–44.

8. COMI's robustness is seen by its adoption across a number of international insolvency instruments (e.g., the EU Insolvency Regulation, the UNCITRAL Model Law, Chapter 15 of the U.S. Code), as well its carriage into other commercial areas as a functioning jurisdiction-selecting rule. For example, the Cape Town Receivables Convention uses the COMI of the assignor as a choice of law rule. Convention on International Interests in Mobile Equipment ch. xxiv, art. 1(ii), Nov. 16, 2001, *available at* http://www.dgca.nic.in/int_conv/Chap_XXIV.pdf. COMI is here to stay.

9. LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 200. “The potential for economic harm from international forum shopping is greater than the potential for harm from domestic shopping. . . . If [universalists] succeed, they will unleash the international system's full potential for harm.” *Id.* at 207.

10. See Lynn M. LoPucki, *Global and Out of Control?*, 79 *AM. BANK. L.J.* 79 (2005); Samuel L. Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, 79 *AM. BANK. L.J.* 105 (2005) [hereinafter Bufford, *Global Venue Controls*]; LoPucki, *Universalism Unravels*, *supra* note 2.

11. Bufford's recommendations include adding a temporal “domicile” qualifier to COMI and a due process-animating probationary period to an initial COMI determination. See Bufford, *Global Venue Controls*, *supra* note 10, at 133, 139. LoPucki, in fairness, replies with some problems with the Bufford proposals (some of which are well taken and some of which are overstated, but that is a topic for another day). See LoPucki, *Universalism Unravels*, *supra* note 2.

fostering forum shopping. I also take a more pointed stance by contending that not only is universalism's capacity to encourage forum shopping misunderstood and overstated—a myth—but that *territorialism's* potential for forum shopping has hitherto escaped unnoticed and may be much worse.

The analysis proceeds by first considering the theoretical prerequisite to forum shopping—choice of law predictability—and contends that territorialism is worse for forum shopping on that ground.¹² It then discusses the second condition—manipulability—and again expresses concerns with territorialism. It finally explores what it calls the “real” cross-border bankruptcy forum shopping: inter-system arbitrage between territorialist and universalist courts in a world of both types of jurisdictions. While acknowledging that this is the exclusive fault of neither territorialism nor universalism, the analysis suggests that universalism's recent legislative efforts, such as Chapter 15, have made strides to combat the problem. The discussion concludes with final reflections.

II. FORUM SHOPPING'S THEORETICAL PREREQUISITE: PREDICTABILITY

For purposes of this discussion, the reader is presumed to know the differences between the universalism and territorialism paradigms, including their respective “modified” cognates.¹³ At an important level, these two paradigms can be seen as endorsing competing private international law rules regarding the selection of governing bankruptcy law in cross-border proceedings.¹⁴ Territorialism follows the *lex situs* rule of having the substantive bankruptcy law derive from the physical location of each of the bankrupt's assets. Universalism follows, generally (but not precisely), the *lex fora* idea of the bankruptcy law deriving from the location of the debtor's bankruptcy proceeding (assuming that that proceeding is in the debtor's “home” jurisdiction). The arguments as to which choice of law regime is normatively preferable have been well developed in

12. See *infra* note 20 on the diction choice of “prerequisite.”

13. See generally Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252 (2000) [hereinafter Rasmussen, *Resolving Transnational Insolvencies*].

14. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 200–04 (generalizing that courts apply their own bankruptcy “laws, procedures, and priorities” but recognizing that this is not invariably so “at the margins”); see also *Stonington Partners v. Lernout & Hauspie Speech Prods.*, 310 F.3d 118 (3d Cir. 2002) (Belgian and U.S. courts insisting on application of their own bankruptcy laws in parallel proceedings); *In re Treco*, 240 F.3d 148, 158–59 (2d Cir. 2001) (rejecting deference to Bahamian proceeding due to dissimilarity of its bankruptcy law).

previous scholarship.¹⁵ One advantage that universalists repeatedly trot out is that their rule yields more “predictability” (and hence efficiency) from the ex ante perspective of lenders: lenders have no need to follow assets around the world to keep track of shifting governing law; they know that if they lend to a Canadian-centered business, Canadian bankruptcy law will govern the adjudication of all assets everywhere in the event of financial distress.¹⁶

The universalists are generally correct in their claim to greater predictability, at least on a theoretical level (the sheer number of applicable bankruptcy laws under a territorial regime almost makes the case on its own). Yet they should not necessarily trumpet their predictability so enthusiastically for at least two reasons. First, as we shall see, while on a *theoretical* level universalism should yield greater predictability than territorialism, *as it has been operationalized* (through the Model Law, Chapter 15, and so on), that potential predictability has been curtailed.¹⁷ Secondly, and more fundamentally, celebration of “predictability” may actually be misguided, especially in a world now sensitive to the perceived evils of forum shopping.¹⁸

This second point may be heresy to many bankruptcy readers—to question the holy grail of “predictability.”¹⁹ But for all the encomium predictability receives by scholars in our community, its seedy underbelly needs to be exposed to have a meaningful and frank discussion of bankruptcy forum shopping. This is due to the straightforward but nevertheless important point that predictability is a necessary prerequisite to forum shopping.²⁰ If “case placers”²¹ do not know which forum’s laws

15. See, e.g., Rasmussen, *Resolving Transnational Insolvencies*, *supra* note 13.

16. See, e.g., Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2208 (2000); Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2292–93 (2000). Note that if the universalism vs. territorialism contest is collapsed into a choice-of-law debate, then the “predictability” benefits of universalism are chronologically upstreamed, such that universalists contend transactional planners will know which insolvency law will govern distribution and priority if and when the debtor ever files for bankruptcy.

17. Cf. LoPucki, *Universalism Unravels*, *supra* note 2, at 158–63 (arguing that territorialism accords greater predictability than universalism as implemented).

18. See *infra* Part VIII (discussing normative desirability of forum shopping).

19. LoPucki aptly needles that “predictability,” when used by bankruptcy case placers, is sometimes nothing more than a codeword for “case placer solicitude.” LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 249–50.

20. See Nita Ghei and Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1373 (2004) (“[U]ncertainty about which jurisdiction’s law applies would actually reduce forum shopping.”); see also Kaplow, *infra* note 36 (noting that predictable rules regarding form make fraud easier for transactional planners and hence that “standards may be pref-

will apply to a filed bankruptcy case, they cannot shop that case for attractive law.²² Indeed, this is likely the animation behind random as-

erable in some contexts"). Strictly speaking, "prerequisite" may technically be an overstatement. One can always forum shop, even in a highly unpredictable choice of law environment; the uncertainty costs, however, associated with shopping will rise with unpredictability and may eventually cross a prohibitive threshold. At the absolute case, the proposition of a prerequisite holds: it is impossible to forum shop (at least for law) if knowledge of applicable law is unavailable. This semantic qualification duly noted, I will continue to deem predictability a "prerequisite" to forum shopping.

21. This is LoPucki's term. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 249.

22. As mentioned, *see supra* note 20, this statement characterizes the absolute case at the extreme: if choice of law is truly random, forum shopping is impossible. Relaxing that extremism, if we say merely that the choice of law rule is "highly unpredictable," then forum shopping, while not impossible, is "highly risky," because that unpredictability undermines the transactional planner's efforts to select desired law. Compare a more predictable choice of law rule (the forum selected by the parties to the contract) to a more unpredictable one (the forum selected by the parties to the contract, if appropriate). The forum shoppers in the second case are uneasy than their first case counterparts because they face the risk that their desired choice will be unsettled. A middlingly predictable rule (the forum selected by the parties to the contract, unless manifestly contrary to the public policies of the *lex fori concursus*) would be of correspondingly middling comfort to the forum shopper. Thus, along this simple axis of analysis, more predictability is preferable to putative forum shoppers, in part because it gets ex post judges out of their hair.

Now complicate matters by relaxing the assumption of objective judges dispassionately interpreting a choice of law rule and inject case-scroungers of the sorts over which Professor LoPucki (and not without reason) frets. In that case, diminished predictability—at least if arising through ambiguity in the choice of law rule—may actually foment, rather than discourage, forum shopping. Take a highly ambiguous rule (the fairest jurisdiction's laws to resolve the contractual dispute). Such a rule might inspire case placers, in an environment of solicitous judges, to seek friendly courts with any plausible argument that their desired forum is the fairest. Here, the forum shopping is focused less on upstream transactional planning and more on ex post filing in a desired courtroom. The ambiguity of the choice of law rule gives the case placers cover in this competitive judicial environment and hence actually facilitates their shopping impulses. Ironically, to cabin the discretion of these judges requires clearer, more predictable rules—rules that unfortunately offer clear guidance to the upstream transactional planner seeking to shop for attractive law. *See also infra* text accompanying note 31 (discussing difference between jurisdiction-selecting rule's exclusivity and clarity).

This Article proceeds on the simplifying assumption of judicial objectivity and hence of unpredictability generally working to frustrate forum shopping, *see Ghei & Parisi, supra* note 20, but the reason for this assumption is more expositional ease and aspired clarity than substantive rejection of Professor LoPucki's corruption concerns (a debate I defer major participation in for a later day). As I do mention briefly below, however, *see infra* notes 50 and 111, although I think Professor LoPucki uncovers a serious problem in the U.S. domestic venue rules, he and I diverge when we turn to the international front, both because of the exclusivity of the COMI rule in contrast to the multiplicity of the domestic venue rules, and, more relevant to the instant issue, because of our differing assessments of the vagueness of the COMI rule. I openly admit that the COMI

signment in bankruptcy venues with multiple judges, such as the Southern District of New York, where the clerk “spins the wheel” in assigning which judge will sit on a case after its filing: a presumable effort to diminish intra-district judge shopping. If an international debtor had to spin a wheel to determine which bankruptcy law would apply in the event it filed for reorganization, forum shopping would be very difficult indeed. To be sure, lenders might be horrified by such a system—the death of predictability!—and they would consequently add a hefty legal risk premium in pricing credit, but it would certainly end forum shopping as we know it (or at least sublimate it into wheel-spinner bribing). Accordingly, concern about forum shopping cannot proceed in the absence of a recognition that a necessary prerequisite is predictability and, therefore, that there is an inherent trade-off between predictability, which is traditionally viewed positively in bankruptcy circles, and “shopability,” which is presumably more negative.²³

This relationship between predictability and forum shopping means that earlier territorialist criticism of the imperfections of universalism’s choice of law rules may actually, and perhaps ironically, be praise for a certain flexibility that may inhibit forum shopping.²⁴ As will be discussed below, the very genius of the universalist COMI rule is its fact-sensitivity. While it sacrifices a degree of clarity, it comes at the gain of an ability to stifle putative forum shoppers. This dawning realization may be why territorialists have changed the thrust of their critique in trying to discredit universalism. Initially, territorialists complained that proposed jurisdiction-selecting rules under universalism, such as COMI, would be vague and unpredictable, pointing to the crispness of the competing situs rule.²⁵ Now, likely as a result of the new concern about forum shopping,

rule has some unpredictability inherent in it (its juxtaposition to the alternative jurisdiction-selecting rule of place of incorporation exposes this attribute), but see this vagueness as limited (“bounded vagueness” perhaps). Professor LoPucki sees the play in the joints as much greater and hence much more ominous—perhaps scarcely better than my stylized unpredictable choice of law rule of the “fairest” jurisdiction. See LoPucki, *Universalism Unravels*, *supra* note 2, at 143 (“[The COMI] standard is intentionally vague and practically meaningless.”).

