Common Law COMI

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I. INTRODUCTION

A debtor's Center of Main Interests (COMI) is the jurisdictional anchor that determines where a "foreign main proceeding" is located. This in turn bears on which court takes the lead, which insolvency law governs, and what relief is available under domestic enactments of the UNCITRAL Model Law on Cross-Border Insolvency (Model Law). In the U.S., recognition of a foreign main proceeding under Chapter 15 of the Bankruptcy Code does three main things. It triggers an automatic stay, empowers the foreign representative to administer U.S. assets, and makes available a wide buffet of discretionary relief.[1]

These consequences have not gone unnoticed. Multinational debtors, their sponsors, and their creditors are acutely aware that insolvency law differs across jurisdictions. Some insolvency regimes are perceived as more restructuring-friendly, more flexible, or more protective of secured creditors. Others are slower, more formalistic, or more oriented to liquidation or local interests. Sophisticated actors thus engage in what critics sometimes call bankruptcy tourism or COMI manipulation. But manufacturing COMI may, in some instances, be beneficial for all parties. Debtors structure corporate groups and financing arrangements ex ante, hoping to secure a favorable COMI. After the fact, with insolvency on the horizon, debtors try to change their COMI to a more attractive forum.[2]

Under the Model Law and Chapter 15, a corporate debtor's registered office is its presumptive COMI.[3] That presumption is rebuttable.[4] Over the last two decades, U.S. courts have developed a fact-intensive balancing test for COMI purposes. The test focuses on elements including the location of the debtor's "head office" functions and management, the place where the debtor regularly administers its interests, and whether that place is "ascertainable by third parties."[5] The Second Circuit has held that COMI is determined as of the Chapter 15 petition date, with a limited look-back to ensure that the debtor has not

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1 11 U.S.C. §§ 1502(4), 1517–1521 (2021).

2 G.A. Res. 52/158, U.N. Doc. A/RES/52/17, annex I, UNCITRAL Model Law on Cross-Border Insolvency (Dec. 15, 1997) [hereinafter Model Law]; Regulation (EU) 2015/848, pmbl. ¶ 5, 2015 O.J. (L 141) 19.

3 Model Law art. 16(3); 11 U.S.C. § 1516(c) (2021).

4 *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129–33 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008); Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc., 381 B.R. 37, 48–49 (Bankr. S.D.N.Y. 2008).

5 Council Regulation (EC) No. 1346/2000, pmbl. ¶ 13, 2000 O.J. (L 160) 1; Regulation (EU) 2015/848, *supra* note 2, pmbl. ¶ 28; *In re* SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006); Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 130–37 (2d Cir. 2013).

manipulated COMI in bad faith.[6] This Comment argues that the most important element in the judicial test has become creditor expectations.

This shift reflects a deeper change in how courts understand COMI. The traditional formulation presents COMI as a superficial geographic or operational inquiry. But in modern cases, particularly those involving sophisticated capital structures, geography often does not do the work. Instead, courts focus on what creditors were told, what they could observe, and what forum they had reason to expect at the time they invested. The inquiry is creditor facing.

The future of COMI is up in the air. To discipline forum shopping and its litigation costs, some scholars have proposed amending the Model Law to replace COMI with a commitment-based rule. Under a Commitment Rule, debtors would stipulate the location of insolvency proceedings in ex-ante disclosures. Courts would then give these disclosures binding or presumptive effect. To these scholars, the solution lies not in COMI reform, but somewhere else entirely.

This Comment disagrees. It argues that the solution should be left to the common law. A review of historical and modern COMI doctrine suggests that courts may already be converging on efficient outcomes. Although recent decisions appear to ratify novel, manufactured COMIs, their underlying reasoning remain consistent with the animating values of COMI and Chapter 15 bankruptcies. Additionally, there are real benefits to a flexible, common-law approach. Courts can tailor their decisions to unique factual circumstances, policing bad-faith forum shopping while respecting the right of parties to bargain over their chosen forum.

Shifting to a Commitment Rule would not eliminate the hard cases. It would shift the inquiry from whether an ex-ante commitment is binding to whether it is enforceable. Instead, courts should synthesize the common law into a modest and rebuttable presumption: when a debtor chooses to disclose an insolvency proceeding upfront, that disclosure should be given serious weight. This presumption would mimic the benefits of a Commitment Rule by allowing parties to tie their hands and credibly communicate their intentions. This approach would keep COMI under judicial stewardship and proceed through stepwise, incremental evolution rather than legislative amendment. It preserves flexibility and respects the policy goals of Chapter 15.

Part II catalogs the traditional account of COMI, beginning with the Model Law and then turning to the canonical judicial test in the U.S. Then, Part III addresses the contemporary evolution of COMI doctrine. It examines three distinct circumstances that reveal the doctrine's convergence towards creditor expectations and consent. Finally, Part IV argues in favor of maintaining COMI as a common law-like standard rather than a predetermined rule.

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6 *Fairfield Sentry*, 714 F.3d at 133–35.

II. COMI IN THE PAST

A. COMI Under the Model Law

In 1997, UNCITRAL adopted the Model Law on Cross-Border Insolvency. The Model Law creates a cooperative regime for debtors with assets or creditors in multiple States. It does not harmonize substantive insolvency law. That would be a fully universalist approach. Instead, the present system operates through recognition, where courts in the "receiving" State extend their assistance to foreign proceedings.[7] International insolvency is structured around two types of proceedings: foreign main and foreign non-main.[8]

A foreign main proceeding is "a foreign proceeding [that] tak[es] place in the State where the debtor has the center of its main interests."[9] A foreign non-main proceeding is any other foreign proceeding, "taking place in a State where the debtor has an establishment."[10] Upon recognition of a foreign main proceeding, an automatic stay arises in the recognizing state. In addition, the foreign representative gains specified powers to administer assets and seek additional relief.[11]

The Model Law does not define "center of main interests." It borrows the term from insolvency law in the EU. The UNCITRAL guide gestures to its roots in the EU Convention on Insolvency Proceedings. There, the EU adopted a Council Regulation instructing that a debtor's center of main interests "should correspond to the place where the debtor conducts the administration of his interests on a regular basis" and be "ascertainable by third parties."[12] In the EU, COMI is a jurisdiction-allocating rule. The court of the COMI State has primary jurisdiction, and only that State may open main proceedings. Secondary proceedings are limited to assets located in other Member States.[13]

Absent "proof to the contrary," the debtor's registered office is "presumed to be [its] center of main interests."[14] Where COMI is uncontested, this shortcut

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7 Model Law, *supra* note 2.

