English Company Law: Legal Architecture for a Global Law Market

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Abstract

English-architecture company law describes the distinct and diverse group of company or corporate law used in more than 60 jurisdictions worldwide. English-architecture company law provides a robust platform for innovation and development due to its permissive structure, opportunity for choice of law in an entity's internal governance, and scalability permitting variation for small and large entities. It is the dominant form among International Financial Centers (IFCs), many of which have legal systems with a British connection. This body of law responds to competition and maintains dynamism by engaging its practice community through "learning by doing" and "frictioneering." An architecture approach permits a broader review of developments in company law that more closely captures the reality of global law practice. The IFC experience of climbing the value chain from tax arbitrage to provide solutions for entities or structures left out in the corporate law of larger jurisdictions provides a useful global governance model to maintain normative, jurisprudential, and regulatory coherence even as it responds to more specialized and unanticipated needs. This Article explores what makes English-architecture company law so successful and how IFCs use it to compete in the global law market.

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At least 2 million business entities are registered in jurisdictions that play roles as international financial centers (IFCs).[1] The majority of these business entities are formed under a company law whose architecture derives from English company law.[2] Millions more business entities around the world are formed under company laws similarly related to English company law in larger jurisdictions, such as Australia, Canada, and New Zealand. And, of course, business entities organized under UK company law play a significant role in the world economy, including AstraZeneca, BP, GSK plc, Imperial Brands, Tesco, and Vodafone. Although many of these jurisdictions have made both changes to various aspects of their company laws, introducing their own innovations or importing legal ideas from civil law jurisdictions, each other, or the United States, the basic structure of English company law remains an important foundation of

[1] Precise data is difficult to obtain. Our estimate was calculated by searching company registrar websites for jurisdictions we count as IFCs (see note 2 *infra*). Note that estimate is bound to be imprecise. As offshore advisor Barry Spitz noted in 2001, "No one can count the number of *offshore companies*, and the number is expanding exponentially." Barry Spitz, OFFSHORE STRATEGIES 14 (2001). Note that by "international financial center" we mean the jurisdictions that earn revenue by offering individuals and/or entities access to their legal systems. *See, e.g.*, James R. Hines, Jr., *International Financial Centers and the World Economy*, STEP (2009) available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1190&context=other. Confusingly, Frankfurt, London, New York, Paris, Tokyo and others are often referred to using the term because of their role in arranging international financial transactions, whether or not their laws are used. *See, e.g.*, LONDON AND PARIS AS INTERNATIONAL FINANCIAL CENTRES IN THE TWENTIETH CENTURY (Youssef Cassis & Eric Bussiere, eds.) (2005).

[2] Because we are primarily discussing the influence of English law, we adopt the English terminology of "company law" rather than the U.S. term "corporate law" throughout. We used "English companies law" to refer to the law of England and Wales. When referring to the entire United Kingdom, we use "British", "UK," or "United Kingdom." The full set of jurisdictions we have examined is (with civil law origin jurisdictions in italics and non-independent ones with an * and the affiliated jurisdiction in parentheses): *Andorra*, Anguilla (U.K.),* *Anjoun* (Comoros),* Antigua & Barbuda, *Aruba* (Netherlands),* Bahamas, Barbados, Belize, Bermuda (U.K.),* British Virgin Islands (U.K.),* Brunei, Cayman Islands (U.K.),* Cook Islands (New Zealand),* *Curacao* (Netherlands),* Cyprus, Dominica, Dubai IFC (U.A.E),* Gibraltar (U.K.),* Grenada, Guernsey (U.K.),* Hong Kong (China),* Isle of Man (U.K.),* Jersey (U.K.),* Labuan (Malaysia),* Liberia, *Liechtenstein*, *Luxembourg*, Malta, Mauritius, *Monaco*, Montserrat (U.K.),* *Mwali* (Comoros),* Nauru, Nevis , Niue (New Zealand),* Norfolk Island (Australia),* *Panama*, Samoa, *San Marino*, Seychelles, Singapore, *Sint Maarten* (Netherlands),* St. Kitts, St. Lucia, St. Vincent & the Grenadines, *Switzerland*, Turks & Caicos (U.K.),* *Uruguay*, and Vanuatu.

the world economy and "English-architecture" company law is likely the most important and successful competitor in the global market for business entities law.