23. Compare the discussion on normative desirability, *infra* Part VIII. Another necessary prerequisite is meaningful difference in law; one can only shop if one has more than one product from which to choose. Cf. LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 231 (worrying that universalism will foment, undesirably in his view, substantive harmonization of bankruptcy laws).

24. See LoPucki, *Universalism Unravels*, *supra* note 2, at 143.

25. See, e.g., Frederick Tung, *Skepticism About Universalism: International Bankruptcy and International Relations* 1, (Berkeley Program in L. & Econ., Working Paper No. 43, 2002), available at <http://repositories.cdlib.org/blewp/43>.

the tone has changed: denigration of universalism's *difficulty* in crafting a choice of law rule has been replaced with concern over the *ease* with which the universalist COMI rule has taken grip and will undergird a pandemic of forum shopping.²⁶

III. UNIVERSALISM VS. TERRITORIALISM'S "PREDICTABILITY" REGARDING CHOICE OF LAW

Ten years ago, there was still debate over which choice of law rule would anchor a universalist paradigm (place of incorporation? location of most assets?). Now, it is clear that COMI has emerged the winner. But what is COMI? Is it a bright-line rule? A standard? A mid-point along a rule-standard continuum? If a mid-point, where precisely does it lie?²⁷ LoPucki at times equates home country with place of incorporation, rendering the impression that they are interchangeable.²⁸ They are not.²⁹ They are quite distinct—importantly, in a manner that implicates the forum-shopping attribute of “predictability.” While one may call COMI a rule, to call it a “bright line” would probably be a stretch, even for its proponents.³⁰ To be clear, this is not a comment on the rule's *exclusivity*.

26. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 210–12 (chronicling universalism's growing acceptance); *id.* at 217–218 (“All the case placer need do to forum shop in a universalist system is make a plausible argument that the chosen court is at the centre of the debtor's main interests.”) (internal quotation marks and alterations omitted); LoPucki, *Universalism Unravels*, *supra* note 2, at 147–48. In other words, in the earlier, more abstract academic discussions, territorialists doubted universalists would be able to get their act together sufficiently to agree upon a jurisdiction-selecting rule (would they pick incorporation? Location of major assets? COMI?). Now that COMI has emerged triumphant, the territorialist concern seems to be that the forum shopper has clear guidance and hence an easy task. Knowing the dominant rule, he can take steps to establish or move his COMI in or into a preferred jurisdiction.

27. Presumably at the middle, but nobody likes a smartass. *Cf.* FLETCH (Universal Pictures 1985) (“Fletch: Well, we're in kind of a grey area. Frank: How grey? Fletch: Charcoal.”).

28. LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 196 (“[T]hroughout most of the world, a debtor corporation's country of incorporation is considered an appropriate venue—if not *the* appropriate venue—for the corporation's bankruptcy case.”); *id.* at 198 (listing place of incorporation as “one of the three tests commonly applied” to determine home country); *id.* at 218 (listing place of incorporation as one of four plausible bases for COMI that is “routinely” accepted).

29. See *id.* at 218 (conceding that “[i]f incorporation is the debtor's only contact with the forum country, the [COMI] argument may not be plausible”).

30. For example, Professor Jay Westbrook defends its clarity, but with circumspect language:

[T]he principal place of business standard in one formulation or another is commonplace throughout American law—state and federal—and is found else-

That is, there should be one and only one “center” of main interests. But exclusivity and clarity are different.³¹ Consider, as a hypothetical, that universalism selected controlling bankruptcy law as the “fairest” jurisdiction to administer the debtor’s global assets.³² Only one jurisdiction can be the fairest of them all (an exclusive criterion), but surely fairness is less akin to a rule than a standard (a malleable criterion). The same comparison holds in differentiating COMI³³ from its logical rival, place of incorporation. Universalism could have selected the governing bankruptcy law by the much brighter-line test of the place of the debtor’s incorporation. Such a decision would have resulted in considerably more predictability.³⁴ (Indeed, underscoring the nexus between clarity of rule and forum shopping capability is corporate law’s internal affairs doctrine, which determines applicable substantive corporate law by place of incorporation; only with such a clear foundation choice of law rule can there be a meaningful jurisdictional “race,” either to the top or the bottom.)³⁵ Yet universalism did not pick place of incorporation as its juris-

where as well. That sort of standard has produced some litigation, but I am unaware of any widely held view that it is so imprecise as to be impractical or to maim any important legal objective. The center-of-main-interests standard was adopted in the EU Convention and the Model Law, with no substantial claim asserted that the standard was too difficult to enforce. A similar standard has been applied by the United States courts in applying section 304 of the Bankruptcy Code in the choice of forum context without provoking substantial litigation.

Westbrook, *Global Solution*, *supra* note 16, at 2316. Other scholars are less enthusiastic. See IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES* 260 (1999); Ian F. Fletcher, *Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency*, 32 BROOK. J. INT'L L. 767 (2007). For an atypical case, but an interesting one, struggling with a difficult-to-determine COMI, see *In Re Bank of Credit and Commerce Int'l SA*, [1996] 4 All E.R. 796 (U.K.); *In re Bank of Credit & Commerce International S.A. (No. 2)* [1992] B.C.L.C. 715 (U.K.) [hereinafter *BCCI*].

31. Although, to be sure, they may be related. See, e.g., Guzman, *supra* note 16, at 2207 n.113 (suggesting that exclusivity of home country rule would enhance clarity).

32. Compare the interest-based choice of law analysis from Restatement (Second) of Choice of Law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

33. The U.S. civil procedure analogue is “principal place of business.”

34. LoPucki indirectly touches on this when he argues that multiple plausible claims exist to COMI. See LoPUCKI, *COURTING FAILURE*, *supra* note 2, at 217–18; see also Luca Enriques and Martin Gelter, *Regulatory Competition in European Company Law and Creditor Protection*, 7 EUROP. B. ORG. L. R. 417, 431 (2006) (describing COMI as “fuzz[y]”) (internal quotation marks and citations omitted).

35. See G. Marcus Cole, *Delaware Is Not a State: Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L.REV. 1845, 1857–58 (2002) (canvassing corporate law “racing” literature and critiquing its applicability to purported “Delawarization”

diction-selecting rule. Instead, it opted for COMI, a more fact-dependent “standardish” criterion.³⁶

To be sure, a debtor’s place of incorporation is not independent from its COMI. Indeed, it is closely related. For example, under Chapter 15, the Model Law, and the EU Insolvency Regulation, COMI is legally presumed to be at a corporate debtor’s registered office (i.e., its place of incorporation).³⁷ But precisely because the presumption is rebuttable, COMI and incorporation are only usually, but not always, in the same place. Thus courts are invited to consider instances in which the brass plate (or “file drawer”)³⁸ corporate office points to COMI in one jurisdiction on a bright-line, formalistic analysis, but a functional, realistic inquiry of business contacts finds COMI elsewhere.³⁹ In other words, the presumption of COMI being place of incorporation is rebutted when the incorporation location is a mere sham, *which is a robust proxy for when a corporate debtor is shopping for attractive applicable law*.⁴⁰ Accord-

of corporate reorganizations); *see also* Rasmussen, *Resolving Transnational Insolvencies*, *supra* note 13, discussed *infra* Part VIII.

36. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 618 & n.180 (1992) (arguing that laws relating to form should be predictable but noting that fraud may be “easier to commit if there are known rigid rules that a fraudulent actor can carefully circumvent” such that “standards may be preferable in some contexts”); *see generally id.* at 562 (defining determinations as “standard-like” if their content is filled subsequent to relevant conduct). For European authors calling COMI a “standard,” *see* Enriques & Gelter, *supra* note 34, at 419.

37. *See* 11 U.S.C. § 1516(c) (2007); UNCITRAL MODEL LAW, *supra* note 1, art. 16.3; EU Regulation, *supra* note 1, art. 3.1.

38. LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 195.

39. These sorts of “letterbox” companies were of express concern to the European Court of Justice, which issued an opinion offering some interpretative guidance to the COMI rule. *See* Case 341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813, *available at* <http://curia.europa.eu/en/content/juris/index.htm>. For an excellent analysis of these proceedings, *see* Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, 27 NW. J. INT’L L. & BUS. 351 (2007).

40. Consider as a comparison the “real seat” doctrine used in some civil law systems in which a corporation is governed under the laws of its “real seat” (which would likely translate into “principal place of business” as U.S. analogue), regardless of its place of incorporation. *See* Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT’L L. 1005 (2007); Nick Segal, *The Effect of Reorganisation Proceedings on Security Interests: the Position under English and US Law*, 32 BROOK. J. INT’L L. 927 (2007); Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019 (2007). For example, companies often try to select into the tax laws of havens by “reincorporat[ing]” and setting up “nominal headquarters.” LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 199 (discussing tax-animating expatriation of Commodore International decades before its ultimate bankruptcy). It is doubtful the Bahamas could be Commodore’s

ingly, viewing COMI and the incorporation presumption together, a more accurate way of casting the jurisdiction-selecting choice of law rule of the Model Law and its universalist progeny is that the choice of law rule actually *is* place of incorporation, but that the rule is subject to an important anti-forum-shopping caveat: that the place of incorporation house the debtor's COMI.⁴¹ In this regard, rather than view *Daisytek* and similar cases as the "unraveling" of the COMI system,⁴² I see them as the vindication of a realistic approach to place of incorporation as a baseline choice of law rule for universalism. It works well as a jurisdiction-selecting criterion for most cases, but cannot stand when it points to a

COMI, which seems to prove the point that haven-induced incorporations may work for bright-line tax rules but not for COMI-based universalism.