8 U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Sales No. E.14.V.2, ¶¶ 1–6, 80–84 (2014).

9 Model Law, *supra* note 2, art. 2(b).

10 *Id.* art. 2(c).

11 *Id.* arts. 20–21.

12 Council Regulation (EC) No. 1346/2000, pmbl. ¶ 13; Regulation (EU) 2015/848, pmbl. ¶ 28.

13 *See* Case C-341/04, Eurofood IFSC Ltd., ECLI:EU:C:2006:281 ¶¶ 30–37 (May 2, 2006); Case C-396/09, Interedil Srl v. Fallimento Interedil Srl, ECLI:EU:C:2011:671 ¶¶ 43–63 (Oct. 20, 2011).

14 Model Law, *supra* note 2, art. 16(3).

makes recognition "as simple and expedient as possible." But the presumption can be rebutted when the debtor's "real seat" is elsewhere.[15]

B. COMI Under Chapter 15

The U.S. implements the Model Law under Chapter 15.[16] The statute's purposes—which are textually preserved in Section 1501—include cooperation, legal certainty, fair and efficient administration, protection and maximization of value, and rescue of financially troubled businesses.[17] Courts are instructed to interpret Chapter 15 with regard to its international origin and to promote uniformity in its foreign applications.[18]

Since neither the Model Law nor Chapter 15 defines "center of main interest," U.S. courts have developed a judge-made test. That test blends the EU's "ascertainable by third parties" language with the U.S. commercial-law concept of a "nerve center" or principal place of business.[19] Judges consider—but do not mechanically apply—various non-exhaustive factors.[20] These *SPhinX* factors include: the debtor's headquarters, its place of management, the location of primary assets, the location of creditors, and the jurisdiction which governs the most disputes.[21]

The leading case, *In re Fairfield Sentry Ltd.*,[22] holds that COMI is determined relative to the Chapter 15 petition date, not the date of the foreign filing, subject to a limited look-back "to ensure that a debtor has not manipulated its COMI in bad faith."[23] In *Fairfield Sentry*, the Second Circuit applied the multi-factor *SPhinX* test and emphasized that COMI should be "ascertainable [to] third parties."[24] In applying the *SPhinX* factors, though, the court stressed that these factors were neither exclusive, mandatory, or dispositive.[25]

15 UNCITRAL, Guide to Enactment, *supra* note 9, at 80–84.

16 *See* 11 U.S.C. §§ 1501–1532 (2021).

17 *Id.* § 1501(a).

18 *Id.* § 1508.

19 *See Fairfield Sentry*, 714 F.3d at 130 (citing Regulation (EU) 2015/848, *supra* note 2); *SPhinX*, 351 B.R. at 117; *cf.* Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010) (defining a corporation's "principal place of business" as its "nerve center").

20 *See SPhinX, Ltd.*, 351 B.R. 103.

21 *Id.* at 117.

22 *Fairfield Sentry*, 714 F.3d 127.

23 *Id.* at 133–35.

24 *Id.* at 130, 137 (citing *SPhinX*, 351 B.R. 103).

25 *Id.* at 137.

Unsurprisingly, then, determining COMI is fact intensive. Judges pay keen attention to where the debtor regularly administers her interests, as well as the perceptions of creditors and other third parties.[26] Courts take a functional—not formal—approach, looking to a debtor's actual head-office functions over its nominal incorporation.[27] For example, *SPhinX* refused to recognize the Cayman Islands proceedings as foreign main when the debtors maintained only a mail-drop presence in the Cayman Islands and conducted all meaningful activity in New York.[28] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.* likewise denied main recognition to the Cayman Islands funds that had "no employees or managers" in the Cayman Islands and conducted all business elsewhere.[29] And in *In re Black Press Ltd.*,[30] the court rejected the argument that U.S. subsidiaries had COMI in Canada solely because their Canadian *parent* was undergoing restructuring there. Each corporate entity's COMI was proven on its own facts, independent of its parent.[31]

COMI selection is a game of strategy. Debtors select and shift their COMI advantageously, but those moves vary widely in legitimacy. A pre-insolvency change in COMI that aligns with creditor expectations and facilitates a value-maximizing restructuring may well be legitimate. But a last minute move to a tenuous jurisdiction that advantages the debtor or prefers some creditors at the expense of others will not be.[32] As a countermanding principle to this jurisdiction manipulation,[33] U.S. courts caution that a debtor's COMI "should be readily ascertainable by third parties."[34]

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26 *See, e.g.*, *Bear Stearns*, 374 B.R. at 129–33; *Betcorp*, 400 B.R. at 286–90; *Brit. Am. Ins.*, 425 B.R. at 912–16; *In re* ABC Learning Ctrs. Ltd., 728 F.3d 101, 307–10 (3d Cir. 2013).

27 *See Fairfield Sentry*, 714 F.3d at 137.

28 *SPhinX*, 351 B.R. at 117–19.

29 *Bear Stearns*, 374 B.R. at 129–33.