English company law, or indeed any company law other than Delaware's, is not generally recognized by academics as an important competitor in the global law market.[3] Although there was some discussion of English law as a successful competitor for business entity formation while Britain was a member of the European Union,[4] the broader family of English-architecture company laws is generally seen as a series of distinct bodies of law in discussions of jurisdictional competition.[5] This approach misses the value of legal architecture as "an integrated system or structure anchored in certain unifying principles" which "serves a plurality of ends or goals for both individuals and larger social units," a description that we think fits English company law.[6] We argue that core concepts derived from English company law are essential parts of the architecture of international business law providing the 60 or more adopters of that architecture a competitive advantage in the global business law market.

Failing to recognize these jurisdictions as working from a shared legal architecture overlooks the essential contributions to the overall development of business entities law made by the community of judges, lawyers, and case law that flow from those jurisdictions. They have substantial degrees of freedom but, because virtually all the jurisdictions with English company law retain important features that derive from that architecture, there remains a common base. This makes moving businesses among these jurisdictions relatively easy and cheap even if particular rules have changed or ideas from elsewhere have been grafted onto individual laws. This is true for both onshore and offshore jurisdictions sharing English architecture and there is often cross-fertilization and exchange between large and small jurisdictions. Indeed, an often-neglected insight is that any jurisdiction is potentially offshore to another: Milton Grundy, a

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[3] William J. Moon, *Delaware's New Competition,* 114 NW. L. REV. 1403, 1405 (2020). Moon is the primary exception to this, and focuses on Bermuda, BVI, and the Cayman Islands as possible competitors. *See also* Ido Baum & Dov Solomon, *The Least Uncomfortable Choice: Why Delaware and England Win the Global Corporate Law Race,* 73 S.C. L. REV. 387, 390 (2021). In addition, Adam Pritchard examines the competition between London and New York over securities law. Adam C. Pritchard, *London as Delaware?* 78 U. CIN. L. REV. 473 (2009). A reviewer on an earlier version noted that Delaware has "made no efforts to export its company law to IFCs" and suggested it should not be seen as a competitor to English law. We note that England also did not explicitly seek to export its law, this happened as a consequence of jurisdictions being part of the British Empire. Whether a jurisdiction attempted to export its law is thus not relevant to our argument, since we are concerned with the consequences of many jurisdictions receiving a particular legal inheritance. Note also, as described below, there are jurisdictions that have imported Delaware corporate law (Liberia and Panama) and quite a few English-architecture jurisdictions adopted LLC statutes based on Delaware's, in part because there was no English analogue.

[4] *See* Baum & Solomon, *supra* note 3, at 398 (noting UK's advantages over continental countries pre-Brexit); John Armour, *Who should make corporate law? EC legislation versus regulatory competition,* 58 CURR. LEG. PROBL. 370 (2005) (noting increase in non-UK firms moving to UK post-the ECJ decision in *Centros*). *See also* Martin Gelter, *Centros and Defensive Regulatory Competition: Some Thoughts and a Glimpse at the Data,* 20 EUR. BUS. ORG. L. REV. 467 (2019) (concluding *Centros*-caused competition was primarily defensive changes in domestic law).

[5] *See, e.g.*, Christopher M. Bruner, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 28 (2013) ("Notwithstanding these core structural and institutional similarities, however, close inspection of these 'Anglo-Saxon' corporate governance systems reveals far greater divergence among them than the comparative literature typically acknowledges – notably with respect to relative degrees of shareholder orientation.'").

[6] Thomas W. Merrill & Henry E. Smith, *The Architecture of Property*, RESEARCH HANDBOOK ON PRIVATE LAW THEORY (Hanoch Dagan & Benjamin C. Zipursky, eds.) 2020, 2021 (2019).

noted offshore expert who practiced law in the area for decades, noted "One man's taxing jurisdiction is another man's offshore jurisdiction."[7] This reality argues for considering English architecture company laws as a group regardless of the size or character of the jurisdiction from which they emanate since they function as such in the global market.

In short, English company law and the jurisprudence it has generated provide much of the vocabulary and grammar that form the *lingua franca* of business entities law even as jurisdictions using it are "cherry-picking the best legislative devices on offer in other common law jurisdictions" to offer "a corporate law regime that is both 'tried and tested' and flexible to meet the evolving needs of the international business community."[8] Using English architecture helps overcome the barriers that Roberta Romano identified as making it costly for newcomer jurisdictions to break into the corporate charter business within the United States by reducing the additional human capital necessary for a jurisdiction's business entities to be used.[9] This easier entry ensures a dynamic law market able to respond to new business needs whether large or small.