41. Miguel Virgós & Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, in THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE 263, 281 (Gabriel Moss, Ian F. Fletcher & Stuart Isaacs eds., 2002) [hereinafter *Virgós-Schmit Report*] ("The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."); see also EU Regulation, *supra* note 1, recital 13, at 2 (replicating Virgós & Schmit's language).

42. *Re Daisytek-ISA Ltd.*, [2003] B.C.C. 562 (Ch. D) (U.K.); see also LoPucki, *Universalism Unravels*, *supra* note 2, at 150 (criticizing *Daisytek* as illustration of courts' inclination to hoard jurisdiction). In *Daisytek*, the Leeds court found the United Kingdom to be the COMI of each of the European subsidiary corporations, notwithstanding many incorporations on the Continent, because most of the suppliers and creditors who did business with them negotiated contracts with the British head office in Bradford and hence expected to be subject to British commercial law. Thus, the vindication of creditors' expectations was important in determining COMI. An interesting hypothetical would be to ask whether the United States (home of the corporate grandparent and great-grandparent) could have been the COMI of these French and German subsidiaries. Here, the answer is probably not under the most recent thinking of universalists, who are moving toward crafting an "economic integration" test as a principled means to combat the nettlesome question of corporate groups. See Mevorach, *supra* note 6 (exploring, in 115 pages of painstaking detail, insolvency considerations of cross-border corporate groups, including, inter alia, the role corporate letterhead should play in mediating the expectations of creditors). Mevorach's formulations are beyond the scope of this Article; suffice it to say she rolls up her sleeves and confronts some of the difficult obstacles territorialists challenge are insurmountable in allocating jurisdiction among corporate affiliates under universalism. Thus, for example, were Toyota's U.S. subsidiary ever to file for bankruptcy, the question whether its COMI would be in the United States or Japan would depend "dominantly," in Mevorach's estimation, on whether its financial affairs were interwoven with the parent (in an analysis reminiscent of substantive consolidation in domestic U.S. insolvency law; for a recent treatment, see *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005), *cert. denied*, 126 S.Ct. 1910 (2006)) and whether that interconnection were readily detectible to outside creditors.

jurisdiction other than a debtor's COMI, because such aberration reeks of (presumably unwelcome)⁴³ forum shopping.

By contrast, territorialism's choice of law rule is unrelenting in its brightness: it is where the assets are physically located on the nanosecond of bankruptcy. There is neither qualification nor caveat. That predictability, of course, comes at the cost of clear guidance to the putative forum shopper. There is no "presumption" in the way that registered office is only presumed to be a debtor's COMI. The asset's physical location is more analogous as a legal construct to the debtor's place of incorporation than to its COMI. Accordingly, a more apt comparison to the COMI rule would be if territorialism chose law based on the asset's "abode," which could be presumed to be its place of physical location. Yet this is exactly the sort of qualification that is anathema to the simplicity sought by the territorialist model.⁴⁴ To be sure, there are necessarily some cases in which uncertainty might arise as to asset location,⁴⁵ but we have no reason to think they will be common. In the main, territorialism thrives on its purported choice of law clarity and predictability; consequently, it must acknowledge its concomitant invitation, at least regarding these attributes, to forum shoppers.

Two conclusions flow from this suggestion that territorialism leads to the clearer (or more "predictable") choice of law rule—at least as universalism has been currently implemented with the COMI rule/incorporation presumption. First, universalism is not as clear in its choice of law ambitions as its proponents would like to say it is.⁴⁶ I say this as an unabashed universalist.⁴⁷ Again, one need only point to the

43. See normativity discussion, *infra* Part VIII.

44. See LoPucki, *Universalism Unravels*, *supra* note 2, at 160 ("Cooperative territoriality can provide greater predictability [because of the clear rule that] bankruptcy administration of a multinational's assets and operations within a given country is governed by the laws of that country."). The advantage of this rigidity, in its supporters' eyes, is that it permits one and only one country—that of the asset's location—to enforce legal control through force. Yet when concerns arise over asset flight, qualifications to this simplicity become necessary: agreement is now required between more than one country—the abode jurisdiction and the situs jurisdiction—and so exclusive reliance on the use of force by one country alone, so valued by territorialist theory, is no longer possible. See *also infra* text accompanying notes 115–18.

45. See, e.g., *Underwood v. Hilliard (In re Rimsat, LTD)*, 98 F.3d 956, 959 (7th Cir. 1996) ("[Rimsat's] principal place of business is in Fort Wayne, Indiana. Most of its financial assets are there, but its nonfinancial assets, principally leaseholds in satellites, have no terrestrial site.").

46. See *supra* note 30.

47. In this regard, I somewhat agree with Professor LoPucki's claim that the COMI rule (compared to territorialism's situs rule) is a "vague" standard. LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 221. He's right, and it would behoove universalists to admit it.

declined alternative of place of incorporation as the universalism choice of law rule to appreciate the foregone clarity. As an olive branch to win my way back into the universalism fold, I offer the further observation that while territorialism, as implemented, has the clearer choice of law rule, that is only a rule for asset-by-asset adjudication. The *cumulative* consequence of these multiple (clearer) choices of bankruptcy law may be, for example, that there are seven applicable bankruptcy laws to one multinational debtor's bankruptcy proceedings. That may result in confusion and expensive legal knowledge costs—the foundational sort of unpredictability that universalists (rightly) bemoan. Moreover, as mentioned, this lack of predictability to the choice of law rule—or, more precisely, this sub-maximal, but perhaps optimal, level of predictability to the choice of law rule—is not anything over which universalists should fret. It could well be a sensible retrenchment from predictability to address concerns of forum shopping.

The second point is an elaboration regarding the proposition that the brighter the choice of law rule, the more manipulable it is by strategic venue-seekers. As mentioned, predictability of the choice of law rule is a necessary condition—a prerequisite—to forum shopping, but it may not be a sufficient one. While there is likely a high correlation between the clarity of the rule and its ease of manipulation in forum shopping,⁴⁸ it is at least theoretically possible to envision a rule that is clear but difficult to exploit—due to, for example, high costs. For example, one can (unhealthily) imagine a clear, bright rule regarding choice of bankruptcy law—the jurisdiction in which the debtor's president has bludgeoned the most puppies—that, while clear, may not actually be that “manipulable” due to inordinate reputational costs or other concerns. Thus while the predictability aspect of territorialism points toward more prevalent forum shopping, a second question remains open whether the rule, while clear,

Where we universalists should dig in, however, is on the normative desirability of that indeterminacy. If indeterminacy dampens forum shopping, and if forum shopping is pernicious, then the vagueness may be nothing to fear. Nor should we despair that this vagueness will condemn commercial transactions to a quagmire of uncertainty. It is “bounded vagueness” at worst. *See supra* note 22. As Jay Westbrook correctly observes, the relevant subset of possible jurisdictions is likely to be a small one. *See infra* note 61. Thus creditors will know *ex ante* which laws will apply for most cases and will face only a small zone of possibilities for the marginal ones. They fare no worse than having to calculate the probabilities of asset movement in lending transactions under territorialism.

48. *See* Guzman, *supra* note 16, at 2207 (“[A] test based on place of incorporation would be inappropriate. A test such as the principal place of business, on the other hand, is much more difficult for the debtor to manipulate.”).

can be easily manipulated.⁴⁹ And the more pointed comparative question is whether the rule is any more manipulable than universalism's alternative of COMI.

IV. UNIVERSALISM VS. TERRITORIALISM'S MANIPULABILITY REGARDING CHOICE OF LAW

The answer to the question whether it is easier to manipulate the choice of law rules in universalism or territorialism ultimately boils down to an empirical inquiry whether it is easier to move a debtor's COMI or its assets.⁵⁰ To "shop" for favorable bankruptcy law, a decisionmaker would have to shift (or establish) the debtor's COMI under universalism into (or in) the jurisdiction—the self-styled haven—with the attractive law. By contrast, under territorialism, the debtor would need to move (or situate) the assets into (or in) the favored jurisdiction. Which is easier? In his book and other recent scholarly writings, Professor LoPucki, perhaps building on earlier expressed suspicions,⁵¹ assumes that it is virtually effortless for a sophisticated global actor with fancy lawyers to move its COMI.⁵² He presents several examples of bankruptcy proceedings where he contends this has happened.⁵³ But what he does not explore in any

49. In sum, it is a two-dimensional interaction. Conceivably, a clear but difficult-to-manipulate choice of law rule could result in less total forum shopping than a fuzzier but easier to manipulate one. (The two vectors may not be fully orthogonal, thus further complicating the analysis.) Cf. LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 208 ("Universalists and their opponents agree that a system that allowed multinational companies a last-minute choice of law would not be viable."). See also *supra* note 22.

50. This is a distinct issue from the amenability of judges to seize or retain cases once a case placer selects her courtroom. Unlike domestic U.S. bankruptcy venue, see 28 U.S.C. § 1408, in which multiple, parallel permissible bases of venue exist—and hence for which there can be a wide pool of judicial suitors for corporate case placers—the COMI standard for allocating primary jurisdiction is an exclusive criterion. There can be only one COMI (just as, under territorialism, there can be only one location of an asset). Case placers do not get to pick from the broad array of options they enjoy under U.S. domestic venue rules.

51. See Lynn M. LoPucki, *The Death of Liability*, 106 *YALE L.J.* 1 (1996).

52. See LoPucki, *Universalism Unravels*, *supra* note 2, at 155–58 ("Regardless which characteristics of a company determine a multinational's COMI, the multinational can easily change them. . . ."). For an interesting analysis about how many COMIs in Europe would actually engage substantial costs and "severe obstacles," see Enriques & Gelter, *supra* note 34.

53. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 226–30. Note that one of his key examples, *Derby Cycle*, was a case of value-maximizing corporate divestiture of a profitable Dutch subsidiary that no party in subsequent litigation (at least to my knowledge) ever suggested was animated by forum shopping. True, it shows how a COMI can arguably change after a major corporate divestiture, but COMI-shift as an ancillary result of the return-maximizing sale of an economically discrete foreign division should not

depth is the corollary issue: the ease with which sophisticated global actors can shift their assets. (His brief consideration of movable assets speculates that they are likely to constitute a small portion of the debtor's estate, to be slow-moving, and to be highly visible to outsiders; he consequently dismisses asset movement as a concern.)⁵⁴

I do not presume to offer an answer to this empirical question, as that would require an empirical study, which I have not done.⁵⁵ I will, however, offer two reflections. First, I will challenge LoPucki's inherent assumption that moving COMI involves little more than clever paper shuffling.⁵⁶ While moving *place of incorporation* requires only glorified paperwork, moving *COMI*, by definition, requires more.⁵⁷ Indeed, this is the very reason why registered office is merely a presumption of COMI. Eve-of-bankruptcy re-incorporation would likely be the quintessential example of when the presumption would be rebutted. The closest example to a fast-paced move of COMI—not just of incorporation—in the transnational insolvency setting of which I am aware involved BCCI.⁵⁸

cause distress. *See also* LoPucki, *Universalism Unravels*, *supra* note 2, at 160 (recognizing not all asset or COMI movement is nefarious). Indeed, for a very recent example where both German and U.K. courts agreed that the COMI of a German construction company that had been swallowed up by a U.K. investment conglomerate (including its “delisting” as a separate corporation) did not shift COMI from Germany to the United Kingdom, see *Hans Brochier Holdings Ltd.* EWIR2007, 177; NZI2007, 187 (U.K. proceedings before High Court in London); EWIR2007, 177, ZIP2007, 81; NZI2007, 185 (German proceedings before Insolvency Court at Nuremberg).

54. *See id.* at 160–61.

55. There is an interesting corpus of empirical research on domestic forum shopping outside the bankruptcy context. For two recent offerings, see Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) (analyzing Administrative Office of U.S. Courts data to find 58% win rate of federal civil cases tried in their court of origin versus 29% win rate in venue-transferred cases); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1 (1998) (analyzing 1,000 published federal appellate and state supreme court cases to find that most plaintiffs file suit—be it in federal or state court—in their state of residence). *Cf.* LoPucki, *Universalism Unravels*, *supra* note 2, at 160 (acknowledging that some COMI shifts are innocent).

56. LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 229 (“But even the multinational’s center of assets and operations can be changed—without moving any assets and operations.”); *id.* at 230–31 (“[T]he ability of both corporations and corporate groups to quickly and easily relocate make forum shopping easy in a universalist system.”).

57. It is by definition because COMI is only rebuttably presumed (not irrebuttably presumed) to be the place of incorporation. *See, e.g.*, 11 U.S.C. § 1516(c) (2007).

58. *BCCI* is LoPucki's strongest example. *See Re Bank of Credit and Commerce Int'l SA*, [1996] 4 All E.R. 796 (U.K.). Other examples he offers of shifted COMIs are less compelling for a variety of reasons. For example, in *Fruit of the Loom*, the COMI (arguably) moved years before bankruptcy. In *Singer*, the COMI of a far-flung operation with

BCCI was a Luxembourg-incorporated global banking and investment empire with main offices in London. Shortly before mounting fraud made bankruptcy inevitable, the principal decision-makers decamped London for their home back in the United Arab Emirates. Thus while the operations back office of the empire stayed in London, the key “brains” had moved home. Consequently, the COMI of this far-flung organization possibly moved just before bankruptcy, or at the very least it became more ambiguous. Indeed, BCCI’s main insolvency proceeding was actually opened in neither the United Kingdom nor the United Arab Emirates; it was opened of all places in Luxembourg. The United Kingdom—the presumably aggrieved “rival” jurisdiction by the case’s opening in Luxembourg—went along by recognizing the Luxembourg main proceeding and pseudo-cooperating.⁵⁹ Even under these facts, however, it is still not clear BCCI’s COMI moved on short notice. What happened is that an already unstable COMI of a far-flung investment and banking empire was rendered even more unstable by a last-minute move of personnel. Indeed, note that it was never suggested in the litigation that COMI (to be sure a counter-factual, as the term was not even used at the time) moved from London to the Mideast. Rather, the move had the narrower effect of “de-selecting” the United Kingdom by making its arguable case for COMI weaker. Moreover, as LoPucki himself concedes, the movement of the principals was not an attempt to forum shop bankruptcy law but an attempt to flee criminal personal jurisdiction.⁶⁰ Thus, the worst-case possible example of COMI-shopping available in published opinions (again, COMI-shopping, not mere re-incorporation) demon-

assets and workers in Africa, Europe, the Middle East, and Asia was (in LoPucki’s estimation) moved from the Netherlands Antilles to the United States by a post-bankruptcy U.S. reincorporation. But LoPucki himself admits that *Singer* had hired a new CEO in New York who was trying to run the global enterprise from U.S. headquarters well before bankruptcy. Indeed, it was by no means clear that the Netherlands Antilles-incorporated holding company didn’t have its COMI in the United States already. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 227–28. My point is not to spar with LoPucki on a case-by-case basis; on the contrary, I am actually trying to find the case that makes his argument best for him—*BCCI*—and confront it head on.

59. The pseudo-cooperation was because after a back-and-forth litigation regarding the jurisdiction and discretionary powers of bankruptcy judges in the United Kingdom, the British administrators cooperated with Luxembourg after holding back certain assets to satisfy (presumably mostly British) set-off claimants whose claims would not have been recognized under Luxembourg law. *Re Bank of Credit and Commerce Int’l SA*, [1996] 4 All E.R. 796 (U.K.). Indeed, the British administrators tried to cooperate with Luxembourg and were apparently broadsided by their own court, which in its voluminous analysis ultimately decided the proposed plan was impermissible under British law.

60. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 220.

strates at most an ability to destabilize relevant factors within a very narrow band of plausible jurisdictions.⁶¹

The second and perhaps more important observation regards the unasked (and unanswered) corollary: can assets also be moved relatively easily on the eve of bankruptcy? The answer seems to be yes. To be sure, hard assets cannot get up and walk away,⁶² and some highly salient recent cases involve some very hard assets indeed, such as oil refineries.⁶³ But not all assets are hard. Indeed, in one sector that has spawned a good amount of cross-border insolvency work—insurance—most of the assets are liquid and hence readily movable.⁶⁴ To be clear, this is not just about cross-border preferences, which are eve-of-bankruptcy asset transfers to a favored foreign creditor—although there are plenty of those filling up the pages of the bankruptcy reporters.⁶⁵ This is equally about eve-of-bankruptcy, intra-debtor transfers across national borders that exploit the

61. Indeed, *Eurofood, Daisytek*, et al. show that incorporation in another jurisdiction is not enough to move COMI. Much more is required, such as non-trivial exercise of decisionmaking or operations. See *In re Eurofood IFSC Ltd.*, [2005] 1 I.L.R.M. 161 (Ir.); *In re Daisytek-ISA Ltd.*, [2003] B.C.C. 562 (Ch. D) (U.K.). As Jay Westbrook points out, in many cases where there is serious COMI doubt, the relevant short list is likely to be short indeed: “[I]n most countries the standard for locating a corporation on a basis other than its place of incorporation is likely to be built on one of two concepts: the corporation’s headquarters (e.g., ‘chief executive offices’ or ‘real seat’) or its operations (e.g., ‘principal assets’).” Westbrook, *supra* note 40, at 1035; see also Enriques & Gelter, *supra* note 34, at 444 (noting “only a limited number of jurisdictions will be within the set of available options”). LoPucki himself recognizes this point. See *LOPUCKI, COURTING FAILURE*, *supra* note 2, at 218. He simply expresses deep-seated skepticism that judges and courts of the incorporation jurisdiction will rebut the presumption vigorously. See *id.* at 219. *But cf.*, e.g., Case C-1/04, Susanne Staubitz-Schrieber, 2006 E.C.R. I-701, discussed *infra* notes 126–27. For a very recent transnational insolvency undermining LoPucki’s pessimism, consider the *Hans Brochier Holdings Ltd.* case, litigated in the United Kingdom and Germany. There, a German construction company was purchased by a U.K. conglomerate and had its corporate status “delisted” and subsumed into the U.K. parent. After some false starts, the courts in *both* Germany *and* the United Kingdom agreed that the COMI was, and always had been, in Germany. See *supra* note 53.

62. *LOPUCKI, COURTING FAILURE*, *supra* note 2, at 229 (“Numerous examples in this book have already shown the ease with which multinational companies can change their place of incorporation and the location of their headquarters. The location of assets and operations are more difficult to change.”).

63. See, e.g., *In re Yukos Oil Co. (Yukos II)*, No. 06-B-10775-RDD, 2006 WL 3026024 (Bankr. S.D.N.Y. Oct. 25, 2006).

64. See, e.g., *In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006); *In re Refco Inc.*, 336 B.R. 187 (Bankr. S.D.N.Y. 2006).

65. See, e.g., *Maxwell Commc’n Corp. v. Barclays Bank (In re Maxwell Commc’n Corp.)*, 170 B.R. 800, 801 (Bankr. S.D.N.Y. 1994); *In re A. Tarricone, Inc.*, 80 B.R. 21, 22 (Bankr. S.D.N.Y. 1987); *In re Metzeler*, 78 B.R. 674, 675 (Bankr. S.D.N.Y. 1987).

choice of law rule of territorialism.⁶⁶ Global companies can transfer assets before filing for bankruptcy, even if not to any particular creditor. And this happens. Consider the recent case of *National Warranty Insurance*, in which \$24 million of its reserves from the United States (where it faced some disgruntled creditors) were wired to its accounts in the Cayman Islands just before filing for winding up there under Cayman law. Accordingly, for highly liquid and mobile assets—which are likely to be of the most interest to creditors—it is by no means evident territorialism is any less manipulable than universalism.⁶⁷ In fact, it may be more. Assets, at least important assets, may fly as fast as a bank wire.⁶⁸

In sum, it is far from clear that universalism's anchoring choice of law rule that has been implemented over the past decade—COMI—provides more temptation for jurisdictional mischief than territorialism's situs rule. From the perspective of forum shopping's necessary prerequisite, predictability, COMI's comparative flexibility (less fashionably, “unpre-

66. The inevitable breaches of covenant by such moves simply add more unsecured claims to the bankrupt debtor's estate—cold comfort for the aggrieved creditors.