30 No. 24-10044-MFW (Bankr. D. Del. Feb. 8, 2024).

31 Order Denying Recognition, *Black Press*, No. 24-10044-MFW.

32 *See In re* Ocean Rig UDW, 570 B.R. 687, 701–08 (Bankr. S.D.N.Y. 2017); *In re* Modern Land (China) Co., 641 B.R. 768, 786–89 (Bankr. S.D.N.Y. 2022); *In re* Sunac China Holdings Ltd., 656 B.R. 715, 731–35 (Bankr. S.D.N.Y. 2024).

33 *See* Anthony J. Casey, *The Lure of English Proceedings: Form Selection from the United States to England*, *in* CORPORATE RESTRUCTURING LAW IN FLUX 313 (Jennifer Payne & Kristin van Zwieten eds., 2025).

34 *Betcorp*, 400 B.R. at 289; *Brit. Am. Ins.*, 425 B.R. at 912.

Debate persists over the value of forum shopping.[35] For present purposes, it remains a durable feature of restructuring practice. Some scholars predict that "various legal developments" will push debtors further abroad.[36]

C. The Commitment Rule Alternative

The combination of a fact-intensive inquiry and increased forum shopping has drawn sustained criticism. In particular, Anthony Casey, Aurelio Gurrea-Martínez, and Robert Rasmussen argue that COMI is indeterminate, manipulable, and costly to litigate.[37] Their proposed "Commitment Rule" would allow debtors to designate an insolvency forum ex ante in their organizational documents, making that designation relatively binding for Model Law purposes.[38] On their account, a public, charter-level commitment would improve predictability, reduce litigation, and channel competition among insolvency forums toward greater economic efficiency.[39]

The authors believe that COMI is the wrong tool for determining an insolvency forum, and offer the Commitment Rule as an answer.[40] The Rule would replace COMI's ex post factual inquiry with an ex-ante, publicly filed designation of forum in the debtor's constitutional or contractual, notice-obliging documents.[41] Such a switch promises predictability and reduced manipulation by locking in the forum early. The authors further argue that markets can discipline debtors that choose inefficient forums by demanding higher returns or declining to invest.[42]

There is a strong case for the concerns underlying the Commitment Rule, especially the uncertainty and litigation costs endemic to COMI.[43] Yet it would be premature to trade COMI for an amended Model Law for two reasons. First, it is not clear that the proposal delivers what Casey et al. promise. Second, there is

35 *See* Casey, *supra* note 34, at 313 (discussing the possibility of "good" forum shopping).

36 *Id.* at 301–02 (explaining how recent limitations on non-consensual third-party releases may incentivize debtors to switch out of U.S. Chapter 11 proceedings into more permissive English Scheme proceedings, a maneuver that U.S. courts restrainedly ratify).

37 Anthony J. Casey, Aurelio Gurrea-Martínez & Robert K. Rasmussen, *A Commitment Rule for Insolvency Forum*, 4 U. CHI. BUS. L. REV. 51, 55–70 (2025).

38 *Id.* at 71–83; *see also* Anthony J. Casey et al., *A Commitment Rule for Insolvency Forum: A Response to Critics*, 41 EMORY BANKR. DEV. J. 407, 407–10 (2025).

39 Casey et al., *supra* note 38, at 71–83.

40 *Id.*

41 *Id.*

42 *Id.* at 83–90.

43 For a report on negative economic effects of the COMI regime, see AURELIO GURREA-MARTÍNEZ, REINVENTING INSOLVENCY IN EMERGING ECONOMIES, ch. 8 (CUP 2024).

reason for cautious optimism—both about the present state of COMI and its ongoing doctrinal development. In short, judges do not need UNCITRAL to abolish COMI in order to take COMI clauses in corporate charters or offering memoranda seriously. The core insight of the Commitment Rule—which privileges creditor expectations—is already embedded in the judicial test.[44]

III. COMI IN THE PRESENT

Start with the commonsense principle that a debtor's "center of main interests" means what it says. That is, it suggests a physical location containing the debtor's "main interests." Often, that location is the place of formal incorporation. Incorporation works as a proxy only because it tends to parallel head-office functions or day-to-day management. And that is the relevant inquiry—the debtor's "real seat." That is the place where the debtor goes about her business, and where would-be creditors assume any restructuring might occur.

At first glance, the concept appears straightforward. That impression does not last. While "center of main interests" begins as a loose proxy for a debtor's "real seat," legal complexity quickly takes hold. COMI has developed along common-law lines, with judges, debtors, and creditors each exerting pressure on the doctrine. To trace that development, this Comment identifies three distinct constructions of COMI in the case law.

A. Manufacturing COMI

Take the first complication: What do judges do when there is no "center" from which a debtor's business is conducted? That is a *literal* problem. In *In re Ocean Rig UDW Inc.*,[45] the debtors' operations were conducted almost entirely on the high seas. Their oil rigs were mobile and operated outside the territorial jurisdiction of any sovereign—so traditional, geographic COMI was of little help.[46]

The foreign debtors intentionally shifted their COMI from the Republic of Marshall Islands—which lacked any meaningful insolvency regime—to the Cayman Islands.[47] Banks, head offices, and board meetings were relocated to the Cayman Islands, where restructuring activities continued for a year.[48] This activity established the Cayman Islands as the place of COMI, even though no single

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44 *Id.* at 731–35. *Modern Land*, 641 B.R. at 786–89.

45 570 B.R. 687; *see also In re* Ocean Rig UDW Inc., 764 Fed. Appx. 46 (2d Cir. 2019).

46 *Ocean Rig*, 570 B.R. at 706.

47 *Id.* at 703.

48 *Id.* at 706–07.

"center" of main interests existed. The oil rig business operated across the high seas but was (artificially) run from the Cayman Islands.[49]

That shift may have been artificial, but it was value-maximizing and undertaken in good faith, with notice of pre-filing relocation provided to interested parties.[50] Judge Glenn ultimately credited the debtor's shift. He focused on their efforts to establish business administration in Cayman and concluded that their activity was enough to establish COMI.