We see this demonstrated through the struggles of an entity built on a different architecture to find a place in the global marketplace. Liechtenstein has a unique entity, the *Anstalt* which has many potentially desirable features for certain business purposes such as a holding company, cross-border trade, and intellectual property licensing. Because it is unique, however, it is hard for other jurisdictions to connect it to their laws and so "the *Anstalt* does not find a ready niche in the legal systems of other countries. Some courts refuse to accept that an *Anstalt* is a separate legal entity at all. Sometimes they treat the *Anstalt* as a company and sometimes as a trust, their choice seeming to turn on little more than the way they can raise more tax. To make things worse, most European tax administrators assume that a taxpayer who has dealings with an *Anstalt* is hiding assets and income."[10] Using an *Anstalt* rather than a more familiar entity carries with it increase transaction costs an English-architecture entity does not.

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[7] GRUNDY'S TAX HAVENS: A WORLD SURVEY 2 (John Walters, ed., 4th ed., 1983).

[8] Ian Mann, Lilla Zuill, & Jayson Wood, *Bermuda Companies and the Wider Offshore World: An Atlantic and Caribbean Perspective* in OFFSHORE COMMERCIAL LAW IN BERMUDA (2nd ed.). (Ian R.C. Kawaley, ed.) 455 (2018). *See* Baum & Solomon, *supra* note 3, at 398 (discussing English law's advantages); Brian Broughman, Jesse M. Fried, & Darian Ibrahim, *Delaware Law as Lingua Franca: Theory and Evidence*, 57 J. L. & ECON. 865, 866-68 (2014) (discussing idea of a jurisdiction's law serving as a common language).

[9] Roberta Romano, *Law as Product*, 1 J. L. ECON. & ORG. 225, 226 (1985).

[10] Spitz, *supra* note 1, at 208-09. *See also* Gerhard Kutz, 218 TAX HAVENS HOW TO BEAT THE SYSTEM AND KEEP WHAT YOU EARN 98 (1990) (noting that Italy does not recognize the legal personality of the anstalt). Evaluating how to mesh a foreign entity into a domestic tax law system is a question which requires evaluating both the law of the jurisdiction in which the entity is created and the law of the system applying its tax law to it. *See, e.g.*, Giles Clarke, OFFSHORE TAX PLANNING 5-6 (7th ed., 2000) ("It is common ground that, in determining whether a Jersey LLP is a partnership for purposes of United Kingdom taxation, the nature of the rights, obligations and other features of the organization must be determined according to Jersey law; but the characterization of its status, ie whether a body of that kind should be treated as a partnership or not for United Kingdom tax purposes, will be determined according to the law of the relevant part of the United Kingdom."); *R v IRC, ex p Bishop* [1999] STC 531 (discussing status of Jersey LLP under English law); Memec plc v IRC [1998] STRC 754 (German "silent partnership" not a partnership under English law).

For example, onshore tax authorities will be unsure of how to classify it for tax purposes[11] or may deny it legal personality.[12]

As a result, the lower transaction costs of using a "family member's" company law facilitate what Richard A. Johns termed "frictioneering," gaining benefits by creating entities in one jurisdiction to be used in another.[13] (Such activities include forming captive insurance companies, asset securitization, asset segregation to assist in financing, governance of joint ventures, and many more.) Even for those outside the immediate family, English-architecture company laws are so ubiquitous that the transaction costs of using entities created under them are lower than for most of their competitors. Our argument here is that the shared language and understandings created by the widespread use of English-architecture company laws are contributing factors to the success of offshore jurisdictions. Making it easy to understand a jurisdiction's laws is important: Offshore expert Grundy wrote that he had refrained from choosing a jurisdiction because he did not want to have to get "my mind round yet another Trust Law."[14] Jurisdictions which primarily market legal entities to those outside their borders can first establish themselves as global competitors and then, in some cases, move up the value chain to develop their own arrays of business entities. As a Bermuda lawyer reflected on his role in reforming Bermuda's partnership laws, "[c]lients will opt for jurisdictions which offer them familiar legal norms and recognizable commercial forms."[15]

In addition to being crucial to the global architecture of business entities law, we argue that English company law was an important factor in the establishment of IFCs around the world in jurisdictions connected with Britain.[16] For the most part, academic and policy analyses of

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[11] *See, e.g.*, Howard M. Liebman, *United States Tax Treatment of Liechtenstein Anstalts: A Comment*, 19 THE INTERNATIONAL LAWYER 921 (1985) (describing uncertainty over US tax treatment); Herbert Batliner, *Commentary on Liechtenstein Company Law*, 14 C.W.R.U. J. INT'L L. 613, 621-24 (1982) (describing features of anstalt).