67. At one point, LoPucki speculates that while assets can move under territorialism, at least their movement is “highly visible.” LoPucki, *Universalism Unravels*, *supra* note 2, at 160. Leaving aside the unexplained basis for his intuition, I am not sure how much comfort that would offer an aggrieved creditor (other than the virtue of seeing the bullet coming). In any event, the Virgós-Schmit Report makes clear that COMI is supposed to be determined based on objectively ascertainable data to third parties on “where the debtor conducts the administration of its interests on a regular basis;” covert COMI shifts seem definitionally foreclosed. *Virgós-Schmit Report*, *supra* note 41, at 281; *see also* EU Regulation, *supra* note 1, recital 13, at 2 (replicating Virgós-Schmit Report).

68. LoPucki initially suggested that international conventions regarding asset return could minimize forum shopping under territorialism, *see* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 749 (1999), but has since retreated from that claim, instead pointing to the common law hotchpot rule as an indirect policing mechanism. *See* LoPucki, *Universalism Unravels*, *supra* note 2, at 161. Reliance on the hotchpot rule is unpersuasive, because the hotchpot rule is a negative injunction, not an affirmative disgorgement remedy. (For an excellent analysis of hotchpot, *see* Ulrik Rammeskov Bang-Pedersen, *Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests*, 73 AM. BANKR. L.J. 385, 429 (1999)). LoPucki's last-ditch response to forum shopping under territorialism—and I give him great credit for acknowledging the problem and responding to it—is that courts can always agree to cooperate *ex post* when they realize it is in their best interest. *See* LoPucki, *Universalism Unravels*, *supra* note 2, at 162 (arguing that the inducements for cooperation under territorialism are “obvious” because “[i]f the assets of the multinational would bring a higher price if sold together, it will be in the interests of the administrators to sell them together and split the proceeds among them.”). Unfortunately, that response is like saying creditors will agree to forego their individual collection rights when they realize it is in their best interests to respond collectively. They don't, and for holdout and other reasons we have a compulsory bankruptcy law. *See* THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986).

dictability”) renders it less amenable to strategic exploitation. From the probably related but theoretically distinct perspective of manipulability, COMI is no more changeable than asset location; regarding at least some important assets, it may even be less. Taken together, these considerations suggest that the recent *alarum* of universalism’s purported facilitation of forum shopping may be nothing more than a myth. Moreover, it may be displacement. Territorialism may actually create the more fertile environment for would-be forum shoppers.

V. THE REAL FORUM SHOPPING

The previous discussion has tried to explain why a territorialist system might be just as bad as, if not worse, than a universalist system in terms of cross-border bankruptcy forum shopping. But that has been a largely theoretical discussion—an important one, to be sure, for setting the record straight, but one that has considered only a conceptually pure regime of either full universalism or full territorialism. This does not reflect the current state of the world in 2007. This is not to imply that we have yet to see any forum shopping. Far from it. Indeed, there has been plenty.⁶⁹ Rather, the claim is that the problem of *today’s* forum shopping—the real forum shopping, on the ground—is in cases where the current disconnect between universalism and territorialism has been exploited by savvy litigants. It is this discrepancy in the status quo of the incomplete embrace of universalism that has left a lopsided environment, with jurisdictional loopholes embedded in the asymmetry. This problem is an intrinsic fault of neither universalism nor territorialism.⁷⁰ It is a problem of bankruptcy transition where only some countries are universalist but others remain territorialists. This is where the *real* forum shopping of today lies.

Stepping back, one must first define what it means for a country to be “universalist” or “territorialist.” After all, these terms refer to a system of transnational insolvency administration (on one view, a choice of law paradigm), so one country, on its own, can’t technically be anything. It can only support the adoption of one private international law regime. Nevertheless, states have domestic law cognates to universalism and territorialism that reflect their affiliations. For example, the reach of a country’s bankruptcy laws—extraterritorial or territorial—maps generally to

69. See e.g., *Yukos I & Yukos II*, discussed *infra* note 89.

70. To be petulant, I could blame the backward states who have yet to embrace universalism for creating a protracted transition period. The problem with such snarkiness is that territorialists could retort that it was the universalists who wanted transition in the first place and we were all fine in the good old days.

an affinity with universalism or territorialism respectively. A home country under universalism has to believe in the extraterritorial reach of its bankruptcy laws, as seen in, for example, § 541 of the U.S. Bankruptcy Code, if it is to enable the debtor's bankruptcy to be resolved under one substantive bankruptcy law.⁷¹ By contrast, countries with strict territorial restrictions on the scope of their bankruptcy laws, such as South Korea before its most recent round of insolvency law reform, clearly support territorialism.⁷²

In an uneven world of some universalists and some territorialists, a number of problems can develop. The first set comes from when a country is "unprincipled" (or perhaps, "pushy"). This would result from facially asymmetric territorial reach of laws. For example, a territorialist state should not only refuse to acknowledge the reach of a foreign state's bankruptcy laws into its own jurisdiction (through non-recognition of judgments), but should also, to be "principled," restrict its own law's reach into other jurisdictions (for example, by disavowing adjudication of foreign assets). Similarly, a universalist country with extraterritorial application of its own bankruptcy laws must countenance the extraterritorial reach of other countries' laws into its own jurisdiction (with jurisdiction-selecting rules, like COMI, to resolve the conflict presented by the overlap).

Many countries' bankruptcy laws are indeed "principled" in this regard, from both the universalist and territorialist schools. For example, the broad reach of the U.S. assertion of bankruptcy jurisdiction under § 541 is offset by a generous policy of deference to foreign proceedings (of course with inevitable exceptions). This was even so under the less-universalist predecessor to Chapter 15, § 304.⁷³ Similarly, countries such as South Korea and Hong Kong (at least under their prior, territorialist laws) were strict in their territorial application. While they gave a cold shoulder to foreign bankruptcy judgments purporting to regulate assets located within their jurisdictions, they would similarly stop the reach of their own bankruptcy laws at their own borders.⁷⁴

71. 11 U.S.C. § 541 (defining bankruptcy estate as encompassing all property "wherever located").

72. See John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 945 (2005) (discussing Korean insolvency law and recent amendments); Samuel L. Bufford & Kazuhiro Yanagida, *Japan's Revised Laws on Business Reorganization: An Analysis*, 39 CORNELL INT'L L.J. 1 (2006).

73. See, e.g., *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 348 (2d Cir. 1992) (U.S. ancillary proceeding to attach debtor's New York bank account during Swiss main insolvency proceeding).

74. See Bufford & Yanagida, *supra* note 72, at 56–57 (referencing South Korea's territorial application in Mika Maeda, *Nikkan No Rensa Tosan To Minji Saisei Jiken* [A

On the other hand, confirming the fears of game theorists such as Professor Frederick Tung,⁷⁵ there were less principled countries. One such example (a territorialist one, which is not to suggest there weren't universalist transgressors as well) was the Netherlands, where Dutch courts would try to control foreign assets under Dutch bankruptcy law while at the same time refusing to acknowledge foreign bankruptcy courts' powers to do the same regarding Dutch-situated assets. This "one-way" territorialism has already been criticized, and rightly so, by commentators, including respected Dutch insolvency expert Professor Bob Wessels.⁷⁶ (This state of affairs is likely improved under the new E.U. Insolvency Regulation.)

This "unprincipledness" is one problem of asymmetry, and it certainly creates difficulties, but it is not a pervasive one, because even territorialists would castigate these "rogue states" for being too pushy and not following the true spirit of territorialism.⁷⁷ Moreover, traditional requirements of reciprocity have checked this defection impulse under some foreign relations norms.⁷⁸ Accordingly, while there are within-system asymmetry problems under either a universalism or territorialism regime by "defectors," those are not the thrust of the present concern. It is the

Bankruptcy Chain in Japan and Korea and a Civil Rehabilitation Case], 105 JIGYOSAI SEI TO SAIKENKANRI [TURNAROUND & CREDIT MGMT.] 180, 183 (2004)); Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135, 227–28 (1992) (addressing the territorial approach taken by Hong Kong in *Am. Express Int'l Banking Corp. v. Johnson*, [1984] H.K.L.R. 372 (H.C.)).

75. See Tung, *supra* note 25.

76. See Bob Wessels, *The Comity Principle in Amice*, in BIJDRA GE AAN LIBER AMICORUM VOOR PROF RUTGERS 347–59 (2005) ("In foreign and Dutch literature[,] the Dutch model of claiming universal effect for Dutch insolvency proceeding in the Netherlands itself has been severely criticized.").

77. LoPucki provides a good discussion of how territorialists can police over-reaching through non-recognition of judgments. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 204–05.

78. Reciprocity requirements were included in, for example, the South African adoption of the UNCITRAL Model Law. See Cross-Border Insolvency Act 42 of 2000 s. 2(1), available at <http://www.info.gov.za/gazette/acts/2000/a42-00.pdf>. See also Law of the People's Republic of China on Enterprise Bankruptcy (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective Jun. 1, 2007), ch. I art. 5, translated in <http://www.globalturnaround.com/cases/PRCnewBankruptcyLaw.pdf> (2006) (P.R.C.) (providing for reciprocity). Note that the United States is actually trying to get away from the Alphonse/Gaston impasse of reciprocity. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. d (1987) ("A judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed.").

between-system asymmetry problems that create a greater danger. This occurs when litigants unhappy with the restrictions of a “principled” territorialist country seek to relitigate matters by sneaking into a “principled” universalist country’s courtroom. This is the real forum shopping of the current world of incomplete universalism.

This concern is not mere theory. It has happened in actual cases. One striking example of this type of forum shopping can be seen with the *Maruko* proceedings.⁷⁹ Maruko was a Japanese developer. Japan (again, at least until its most recent set of reforms) was a territorialist jurisdiction, and “principledly” so; it restricted the scope of its own bankruptcy proceedings to assets within its physical jurisdiction. When Maruko filed for bankruptcy in Japan (its uncontested COMI), the proceedings did not reach its myriad foreign assets, including a hotel in Australia’s sun-drenched Gold Coast. From the perspective of Japanese bankruptcy law, this was not a problem: Australian law would apply to those assets if and when proceedings were opened there. Indeed, as expected, legal action did commence in Australia; a collection proceeding was brought by a commercial lender who was understandably unhappy with the state of its mortgage with Maruko. Disinclined to work out a restructuring plan, the creditor instituted foreclosure to liquidate the property.⁸⁰ The problem for Maruko was that Australian substantive bankruptcy law gave the mortgagee too powerful a negotiating endowment for its liking: a secured creditor in Australia can proceed to foreclose in the event of bankruptcy, unfettered by a stay.⁸¹ While this may upset Professor Jackson, it is certainly a commonplace legal protection for secured creditors in Commonwealth jurisdictions.⁸²

Maruko’s “solution” to the “problem” of Australia’s policy decision to accord super-protection to secured creditors in bankruptcy was for Maruko to open insolvency proceedings in the (universalist) United States and invoke its (universalist) worldwide stay. It did, and the stay had real pinch due to in personam general jurisdiction over the lender; the Australian foreclosure ground to a halt. Did the United States have a legitimate

79. See *In re Maruko, Inc.*, 200 B.R. 876 (Bankr. S.D. Cal. 1996).

80. This of course is the classic creditor’s bargain problem, where a trigger-happy creditor can seize an available asset at the potential expense of all creditors—hence the need for collective resolution in bankruptcy. See JACKSON, *supra* note 68.