Two considerations were central. First, there was no meaningful COMI alternative. The debtors' operations were inherently mobile, and no competing jurisdiction plausibly served as a viable candidate—the RMI lacked a value-preserving insolvency regime. Second, the shift was not undertaken in bad faith in the dead of night. *Ocean Rig* reflects an early willingness to recognize a debtor's pre-filing COMI shift when undertaken to preserve value, accompanied by disclosure, and met with creditor acquiescence.

The evolution does not end there. The harder question arises when there a viable alternative exists, yet all parties agree it should be set aside. *In re Mega NewCo Ltd.*[51] presents such a scenario, involving explicit COMI manufacturing. There, the debtors formed an English subsidiary and had it assume the American parent's obligations. They then relocated board meetings and corporate decision-making, and initiated an English scheme proceeding to restructure U.S.-law governed notes.

The debtors did so to take advantage of features of English restructuring law unavailable under Chapter 11, including a more streamlined and private process and the absence of an absolute priority rule.[52] All parties agreed the debtors acted deliberately and with an eye toward Chapter 15 recognition. In short, the strategy was designed to avoid application of an American COMI.

Judge Wiles cautioned that if such tactics were routinely sanctioned, "the ordinary predicates for Chapter 15 relief [would] be stripped of all meaning."[53] Any debtor could simply choose any jurisdiction in the world, create a subsidiary in that jurisdiction, and have the subsidiary assume its obligations. "The parent company's COMI would no longer be relevant."[54] Debtors would be able to use the fiction of corporate childbirth to relocate at will. A curated jurisdiction's laws

49 *Id.* at 697.

50 *Id.* at 704.

51 2025 WL 601463, *1 (Bankr. S.D.N.Y. Feb. 24, 2025).

52 *Id.* at *2.

53 *Id.* at *3.

54 *Id.*

might "favor[ ] insiders," undercut the "legitimate expectations of creditors," or further "other improper [motives]." There must be a limiting principle.

Judge Wiles found that limiting principle in creditor expectations and fairness.[55] Although the debtors in *Mega NewCo* nakedly manipulated COMI, creditors were extensively involved and consented to the change.[56] Noteholders negotiated the terms of the restructuring, voted (overwhelmingly) in its favor, and received detailed notice—both of the English proceedings and anticipated Chapter 15 recognition.[57]

The COMI rule should not be applied to undermine its very purposes. Chapter 15 emphasizes "protecting the reasonable interests of parties" and preserving "fair procedures" that maximize the debtors' value.[58] Creditors are in the best position to determine if their interests have been frustrated.[59] "It would be absurd . . . to thwart the creditors' constructive desires and expectations in the guise of supposedly protecting them."[60] Because the restructuring was negotiated, transparent, and value-maximizing, Judge Wiles blessed the new COMI. He declined to "look past the form of the transaction[ ]" and "pursue theoretical issues that no affected party [wanted] to pursue."[61]

Mega NewCo can be read as a rejection of judicial paternalism and a respect for the way sophisticated financial actors bargain around the rule towards something like a Pareto-optimal outcome. *Mega NewCo* pushes the envelope of the *Fairfield Sentry* test for COMI, returning to the text of Chapter 15 and to its stated purposes.[62]

These cases stand for an important chapter in COMI's common-law trajectory. Courts started by taking the meaning of COMI literally. Businesses used to have a more concrete physical presence, with managers, assets, operations, or some other identifiable center of activity. The *SPhinX* factors existed to approximate what a third party could reasonably expect from a debtor.

That approach has started to give way. The Second Circuit has begun to hew towards a totality-of-the-circumstances analysis of creditor expectations and consent. When a debtor's COMI is engineered to meet the *SPhinX* factors, courts may tolerate it if the location is reasonably ascertainable to third parties, value-

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55 *Id.* at *3–4.

56 *Id.* at *4.

57 *Id.* at *3–4.

58 *Id.* at *4.

59 *Id.*

60 *Id.*

61 *Id.*

62 *See* 11 U.S.C. § 1501(a).

preserving, and selected in good faith. Debtors can opt into a chosen COMI if it is met with overwhelming agreement from the relevant parties. That is not only true when there is no viable alternative COMI.[63] Even when the default COMI is viable, the parties may agree to a selected COMI instead.[64]

This new approach is not unbounded. Judges are rightly wary of overly structured COMIs and look to the purposes of Chapter 15 as a guide. JudgesThey distinguish between strategies that do or do not jive with Chapter 15's policy goals.

B. Rebutting the "Nerve Center" Presumption

Recall the traditional COMI rule. A debtor's "nerve center," or principal place of business, is presumptively its center of main interest.[65] Yet, with enough notice to creditors, or with agreement and no objections, courts appear willing to suspend that presumption and let parties restructure in their chosen jurisdiction.[66] Alternatively, perhaps the nerve center presumption was only ever a *means* to creditor expectations. In the contemporary world of far-flung insolvencies and sophisticated parties, it may no longer serve as the most reliable guide. Instead, the best guide for creditor expectations is precisely that: the expectations that creditors profess through their actions and support for various schemes. If creditors agree on a mutually beneficial forum ex ante in their organizational documents, it takes a peculiar kind of formalist to insist on the nerve center presumption notwithstanding.

Debtors can provide notice through various ex ante disclosures. These disclosures often take the form of contract terms, resembling forum selection clauses. They are typically enshrined in corporate charters or appear in contractual documents like bond indentures.[67] Disclosures change the balance of COMI by allowing parties to signal their preferences in advance.

Turn first to *Modern Land*, from which the following principle can be derived.[68] To override the presumption that COMI lies where the debtor conducts her regular business,[69] two conditions must be met. First, the debtor must have obtained the overwhelming support of its scheme creditors. Second, no party can

63 *See Ocean Rig*, 570 B.R. 687, 640 (2017).

64 *See Mega NewCo*, 2025 WL 601463, at *4.

65 *Supra* note 20.

