

A Commitment Rule for Insolvency Forum

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ABSTRACT

In this article, we propose a new rule for determining the proper forum for insolvency proceedings. Currently, the Model Law on Cross-Border Insolvency—promulgated by the United Nations Commission on International Trade Law (“UNCITRAL”)—looks to a debtor’s center of main interest (“COMI”) to determine the proper forum for a foreign main insolvency proceeding. This rule is flawed. It is both inflexible and manipulable. It is also indeterminate and neither requires nor allows advance commitment by debtors. As a result, it leads to uncertainty, increases litigation costs, and opens the door to opportunistic manipulation by debtors. These costs, in turn, raise the cost of credit for all companies.

And so, we propose a better approach—the “Commitment Rule”—for determining proper insolvency forum. In short, the Commitment rule allows debtors to signal an advance commitment to a particular insolvency forum. To make this commitment public and binding, the debtor must put it in their company’s constitution. This upfront and observable commitment eliminates uncertainty and opportunistic manipulation.

The Commitment Rule presents a rare “win-win” legal reform requiring no major tradeoff. It would reduce strategic forum shopping and minimize litigation costs while also promoting the development and selection of efficient insolvency forums, which benefit all stakeholders – debtors, creditors and society at large. These improvements support the development of financial markets, entrepreneurial innovation, and economic growth more generally. UNCITRAL should adopt the Commitment Rule as part of the Model Law.