81. See Corporate Law Reform Act, 1992, §§ 440A (secured creditors with substantially all of a debtor’s property under a lien), 440B (secured creditors who have acted to enforce their claims before the appointment of an administrator), 440C (secured creditors who have a lien on perishable property) (Austl.).

82. See e.g., Bankruptcy Act, R.S.C., ch.B-3, §69 (1985) (Can.); see also LoPucki, *Universalism Unravels*, *supra* note 2, at 164.

interest in regulating the insolvency estate of a Japanese debtor's Australian assets? Doubtful. Yet universalists celebrated the *Maruko* outcome, extolling the "value-preserving" capacity of the U.S. stay that rescued the Australian resort from liquidation at the hands of an impatient creditor while a consensual restructuring could be approved.⁸³ Territorialists, by contrast, spluttered over the "intimidation" of the Australian courts by the U.S. courts and cast *Maruko* as a black eye, rather than cap feather, for universalism.⁸⁴

The territorialists are right, but not for the reasons they think they are. They are correct that *Maruko* is a bad case, notwithstanding its arguably sympathetic outcome, and that in an ideal world the United States would have butted out (as a doctrinal matter, this could have been done under § 305).⁸⁵ But they are wrong to paint *Maruko* as an indictment of universalism.⁸⁶ The skewed outcome of *Maruko* was neither the fault of the United States nor universalism. Rather, the "fault," to the extent it even makes sense to ascribe fault to a bankruptcy proceeding, is equally Japan's and territorialism's. Had Japan subscribed to a system of universalism, none of this would have (or should have) happened. Under such a scenario, Japanese law would have controlled, per the COMI of Maruko, and Australia (assuming it supported universalism too) would have complied with a request for assistance by convening an ancillary proceeding. Without getting into the safeguard protections for local creditors under a more modified form of universalism,⁸⁷ the point is that the only plausible case for the application of U.S. law was due to the necessarily incomplete scope of the Japanese proceedings in the first place. Thus to say that *Maruko* shows how universalist jurisdictions distort transnational insolvencies is not just inaccurate; by refusing to shoulder equal responsibility on the territorialist home state, it is unfair.⁸⁸ Had all three jurisdictions been universalists (equally, had all three jurisdictions been terri-

83. See Bufford, *Global Venue Controls*, *supra* note 10, at 116.

84. See LoPucki, *Universalism Unravels*, *supra* note 2, at 163–64 ("What [universalists such as Bufford] refer to as deference to the U.S. stay was actually intimidation by it.").

85. 11 U.S.C. § 305(a)(2) (2006) (permitting abstention of cases properly brought within the jurisdiction of the U.S. courts to assist foreign proceedings); *see also* LoPucki, *Universalism Unravels*, *supra* note 2, at 164 ("The *Maruko* transaction was entirely domestic to Australia . . .").

86. See LoPucki, *Universalism Unravels*, *supra* note 2, at 164 ("*Maruko* demonstrates the potential for unpredictability in a universalist regime.").

87. 11 U.S.C. § 1522 (2006).

88. Thus LoPucki's criticism of universalism as "fail[ing]" the *KPNQwest* bankruptcy in the Netherlands may be similarly unfair. *See* LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 226.

torialists), this cross-global forum shop would have failed. It was only the interaction between territorialist Japanese law and universalist U.S. law that created this (realized) opportunity for forum shopping and relitigation.⁸⁹

VI. UNIVERSALISM'S RESPONSE TO THE REAL FORUM SHOPPING

If the true problem of forum shopping is caused by exploitation of differences between universalist and territorialist states' jurisdictional rules, is there anything that can be done today, in the real world, before the complete acceptance of universalism?⁹⁰ There is reason to think that the answer is yes, and that universalism, as implemented by Chapter 15, has already started. Recall that the problem in *Maruko* was that a U.S. stay extraterritorially blocked seizure of a Japanese debtor's assets located in Australia. Because Chapter 15 now expressly recognizes jurisdictional hierarchy (a necessary foundation of universalism),⁹¹ the U.S. bankruptcy regime has adjusted the scope of its automatic stay accordingly. Specifically, § 1520(a)(1) now confines the automatic stay that is triggered by recognition of a foreign main proceeding, i.e., when the United States has been determined *not* to be the COMI of the debtor. This is the sort of recognition, and hence "light-form" stay, that would have occurred had *Maruko* been brought as a Chapter 15 proceeding. The new

89. The most dramatic recent example of this same sort of forum shopping is (both installments of) the *Yukos* insolvency, in which unhappy litigants in quasi-territorialist Russian proceedings tried to get a U.S. stay to stymie unwelcome legal developments both in and outside Russia. The first U.S. hearing saw through this maneuver as an impermissible collateral attack—adding an excellent counterpoint to the *Maruko* case, because here the court's decision reached an unsympathetic outcome—and bit the bullet to dismiss the U.S. case. See *In re Yukos Oil Co. (Yukos I)*, 321 B.R. 396 (Bankr. S.D. Tex. 2005). The second U.S. hearing fell for the trap, asserted jurisdiction, and vindicated the re-biting of the apple by foreign litigants who had already lost in their home courts. See *In re Yukos Oil Co. (Yukos II)*, No. 06-B-10775-RDD, 2006 WL 3026024 (Bankr. S.D.N.Y. Oct. 25, 2006).

90. Or before a complete abandonment of universalism back to territorialism—although that would require quite some winding back of the clock: U.S. courts have been recognizing the binding nature of Canadian court restructurings of Canadian debtors for over a century, even against U.S. creditors who invest in, but do not want to litigate in, Canada. See *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 536 (1883) ("That the laws of a country have no extraterritorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country.").

91. 11 U.S.C. § 1517 (2006) (distinguishing between "foreign main" and "foreign non-main" proceedings and attaching hierarchical legal consequence to each, such as, e.g., imposition of an automatic stay for the former but only discretionary stay for the latter).

limitation to the U.S. stay in these circumstances is that it only applies to assets within the physical jurisdiction of the United States.⁹² Indeed, even if a full-blown plenary proceeding is opened under Chapter 11 (which would implicate § 541's reach of an extraterritorial estate) after recognition of a foreign main proceeding, § 1528 now provides that such a plenary proceeding, albeit conducted under U.S. substantive law, is still generally limited to the assets within the physical territory of the United States. In other words, *Maruko* would not have been possible under Chapter 15. This is because the solution, from the universalist perspective, of territorialist-jurisdiction litigants trying to forum shop into universalism's necessarily extraterritorial reach of law, is to make it clear ex ante that the existence of non-U.S. COMI proceedings will preclude the extraterritorial reach of U.S. bankruptcy law.

Chapter 15's approach arguably codifies what some courts were already struggling to do when facing inter-system friction: respect the home jurisdiction's intended scope of its bankruptcy law. One such case was the *Axona* decision from the early 1990s.⁹³ In *Axona*, a Hong Kong debtor filed for liquidation in Hong Kong, which had ("principled") territorialist bankruptcy laws. Because there were assets in the United States, the Hong Kong liquidator opened U.S. proceedings (his Hong Kong territorialist proceedings having disavowed jurisdiction over the U.S. assets), with an eye to recovering a transfer that was preferential under U.S. bankruptcy law.⁹⁴ Case law of a universalist bent in the United States had crafted a rule that § 304 ancillary proceedings should apply the avoidance law of the debtor's home jurisdiction.⁹⁵ The liquidator, however, wanted to use U.S. law because Hong Kong law would have insulated the payment from recovery. Accordingly, the liquidator side-stepped § 304 and opened a full plenary proceeding in the United States, successfully voiding the transaction that would have been unassailable under strictly universalist application of Hong Kong law. Adding insult to injury to the U.S. preference recipient, the liquidator then dismissed the proceedings under § 305 "in deference" to the Hong Kong proceeding, which had the effect of returning the assets to Hong Kong, a jurisdiction in which they would have never been recoverable under local bankruptcy law.⁹⁶

92. 11 U.S.C. § 1520(a)(1) (2006).

93. See *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988); *Am. Express Int'l Banking Corp. v. Johnson*, [1984] H.K.L.R. 372 (H.C.).

94. See *Axona*, 88 B.R. at 602-03.

95. See *In re Metzeler*, 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987).

96. See *Axona*, 88 B.R. at 618-19 (Bankr. S.D.N.Y. 1988).

While some universalists begrudged the application of U.S. avoidance law to what was a Hong Kong-COMI bankruptcy,⁹⁷ Professor Charles Booth came to the defense of *Axona*.⁹⁸ The universalists, Booth implied, were assuming that Hong Kong law was universalist and intended its preference law to apply extraterritorially to transfers of assets in the United States. But that was not the case. On the contrary, Hong Kong expected U.S. avoidance law to apply to any U.S. assets and would have been surprised by § 304's application of Hong Kong law. As such, it was not forum shopping (or "section shopping" as Booth called it)⁹⁹ by the Hong Kong liquidator—although to be sure he achieved the substantive result he desired—but scrupulous adherence to the jurisdictional restrictions of Hong Kong law. *Axona* is not a case without problems,¹⁰⁰ but it serves as a counterpoint to *Maruko* to show how universalist and territorialist jurisdictions were supposed to interact in an imperfect environment. Chapter 15's new restrictions on the U.S. stay may be seen as a related effort to codify appropriate measures to address inter-system issues in an interregnum world.

Accordingly, whatever the steps taken to combat forum shopping under § 304 in the past, I contend Chapter 15 now prevents *Maruko*-style forum shopping due to the recalibration of the automatic stay. Has this brave claim been put to the test in the first year of Chapter 15's early life? It has, and it was shown spectacularly wrong. This comeuppance

97. See, e.g., Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 *FORDHAM L. REV.* 2531, 2540 (1996).

98. Booth, *supra* note 74, at 227–28.

99. *Id.* at 229.