66 Order Granting Petition for (I) Recognition of Foreign Main Proceeding, *In re* Fossil (UK) Glob. Servs. Ltd., No. 4:25-bk-90525 (Bankr. S.D. Tex. Nov. 12, 2025).

67 *See, e.g.*, *Modern Land*, 641 B.R. at786–89.

68 *See id.* .

69 *See Fairfield Sentry*, 714 F.3d at 130.

have objected to recognition.[70] The facts of *Modern Land* put these conditions squarely up against the nerve center presumption. In *Modern Land*, a company that operated in China successfully contracted away from a Chinese COMI. It formally incorporated in the Cayman Islands and disclosed that insolvency proceedings would be held there.

The company's "nerve center" remained in China, but Judge Glenn found that "definitive creditor expectations and overwhelming creditor support solidif[ied] a finding of COMI in the Cayman Islands."[71] In *Modern Land*, the proffered notice was sufficient. The company's offering memoranda and indentures disclosed that Cayman law would govern its notes and warned that it anticipated insolvency proceedings.[72] When the company formally pursued the scheme, creditors overwhelmingly supported it.[73]

Contrast the above to *Sunac China*.[74] The debtor was also incorporated in the Cayman Islands and presented similar offeringmemoranda disclosures about Cayman law.[75] Judge Bentley acknowledged the factors from *Modern Land*, where "overwhelming creditor support" and the lack of any objections had sufficed to establish a Cayman COMI.[76] Indeed, the disclosures present in *Sunac China* made Cayman "at or near the top of the list of jurisdictions where creditors might reasonably have expected any restructuring proceeding to be brought."[77]

But there was one crucial difference. Aside from the above, the debtor had "no other Cayman Islands connections."[78] They had no real headquarters or office in the Cayman Islands. Their senior financial staff all lived in mainland China. And they had substantial connections to Hong Kong, the "primary locus" of their "business activities and decision-making."[79] Sunac conducted restructuring negotiations, meetings, and regulatory interactions all in Hong Kong.[80] Creditors supported restructuring in Hong Kong, too. The *Modern Land* factors were not met, so Judge Bentley applied the traditional test. Although Sunac had a greater physical presence in China than Hong Kong, its primary business activity was to issue and restructure debt in international capital markets. That happened

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70 *See Modern Land*, 641 B.R. at 789 (discussing the two conditions).

71 *Id.*

72 *Id.* at 786–88.

73 *Id.* at 786–89.

74 656 B.R. 715 (2024).

75 *Id.* at 731–32.

76 *Id.* at 732.

77 *Id.*

78 *Id.* at 725.

79 *Id.* at 719.

80 *Id.* at 731–35.

"principally in Hong Kong, where its CFO . . . [was] based."[81] Judge Bentley properly held that Sunac's COMI was in Hong Kong, not the Cayman Islands or China.[82]

In *Modern Land*, ex ante disclosures supported a COMI finding in Cayman because operations and governance also were conducted there and creditors unanimously supported the scheme. In *Sunac China*, disclosures suggested a Cayman COMI, but the lack of equivalent creditor support and the company's actual administration in Hong Kong won out.

The final chapter of the *Modern Land*saga plays out in *In re Xinyuan Real Estate Company*.[83] There, the debtor's nerve center and place of incorporation clashed. Their nerve center was "undisputed[ly]" in China.[84] They had incorporated and chosen to restructure in the Cayman Islands, but their "regular business" was still based in China.[85] Under *Modern Land*, the clash between nerve center and selected venue could be resolved in favor of the latter only if there was "overwhelming support" from creditors and "no [ ] object[ions]."[86] Yet, as Judge Bentley put it, "those are [two] big 'ifs.'"[87] The Xinyuan debtor was very far from obtaining the requisite creditor support, and their efforts to restructure in Cayman had stalled.[88]

These cases reflect newfound flexibility in COMI. Rather than rigidly adhering to the nerve center presumption, courts demonstrate a willingness to relax it—but only when creditor expectations and consent are manifest. That flexibility contrasts with the rigid nature of some ex-ante commitments.[89] A stricter rule might have resulted in a Cayman COMI. Instead, the comparatively flexible *Modern Land* analysis led the court to reach a different—and likely correct—result.

The evolution of the "nerve center" presumption suggests that COMI is no longer just about geography. What exactly creditors signed up for, whether demonstrated through on-paper commitments or objections in court, plays a preeminent role.

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81 *Id.* at 719.

82 *Id.* at 735.

83 2026 WL 592250 (Bankr. S.D.N.Y. Mar. 3, 2026).

84 *Id.* at *10.

85 *Id.*

86 *Id.* at *11.

87 *Id.*

88 *Id.*.

89 *See supra* Part I.C. (discussing the Commitment Rule).

C. Overriding Expectations With Consent

The previous Parts might give the impression that COMI is *all* about creditor expectations. After all, creditor expectations dictate what courts do when no sensible forum is available,[90] when the parties wish to ignore a sensible forum,[91] and when the chosen COMI conflicts with the corporate nerve center.[92] Throughout, though, creditor expectations have been accompanied by consent. When no single territorial jurisdiction provided the answer, the parties consented to the Cayman Islands.[93] When debtors sought greener insolvency forum pastures, "overwhelming" creditor support carried the day.[94] And with a dearth of agreement from creditors, judges returned to the traditional presumptions.[95]

A different dilemma emerges at the intersection of creditor expectations and consent: whether creditors can, after the fact, consent away their reasonable expectations?

In re Fossil (UK) Glob. Servs. Ltd. presents a useful case study.[96] Fossil is a watch company based in the U.S., with largely American operations and creditors, and debt governed by U.S. law. Nonetheless, Fossil chose to restructure its 2026 notes through an English restructuring plan—a forum with little organic connection to its business—because the process was more streamlined and private.[97] English schemes offer the ability to target specific debt tranches unlike in Chapter 11.[98]

One American noteholder wrote in protest to Judge Lopez and aired his grievances. He persuasively argued that being forced into an English proceeding was contrary to his expectations as a U.S. creditor holding U.S.-law governed debt. Judge Lopez expressed hesitation about recognizing the English foreign main proceeding on precisely those grounds.[99] Nonetheless, he granted the petition. The posture of the case had changed. The objecting creditor had sold his notes, leaving no remaining party to assert that the English forum was inapposite and

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90 *See supra* Part II.A.

91 *See id.*

92 *See supra* Part II.B.

93 *See Ocean Rig*, 570 B.R. 687.

94 *See Modern Land*, 641 B.R. 768, at 789.

95 *See Xinyuan*, 2026 WL 592250.

96 Order Granting Petition for (I) Recognition of Foreign Main Proceeding, *In re* Fossil (UK) Glob. Servs. Ltd., No. 4:25-bk-90525 (Bankr. S.D. Tex. Nov. 12, 2025).

97 *Id.*

98 *See id.*

99 *See* Transcript of Recognition Hearing, *Fossil* , No. 4:25-bk-90525.

providing Judge Lopez with apparently sufficient comfort to grant the petition.[100] He was quick to emphasize that these were unusual circumstances and that his order was not precedential. Faced with no present objectors once the previously objecting creditor had sold his notes, Judge Lopez took the remaining parties at their word in deeming an English COMI value-enhancing.[101] Even though an American creditor would have had no reason to expect an English restructuring, agreement was enough to carry the day.

It follows, one might think, that creditors can consent away their reasonable expectations at the right price. The American noteholder voiced his objections, and they were acknowledged in court. Then, he sold his notes. The most charitable inference is that he cashed out at a price commensurate with or greater than the value to be gained from participating in an American restructuring.

Although not precedential, the decision in *Fossil* is not without foundation, either. *SPhinX* reappears in parable form. The decision laid out several well-known factors but also taught that COMI determinations should not be made mechanically.[102] They should be made in light of "Chapter 15's emphasis on protecting the reasonable interests of parties in interest," "fair procedures," and the "maximization of the debtor's value."[103] The objecting creditor in *Fossil* was presumably in the best position to say that his expectations were thwarted. Courts "generally should defer . . . to creditors' *acquiescence*" to a proposed COMI.[104] Judge Lopez did just that.

Fossil supports an argument for the Commitment Rule. Creditor expectations can be priced and consent can be solicited. A debtor could not only designate COMI in their organizational documents but offer to buy the right to select a new COMI from any willing creditor. Debtors could even specify formulas for determining the strike price, like an option.

To draw out the principle, if consent can trump even creditor expectations, it may be worthwhile to formalize a consent-based regime. Creditors like the objecting noteholder in *Fossil* could stipulate their price, and debtors who want an alternative COMI can compensate them. If the value of an alternative COMI is greater than an objecting creditor's price and that creditor will do roughly as well (but probably demand better) from selling, then debtors will select their favored COMI and compensate the creditor for the shift. This is a Pareto-improving, liquidated damages situation.

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100 *Id.*

101 *Id.*

102 *See SPhinX*, 351 B.R. at 117.

103 *Id.*

104 *Id.*

On the other hand, nothing stops parties from engaging in these mutually beneficial transactions now. What's more, the costs of formalizing Casey et al.'s Commitment Rule are not trivial. COMI may already be driving towards an equilibrium.

The evolution towards emphasizing creditor expectations and consent rather than substantive business activities is notable. This is a stark difference from the past, where the analysis turned on the debtor's day-to-day presence.[105] Even when there is no underlying connection to the country chosen for COMI, courts may honor those connections with sufficient notice. It is possible that courts will continue to relax COMI requirements to reflect party preferences, interpreted against the background principles of Chapter 15.

IV. COMI IN THE FUTURE

A. Protecting COMI's Common-Law Evolution

Sometimes, the best way to evolve a new rule is by using its old language. As transnational insolvency practice continues to develop, courts should endeavor not to be hamstrung by outmoded and baffling tests. Ruthlessly applying the nerve center presumption, for example, will sometimes produce the wrong outcome when contract terms and consent point in the other direction. So too for the *SPhinX* factors or the canonical *Fairfield Sentry* test. Doctrine can be a blunt instrument when it responds too closely to new sets of facts without sufficient reference to its animating law.

Judges should allow COMI doctrine to evolve towards Chapter 15's values. The chapter exists to coordinate solutions to collective action problems. Its stated goals leave room for flexibility. What makes a procedure "fair" or "reasonable" is context dependent. There is no one-size-fits-all bright line that produces the right answer in every case. Instead, judges should recognize where there is play in the joints. The levers of creditor consent and notice can make surprisingly unintuitive outcomes turn out to be the correct ones. Those decisions should be left to sophisticated parties on the ground, supervised by keen judging, and not to those judges who may mechanically and formulaically apply the doctrine.

More fundamentally, incremental evolution is foundational to the entire project of creditor expectations. Creditors (and debtors) must have some assurance that the law today will remain the law tomorrow. That means gradual, stepwise evolution—not abrupt change via legislative decree. Existing judicial norms should act as a lodestar against which innovations in modern restructuring practice are measured. Coloring within the lines allows judges to build on COMI's first principles while respecting the rule of law.

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105 *See, e.g.*, *In re* Iovate Health Servs. Int'l Inc., 673 B.R. 516 (Bankr. S.D.N.Y. 2025).

That approach is preferable to overhauls like Casey et al.'s Commitment Rule. Those proposals are politically costly, and amending the Model Law is unlikely to be an easy task. The perfect should not be made the enemy of the better. For another, though, reforms like the Commitment Rule are motivated by less-than-sober assessments of present-day COMI doctrine. Although abstract recitations and rule statements may be easy to circumvent or manipulate, judges are sorting good manipulation from bad. When manufactured COMIs align with the interests of creditors and meet no opposition, they are approved. When they reflect a last-minute, bad-faith attempt to pull out the rug, they are appropriately rejected.