100. It is not clear, for example, whether it was appropriate to distribute the proceeds of the U.S. avoidance action according to Hong Kong distribution law; there is a case to be made that the law of distribution should track the law of avoidance. See Jay L. Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 *BROOK. J. INT'L L.* 499 (1991). In *Axona*, however, all creditors participated and so choice of distribution law was likely irrelevant, but the problem persists at a theoretical level. More broadly, a potential problem with *Axona* is that the choice of a § 304 (Hong Kong preference law) proceeding versus a Chapter 11 (U.S. avoidance law) proceeding essentially gave the liquidator an option on substantive law, which some might see as unfair. But fairness is tricky in this context, because while it may seem unfair to allow a Hong Kong debtor a second crack at more favorable U.S. law, it should not seem unfair to subject a U.S. creditor to U.S. law. Moreover, one's view of fairness may depend on whether one is the creditor whose transfer is under attack or the rank-and-file creditor who seeks increased estate funds for distribution.

Note that for all its improvements, Chapter 15 would actually seem to permit an *Axona* repeat. See *Axona*, 88 B.R. at 597; 11 U.S.C. § 1528 (2005).

occurred in the case of *Yukos II*.¹⁰¹ In these 2006 proceedings, a Russian debtor had been petitioned into an involuntary bankruptcy proceeding in its home country, which appears to have a territorialist or at least quasi-territorialist bankruptcy law.¹⁰² The Russian administrator in *Yukos II* then traveled to the Netherlands (another territorialist jurisdiction) to intervene in unfolding legal proceedings there regarding collection on a corporate subsidiary's assets. For reasons that are too complicated and painful to explain here, the administrator did not get the substantive outcome he wanted in the Netherlands, much like the unhappy *Maruko* debtor in Australia. And also like the *Maruko* loser, the Russian administrator wanted a second bite at the apple. The only way he could do so was to try a "Hail Mary" filing in a universalist jurisdiction elsewhere that might throw a wrench into the disappointing Dutch proceedings. He did just that: perhaps having read *Maruko*, the Russian administrator came to America and opened a Chapter 15 proceeding in the Southern District of New York.

Under Chapter 15, the result should have been either recognition of the Russian proceeding as a main or a non-main foreign proceeding (or, more likely, dismissal for public policy reasons beyond the scope of this discussion).¹⁰³ If the Russian proceeding had been recognized as a main proceeding (the corporate formalism of Russian law made even that a confusing question), the most invasive U.S. law could have gotten would have been through imposition of the new territorially limited "light-form" stay of § 1520(a)(1). The substantive decisions of the Dutch proceedings, and the assets under its jurisdiction, should have been unaffected. Sadly, that did not happen. On the contrary, the U.S. court took

101. See *In re Yukos Oil Co. (Yukos II)*, No. 06-B-10775-RDD, 2006 WL 3026024 (Bankr. S.D.N.Y. Oct. 25, 2006).

102. Characterizing Russia as territorialist is uncertain at best; there is some suggestion that it might expect extraterritorial application of Russian bankruptcy law but not recognize foreign bankruptcy orders, in which case it would be an "unprincipled" territorialist. What is known about Russian commercial law is that it is strictly formalist in its treatment of the corporate form, and so the conceptual rigidity of territorialism seems plausibly related. See Holger Muent and Francesca Pissarides, *Impact of Collateral Practice on Lending to Small and Medium-sized Enterprises*, Law in Transition, Fall 2000: Secured Transactions 64 (EBRD Autumn 2000), available at <http://www.ebrd.com/pubs/legal/lit002c.pdf>.

103. 11 U.S.C. § 1506 (2006). The *Yukos* debacle is a brazen display of confiscatory taxation. The Russian government renationalized this strategic energy resource by concocting dubiously legal "back taxes" against the company and then seizing its assets for non-payment of these taxes. Litigation is unfolding before the European Court of Justice regarding this confiscation as an allegedly uncompensated taking. It is a melodramatic affair, with criminal intrigue on the part of Yukos officers too. Suffice it to say that political opposition to the Kremlin is ill-advised for those uninterested in Siberia.

the bait and granted a temporary restraining order (possibly *ultra vires*) to block the Dutch proceedings, and, as in *Maruko*, in personam jurisdiction over the defendants made that order stick. Accordingly, the Dutch action, like the Australian foreclosure action in *Maruko*, ground to a halt by command of a remote U.S. court sitting far away from the debtor's COMI.

The *Yukos II* outcome was no fault of Chapter 15. It was the fault of a court that did not fully understand Chapter 15's design and the mandatory jurisdictional role of "recognition." (In fairness to the court, one way to read *Yukos II* is that the judge was stretching the law—or at least deferring reaching an inevitable decision on the law that would have foreclosed jurisdiction—in a noble attempt to pressure the parties to settle.)¹⁰⁴ *Yukos II* has already been criticized academically, so there is no point to repeat an airing of the grievances.¹⁰⁵ Its inclusion in the instant discussion is in the spirit of full disclosure of contrary authority. The reader should feel comforted that it would probably not have survived appellate review,¹⁰⁶ which allows reinstatement of the claim from above: *Maruko*-style forum shopping should be impossible—or at least require the sort of judicial back-breaking of *Yukos II*—under Chapter 15. This is universalism's solution to the real forum shopping of inter-system jurisdictional arbitrage between territorialist and universalist venues.

VII. REPRIS: THE SCOPE OF FORUM SHOPPING UNDER UNIVERSALISM VS. TERRITORIALISM

There is a final forum-shopping complaint against universalism by territorialists concerning not the ease, but the scope, of the problem. Initially, Professor LoPucki makes two seemingly contradictory predictions. The first is that as universalism's choice of law rule—COMI—becomes more entrenched, it will be harder for ancillary jurisdictions to hold onto cases (and hence assets), because it will become harder to contest primary jurisdiction. In other words, universalism's "precommitment" to the cession of jurisdiction pursuant to the COMI rule will remove the ex post check available to judges to hold onto cases under ad hoc territorial-

104. And even so the court eventually got fed up and dissolved the stay. *See Yukos II*, 2006 WL 3026024. Notwithstanding the charitable interpretation of the case, the criticism remains that it is not the place of judges to distort doctrines of jurisdiction simply to come up with seemingly attractive results.

105. At least I criticized it. *See* John A. E. Pottow, *Cutting Chapter 15's Teeth: The Yukos Adventure* (Presentation Paper to INSOL 2006 Academic Conference, May 2006).

106. Although the reader's comfort may be tempered by the scarcity of such appeals in practice.

ism.¹⁰⁷ The second claim is that because judges and courts “compete” for jurisdiction—holding themselves out as attractive venues to case placers—they will not readily relinquish jurisdiction to main proceedings under the COMI rule if they lose the competition.¹⁰⁸ Leaving aside the apparent tension of these positions,¹⁰⁹ each requires response. Actually, the first point has already been responded to above in the discussion of the role choice of law clarity plays in forum shopping: the COMI rule is crisp, but not as crisp as others. As for the second point, regarding the temptation of courts to shade ambiguous jurisdictional claims at the margin and a disinclination to cede control *ex post*, I am in full agreement with Professor LoPucki and have written so elsewhere regarding the pride of courts.¹¹⁰ The solace I take under the early case law of Chapter 15 is that this margin may be a narrow one. For example, in one recent case, the U.S. court after a thorough and methodical analysis deferred to St. Vincent as the COMI of a foreign insurance company debtor, notwithstanding the objection of U.S. creditors and the presence of sizable (and seizable) U.S. assets that would have made a “corrupt” U.S. judge salivate.¹¹¹

107. See LoPUCKI, *COURTING FAILURE*, *supra* note 2, at 205 (“[Universalism] seeks to precommit the countries of the world to recognize and enforce each other’s bankruptcy decisions. If universalists succeed, they will eliminate the need for after-the-fact, case-by-case recognition . . .”).

108. *Id.* at 209 (“In thinking that the home country standard will be sufficient to control international forum shopping, the universalists have underestimated . . . the pressures on courts and countries to win at least a share of the world’s multibillion-dollar bankruptcy industry for themselves.”); *id.* at 217–18, 223–24; see also LoPucki, *Universalism Unravels*, *supra* note 2, at 152.

109. One way to resolve the contradiction is to distinguish *ex ante* from *ex post* competition. Jurisdictions compete *ex ante* by drafting substantively attractive bankruptcy laws. Jurisdictions compete *ex post* by saying that once a bankruptcy case is filed in their venue—once they have won the spoils of attracting cases—they will relinquish or cede jurisdiction to another venue over the judge’s dead body.

110. John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to “Local Interests,”* 104 MICH. L. REV. 1899, 1918–19 (2006).

111. See *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006). Perhaps then LoPucki and I differ only by degree rather than kind regarding the inclination judges will have to shade jurisdiction. I see problems at the margin but see the margin as not overly wide. By contrast, LoPucki’s skepticism is deep-seated. See, e.g., LoPucki, *Universalism Unravels*, *supra* note 2, at 152 (“Judge Bufford bases his solution on the assumption that judges will be disinterested and unbiased—an assumption he makes little attempt to justify or explain.”). Perhaps a cynic might explain *Tri-Continental* as a consequence of the Eastern District of California being a sleepy backwater unattuned to (or unable to compete meaningfully in) the heady world of jurisdictional

But this latter point ties into the broader concern LoPucki has with the scope of forum shopping under universalism. LoPucki worries that even if it is just as easy to move assets as it is to move COMI (which he never concedes),¹¹² it is still more troubling to move COMI because, in essence, the stakes are higher.¹¹³ Under territorialism, if some assets can be moved out of jurisdiction to shop favorable law, then there is a definite, but only partial loss. By contrast, if COMI is successfully shopped, then the loss is a complete one—*all* assets will be adjudicated subject to the haven's bankruptcy laws, not just the assets that were able to be moved there.¹¹⁴ In other words, universalism puts all the choice of law eggs in one basket. This argument is a legitimate one, and universalists should not pretend that it isn't. The forum shopping stakes *are* higher under universalism. What is not conceded, however, is that it is easier or as easy to forum shop under universalism as it is under territorialism, as discussed above. Thus, for now, LoPucki and I draw to an empirical stalemate.¹¹⁵

While the empirics may be an open question, theory leaves one mark against territorialism in the final analysis of forum shopping. It is what might be called the “attitudinal” issue: that territorialism is worse disposed than universalism to deal with its forum shopping problems. One of the key advantages territorialism purports to wield over universalism is that it does not need to rely upon international cooperation, goodwill, and other such namby-pamby values.¹¹⁶ It is set to deal with the rough and tumble insolvency state of nature. That may be so, at least as a first cut. But when one introduces concerns of forum shopping, which under territorialism entails the improper movement of assets across borders, then solutions need to be designed to relocate assets to their “proper”

competition. Even the cynic, however, might find it difficult not to be encouraged by *Hans Brochier Holdings Ltd.*, *supra* note 53.