In many respects, this Comment does not take issue with Casey et al.'s diagnosis of insolvency practice. Cheap planning and low litigation costs are good. But the preferable way to achieve that result is through patience and a judicial common-law approach. That produces less litigation and more stable, yet evolving, standards over time. Market actors do not always react well to the imposition of rules from on high.[106] For example, Casey predicts that there will be more forum shopping from the U.S. to England in an attempt to avoid the Supreme Court's decision in *Harrington v. PurduePharma*.[107] In all likelihood, norms of comity and economic ties between England and the U.S. will discipline British proceedings. But the risks are evident. If legislators move too far too fast, the result will be judicial backlash, perhaps even resulting in a nativist, restrictive approach to Chapter 15.

The path to a predictable standard lies in doctrinal evolution and the common law—repeated decisions, testing, and correction. COMI is heading down that path now. Locking in a formal rule risks undermining that progress. To the contrary, parties should be permitted to contract around the expectations reflected in the law. When no expectations exist beyond "choose what you want," litigation is likely to follow.

That is not to say there is no space for COMI-selection clauses. Quite the opposite. Such clauses may have evidentiary value, but a Commitment Rule is not needed to bring them into existence. Cases like *Fossil* suggest that parties are adept at bargaining around the rule. The contrast between *Modern Land* and *Sunac* reveals the importance of upfront, consistent disclosures. Debtors still have much to gain from declaring their COMI in advance—early and often.

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106 *See generally* Casey, *supra* note 34 at 315 (predicting that English courts may decline to exercise jurisdiction over, for example, a U.S. mass tort case, for fear of American political backlash and a "protectionist response" that keeps cases at home).

107 *Id.* at 314 (citing *Purdue Pharma*, 144 S. Ct. 2071 (2024) (ending the practice of awarding nonconsensual third-party releases in bankruptcies)).

Concerns about opportunistic behavior and non-adjusting creditors are legitimate, but they are also manageable. The concern is that debtors will choose a distant, creditor-unfriendly forum at formation, add a COMI clause to their charter, and finalize that choice before investors or other stakeholders can react. (Note that the Commitment Rule faces the same objection.[108]) The objection does not succeed for two reasons:first, COMI is an innately factual test. Even with a COMI clause, courts must still ask where a debtor *actually* administers its interests and whether that location is ascertainable to third parties. If a debtor designates a jurisdiction with minimal ties and then routes all its operations and financing from a different hub, and there are objecting creditors, courts can and should disregard the toothless clause.[109] And if there are *not* objecting creditors, then the chosen COMI may not be so odious. That is the beauty of allowing parties to bargain.

Second, the public-policy and sufficient-protection provisions of the Model Law are a safety valve for non-adjusting creditors. Mass-tort victims, employees, and local trade creditors often do not have—or read—offering memoranda or charters. Yet recognition of a foreign main proceeding can dramatically affect their rights. Fortunately, courts have protective tools in place. Section 1506 allows a court to refuse to take any action under Chapter 15 that would be manifestly contrary to U.S. public policy.[110] 1507(b)(4) safeguards absolute priority. Lastly, 1522(a) requires that relief be granted only if creditors and other interested entities are "sufficiently protected."[111]

These sections create a safe harbor for less sophisticated creditors. When COMI clauses point to forums that provide substantially weaker protections for non-adjusting creditors, courts should apply Sections 1506 and 1522 stringently. That is not a license to reject foreign law whenever it differs from American law. It is a targeted response to cases where the combination of forum selection and capital-structure design threats to externalize costs onto parties that lacked the opportunity to protect themselves from the get-go.[112] The safe harbor allows judges to apply their discretion, entering relief under Chapter 15 only when doing so is not unjust.

B. Returning to First Principles

Instead of rushing down the racetrack of formalization, courts should take existing common law insights and harmonize them into a rebuttable presumption.

108 *See* Casey et al., *supra* note 38, at 417–22 (addressing involuntary creditors).

109 *See Bear Stearns*, 374 B.R. at 129–33; *see also SPhinX*, 351 B.R. at 117–19.

110 11 U.S.C. § 1506.

111 11 U.S.C. § 1522(a).

112 *See* Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT'L L. 401, 432–46 (2010); *see also* Rosa M. Rojas-Vertiz, *The MLCBI, the COMI, and Emerging Markets: Is It Time for Amendments?*, 98 CHI.-KENT L. REV. 509, 520–33 (2024).

This presumption could serve as an outright alternative to proposals like the Commitment Rule. Or it could function as a bridge, allowing judicial practice to crystallize around contractual norms until the time is right for legislation.

Such a presumption should look something like the following: when a debtor's publicly filed constitutional documents or widely disseminated capital-markets instruments contain a clear designation of COMI, that designation creates a rebuttable presumption. This presumption should be subject to a few important (non-exhaustive) limitations. It must be in place for a meaningful period before distress, it must be consistent with the debtor's coordination of restructuring activities, and it may not prefer the debtor or some creditors over other creditors.

In fashioning this presumption, courts should keep several design choices in mind. First, any presumption must be grounded in public and widely accessible documents. The point of contractual COMI is notice. A COMI clause in a charter filed with a corporate registry or in an offering memorandum used to market notes should be given due regard—the debtor has clearly made an effort to broadcast its forum preferences. A clause buried in a confidential shareholders' agreement or bilateral loan, though, should carry little weight. Requiring publicity aligns with the "ascertainable by third parties" principle, which has informed both European and American law.[113] When a court finds notice to be inadequate and materially damaging, the presumption would be called into question or rebutted.[114]

Second, timing matters. COMI clauses adopted at formation or at major financing events and left unchanged until financial distress should be given greater weight than clauses adopted on the eve of insolvency. To this end, courts can borrow *Fairfield Sentry*'s petition-date focus and look-back concept.[115] Much like how preference law scrutinizes certain transfers made within ninety days of filing, a clause adopted within a specified window before a Chapter 15 petition should trigger heightened scrutiny.[116] This design choice works to prevent opportunism and ensures that the notice gained from a COMI clause is genuine.

Third, COMI clauses should often (but not always) align with operational reality. If the designated forum has real, concrete ties to the debtor's head-office functions, treasury operations, board meetings, restructuring work, and the like, the presumption is nigh irrebuttable. That was the case in *Modern Land*.[117] If, by contrast, the designated forum is nothing more than a pure letterbox jurisdiction with no real nexus, and creditors were not placed on crystal clear notice, courts

113 Regulation (EU) 2015/848, pmbl. ¶ 28; UNCITRAL, Guide to Enactment, *supra* note **Error! Bookmark not defined.**, ¶ 84.

114 *See, e.g.*, *Bear Stearns*, 374 B.R. at 129–33.

115 *Fairfield Sentry*, 714 F.3d at 133–35.

116 *See* 11 U.S.C. § 547(b)(4)(A).

117 641 B.R. at 786–89.

should give the clause relatively little weight, as in *Sunac China*.[118] In that circumstance, something like "overwhelming" support from creditors, with no objections, is required.

Finally, safeguards for non-adjusting creditors and public policy must remain intact. Chapter 15 allows courts to refuse relief or impose limiting conditions to protect "the public policy of the United States."[119] Courts take into account whether creditors are "sufficiently protected," too.[120] The COMI clause presumption should not interfere with these safeguards. Even if a clause specifies a particular forum, courts should make sure that local tort victims, employees, and small trade creditors are not stripped of basic protections.[121]

This presumption would respect COMI's first principles. It is intentionally flexible and modest. It does not forbid COMI findings in the absence of, or that contradict, a clause. Nor does it force courts to accept exante stipulations that obviously blink reality. It simply takes seriously what the Model Law values: objective, perceptible facts about where the debtor administers its interests and where creditors can reasonably expect insolvency proceedings to take place; cooperation; and the manifest desires of interested parties. Encouraging debtors to disclose outright where they might restructure provides the market with better information. Better information yields better pricing. And, in turn, that helps reduce litigation costs, as advocates of the Commitment Rule hope.[122] Courts have already demonstrated their capacity to tailor COMI rules to unique facts. They should do the same with this presumption.

V. CONCLUSION

COMI is now more than twenty-five years old. It anchors the Model Law, the EU Insolvency Regulation, and Chapter 15. Over that time, it has guided courts through hedge-fund failures, shipping and offshore restructurings, Brazilian and Latin American corporate crises, and waves of Chinese property-developer collapses. It is not perfect. It has proven flexible and resilient. (And people sure do like to file in S.D.N.Y.).

The Commitment Rule proposal aptly draws attention to real frictions in COMI practice. There is huge uncertainty about forum, litigation costs in high-stakes cases, and the potential for opportunistic manipulation.[123] Yet replacing

118 656 B.R. at 731–35.

119 11 U.S.C. §§ 1506, 1522(a).

120 *Id.*

121 *See* Janger, *supra* note 107, at 432–46.

122 *See* Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEVS. J. 463, 501–02 (2021).

123 *See* Casey et al., *supra* note 38 at 54.

COMI wholesale with a binding charter-based forum designation would be radical and may prove difficult to implement. It might also unsettle an international compromise that has taken decades to build, risk exacerbating distributional problems for non-adjusting creditors, and shift strategic behavior to the making of corporate charters. It is true these last two concerns exist with the contract-terms COMI as well. But starting with private ordering rather than legislative change means there is room for practice to reveal the optimal ways of organizing.[124] In turn, prices will reflect that organization and so will the market. Then, a consensus way of indicating forum-selection clauses will emerge.

The better path is incremental. Courts should recognize, and make explicit, what they are already doing in cases like *Ocean Rig*, *Modern Land*, and *Fossil*. They recognize manufactured COMIs, even in the face of alternatives, when the manipulation is advocated for by the majority. They likewise set aside the nerve center presumption when there is overwhelming agreement from creditors. And they allow objectors to withdraw their objections at the right price.

By adopting a rebuttable, time-sensitive presumption in favor of clearly designated insolvency forums in corporate documents, courts can capture many of the benefits that the Commitment Rule promises. A presumption could result in better information, more accurate pricing of insolvency risk, and less opportunistic litigation. This would all be done without sacrificing the flexibility and protective tools built into the Model Law. With time, courts would begin to tolerate increasingly structured COMIs—as long as they remain under watchful judicial supervision. Private parties, too, would learn judicial norms and adapt their behavior to the presumption.

The point of using a debtor's center of main interests is to capture what a creditor could reasonably expect and contract for. For a long time, that meant a firm's physical location. That location, however, should not be reified for its own sake. The reasoning underlying that epistemological shortcut should endure, even if its traditional formulation does not. So long as the COMI rule's underlying logic remains sound, it should continue to guide the caselaw. Courts should develop the COMI framework with its principles in mind. Parties should be able to reap the benefits of ex ante bargaining without being rigidly bound to a particular locale.

A contractual framework for insolvency need not mean COMI's contractual *replacement*. It can mean COMI informed by contract. A sound COMI analysis should listen carefully to what debtors and creditors have disclosed ex ante, bear operational reality in mind, and live up to Chapter 15's laudable policy objectives.

124 The value-maximizing forum for a debtor may change over time. This weighs in favor of allowing alterations of COMI—albeit those that are in good faith and value-adding for all parties involved. Robert K. Rasmussen, *Debtor's Choice, A Menu Approach to Corporate Bankruptcy,* 71 TEX. L. REV. 51, 116–21 (1992).

That is a trajectory courts already embrace. They should continue to travel down that path as the law of cross-border insolvencies develops.