112. In fact, he seems to countenance asset movement with great sanguinity. *See* LoPucki, *Universalism Unravels*, *supra* note 2, at 160–61.

113. *See id.* at 148 (“Universalism is an all-or-nothing system. A single court gets the case, and runs it worldwide.”).

114. *See id.* at 160 (“In today’s territorial system, eve-of-bankruptcy transfers can alter creditor priorities, but *only in the assets transferred*. [A change in the debtor’s COMI] could alter creditor priorities *in all the debtor’s assets*. . . .”).

115. It is interesting that the European Union Insolvency Regulation’s Preamble focuses on the movement of assets in expressing a desire to diminish forum shopping. *See* EU Regulation, *supra* note 1.

116. *See e.g.*, Lopucki, *Cooperative Territoriality*, *supra* note 2, at 2243–45; *see also* LoPucki, *Universalism Unravels*, *supra* note 2, at 164 (“[T]erritoriality requires no cooperation. . . .”).

locations.¹¹⁷ And these solutions, as territorialists concede, include conventions and treaties (presumably from an ex ante perspective, because ex post it will be impossible for the very competitive forces LoPucki fears),¹¹⁸ which are the very sorts of cooperative international efforts territorialism disdains.¹¹⁹ This raises the question: if an asset return convention needs to be negotiated to shore up territorialism against forum shopping, why not just continue to negotiate a choice of law convention to empower universalism?¹²⁰

VIII. FINAL REFLECTION: IS FORUM SHOPPING ALL THAT BAD?

The final question that bears mention in an analysis of bankruptcy forum shopping is the degree to which one should even worry about it. After all, the whole paradigm of contractualism is premised upon ex ante forum shopping, animated by a belief that such shopping is good and will be more of a race to the top than a race to the bottom.¹²¹ If so, then is forum shopping in the international bankruptcy arena something to worry about in the first place?¹²²

117. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 749 (1999) ("Implementing this rule would necessitate treaties that require the return of fleeing assets . . ."). As I have written elsewhere, I am skeptical that the sorts of jurisdictions likely to style themselves as havens will be enthusiastic about joining these conventions. See Pottow, *supra* note 72, at 955 n.83.

118. See *infra* note 120.

119. See LoPucki, *Universalism Unravels*, *supra* note 2, at 164 ("[T]erritoriality requires no cooperation beyond that which already occurs.").

120. In his earlier writings, LoPucki embraced treaties and conventions as the way to return fleeing assets to their proper location. See LoPucki, *supra* note 117. He may have backed off his earlier support as suggesting (I think) not that states should negotiate such treaties ex ante, but rather that they should do them ad hoc and ex post—if and when an asset flight dispute arises. See LoPucki, *Universalism Unravels*, *supra* note 2, at 164 ("Judge Bufford strains to make my proposal for a cooperative territorial regime dependent on treaties and conventions. I repeat here that it is not. . . . Territoriality . . . provides a stable platform for treaties and conventions dealing with specific opportunities for mutual benefit, such as the return of fleeing assets."). I may be misreading his most recent articulation of his position. If he has indeed changed his stance, this new position is unlikely to generate many agreements. Agreements after the assets have flown are likely to interest the country whence the assets flew much more than the country where they landed.

121. See Rasmussen, *Resolving Transnational Insolvencies*, *supra* note 13.

122. The most recent and eloquent proponent of this comfort with forum shopping has been Professor Rasmussen. See, e.g., Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 291 (2001) ("Competition can be a good thing."); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Forum Shopping by Insol-*

Clearly courts worry.¹²³ Consider the contortions one court recently worked on Chapter 15 and the concept of jurisdiction to frustrate what it saw as naked forum shopping.¹²⁴ Clearly Professor LoPucki, who literally wrote the book on it, worries too.¹²⁵ Nor is the worry exclusively domestic.¹²⁶ I confess, however, to being more conflicted.¹²⁷ Perhaps the

vent Corporations, 94 NW. L. REV. 1357 (2001) (applauding jurisdictional competition in certain contexts, such as “prepackaged” bankruptcies).

123. See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 521 (1953) (Jackson, J., dissenting) (describing forum shopping as “evil”). For a thorough recent discussion of forum shopping, see Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 362 (2006).

124. See *In re SPhinX, Ltd.*, 351 B.R. 103, 121–22 (Bankr. S.D.N.Y. 2006). While the court’s concern over forum shopping may have been well placed, it is not clear why the court could not have recognized the proceeding as a foreign main proceeding and then lifted the automatic stay thereby imposed (under 11 U.S.C. § 1520(a)(1)) by resorting to 11 U.S.C. § 362(d)(1), which permits lifting the stay for “cause” and illustrates a non-exhaustive example of cause as inadequate protection of a security interest. 11 U.S.C. § 362(d)(1) (2006). Also, if the automatic stay was really the true, nefarious purpose for bringing the Chapter 15 proceeding, it is unclear why the same effect could not have been achieved by filing a full-blown Chapter 11, which would have imposed an automatic stay without need for recognition (although then the foreign representatives would have attorned to U.S. jurisdiction, which they may have been trying to avoid by using Chapter 15 under the most suspicious read of the case’s facts). For criticism of the *SPhinX* case, see Daniel M. Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, AM. BANKR. INST. J., Dec.–Jan. 2007, at 44.

125. See, e.g., LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 193 (“Thus, the downward spiral of international competition has already begun. . . . Besides the United States, the big winners from international forum shopping have been the offshore havens, most notably Bermuda and the Cayman Islands.”).

126. The European Court of Justice recently decided a case in which it held that post-filing relocation of an individual debtor from Germany to Spain (and hence change of her COMI) did not divest the German court of jurisdiction over main proceedings. Case C-1/04, *Susanne Staubitz-Schreiber*, 2006 E.C.R. I-701 (Judgment of the Court). One of the primary reasons supporting its ruling was a concern about forum shopping. See *id.* ¶¶ 3, 25 (noting that European Union Insolvency Regulation’s Preamble’s Fourth Recital expressly mentions intent of law “to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position” (derived from the Virgós-Schmit report, see *supra* note 41)). *Id.* ¶ 25. Indeed, the recital actually defines this incentive, in parentheses, as “forum shopping.” EU Regulation, *supra* note 1, pmb. ¶ 4. Note that in this case, contrary to forum shopping intuitions, Germany was trying to dismiss the action in her courts, and the Spanish (erstwhile German) debtor—who had moved COMI—was fighting to keep the applicability of German law. *Susanne Staubitz-Schreiber*, 2006 E.C.R. I-701 ¶ 16.

127. Cf. Case C-1/04, *Susanne Staubitz-Schreiber*, 2006 E.C.R. I-701 (Opinion of the Advocate-General), ¶¶ 70–73.

[I]n general, lawyers regard the term [“forum shopping”] as pejorative. If forum shopping is defined as the search by a plaintiff for the international jurisdiction most favourable to his claims, there is no doubt that, in the absence of

matter is one of notice. If the purpose of having a debtor's COMI "ascertainable by third parties"¹²⁸ is to prevent unfair jurisdictional surprise by seemingly domestic companies having brass plate headquarters in Havenland, then presumably a well disseminated notice system of applicable bankruptcy law could allow an efficient choice regime. The lingering worry I have regards systemic bias between those likely to have, process, and credit-adjust to that notice and those likely to not.¹²⁹ Thus I flag the issue of contractualism for consideration, but leave its case to be made by its more eloquent proponent, Professor Rasmussen.¹³⁰

IX. CONCLUSION

In 2007, forum shopping remains a concern in transnational bankruptcy. Attempting to dispel the myth that universalism facilitates forum shopping, this Article has advanced arguments why territorialism may be just as bad, if not worse, both in terms of the predictability of its choice of law rule as well as the likely (but not yet empirically tested) greater ease with which assets can be moved than COMIs. It has also argued that the real problem of forum shopping in today's world of incomplete universalism lies in cases such as *Maruko* and *Yukos II*, where unhappy territorialist-country suitors try to have a second crack under the bankruptcy law of a remote universalist jurisdiction. This is not a flaw with universalism any more than it is a flaw with territorialism; it is a necessary by-

legal uniformity in the different private international law systems, that phenomenon must be accepted as a natural consequence which is not open to criticism. . . . Forum shopping is merely the optimisation of procedural possibilities and it results from the existence of more than one available forum, which is no way unlawful. However, where forum shopping leads to unjustified inequality between the parties to a dispute with regard to the defence of their respective interests, the practice must be considered and its eradication is a legitimate legislative objective.

Id. (citations omitted). The Advocate General's remarks hearken back to Professor Friedrich Jeunger's reminder that "not all forum shopping merits condemnation" and warning "not to let a disparaging term becloud our thinking." Friedrich K. Jeunger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 570-71 (1989); see also Rasmussen & Thomas, *supra* note 122 (arguing generally, on efficiency grounds, for warmer embrace of "forum shopping" with prepackaged bankruptcies than with traditional bankruptcies).

128. See *Virgós-Schmit Report*, *supra* note 41, at 281; see also also EU Regulation, *supra* note 1, recital 13, at 2.

129. See LOPUCKI, *COURTING FAILURE*, *supra* note 2, at 232 ("The losers will be the corporate outsiders who have no means of controlling their debtor's choice of courts: tort victims, employees, suppliers, customers, other stakeholders with small interests, and—as with every strategy game—the less sophisticated players.")

130. And his occasional co-author Professor Thomas. See *supra* note 122.

product of an interim regime. The solution to this more complex type of forum shopping is to make it more difficult, if not impossible, to open extraterritorial proceedings in universalist jurisdictions for debtors whose COMIs lie elsewhere. And that is what, notwithstanding the misunderstanding of some courts, Chapter 15 in the United States has tried to do.