[12] *See, e.g.*, George E. Glos, *The Analysis of a Tax Haven: The Liechtenstein Anstalt*, 18 THE INTERNATIONAL LAWYER 929, 944-45 (1984) (describing German cases denying anstalts legal personality).

[13] Johns defined "economic frictioneering activities" as "activities which promote personal, financial and business disintermediation and friction-busting from established onshore (and even other offshore) capital and financial markets and locations of business registration for sectoral profit and the net gain of the offshore state." Richard Anthony Johns, TAX HAVENS AND OFFSHORE FINANCE: A STUDY OF TRANSNATIONAL ECONOMIC DEVELOPMENT 56 (1983).

[14] Milton Grundy, OFFSHORE BUSINESS CENTRES: A WORLD SURVEY ix (Milton Grundy, ed., 7th ed., 1997).

[15] Robinson, *Partnership Law*, *supra* note 100, at 76.

[16] An anonymous reviewer noted that jurisdictions with English architecture company law also inherited the English language from the colonial experience as well as other aspects of British colonialism, plus are members of the Commonwealth, and asked whether those characteristics are part of the explanation as well. We agree that there are important differences between, for example, French and British colonialism that better equipped former UK colonies than French ones for roles as IFCs. *See* Charlotte Ku & Andrew P. Morriss, *International Financial Centers as a Model: Facilitating Growth and Development by Connecting to International Legal Frameworks,*14 LAW & DEV. REV. 429 (2021); Vaughan Carter, Charlotte Ku, & Andrew P. Morriss, *Evolving Sovereignty Relationships Between Affiliated Jurisdictions: Lessons for Native American Jurisdictions,* ARIZ. J. INT. & COMP. L. (forthcoming 2024). The "legal origins" literature makes broad claims for the comparative performance of former British colonies over the former colonies of other nations. *See, e.g.*, Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008). Our argument differs from that literature in that we are more focused on what the IFCs have done with what they inherited than with discerning the long-lasting influences of colonial practices. And while widespread use of English in a jurisdiction is valuable in many respects in attracting international business, it is impossible to disentangle the co-extensive use of English in transactions and the use of English architecture law to design them.

IFCs' roles have ignored the details of their business entity laws, focusing instead on levels of direct taxation or degrees of financial privacy. This approach may reflect a particularly western, large country view with specific interest in "constructing norms in international tax policy and financial transactions through newly constituted international authority structures."[17] In doing so, it overlooks the overall value of the entities created by the law in these jurisdictions. For example, businesses located in IFCs are often pejoratively labeled "shell companies" without considering the function of "shells" in segregating assets;[18] similarly the shell company owners' motives are regularly reduced to "secrecy" and tax evasion without considering the advantage to financing transactions and governance offered by the use of separate entities.[19] We also see that practices allowing for anonymity or secrecy are not confined to IFCs alone.[20] Even when the role of a jurisdiction in providing business entity law is recognized, it is too often swept aside as "essentially glorified paperwork.

By failing to understand fully the place of IFC business entities in the global economy, these analyses miss the significance of innovations and developments—including in financial regulation--from IFC business entities laws. When put into a wider context, it becomes possible to recognize how English company law has enabled engines of productive legal innovation through jurisdictions like the IFCs. Thomas Wainwright captures this failure to recognize the value of IFC contributions to the financial system:

> Earlier work from economic geography has often viewed offshore financial spaces (OFCs) as locations to hide and 'clean' the proceeds of crime, to evade tax, casting them as illegitimate spaces which deprive nation-states of tax revenue…. This analysis has detracted from other important 'legal' functions of offshore spaces; including their role in managing double taxation risks for organizations engaged in global trade, to situate the ownership of mobile assets such as aircraft and ships, … or to locate business ownership in spaces which have a strong legal system, to protect them from the illegitimate activities of corrupt state institutions…. The preoccupation with the illegal and dubious activities undertaken in offshore spaces has also obscured the roles of financial institutions in facilitating the tax planning activities which seek to legally reduce tax liabilities, as opposed to evading tax altogether.[21]

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[17] *See, e.g.,* Chuck Collins, THE WEALTH HOARDERS: HOW BILLIONAIRES PAY MILLIONS TO HIDE TRILLIONS 150 (2021) For a critique of the approach, see Don D. Marshall, *The Path to 'International Finance': Bringing (Caribbean) Offshore Financial Centres in; Attenuating the Western Grand Narrative* in THE DIPLOMACIES OF SMALL STATES: BETWEEN VULNERABILITY AND RESILIENCE (Andrew F. Cooper & Timothy M. Shaw, eds.) 221 (2009). As noted above, the notable exception is William Moon's work.

[18] *See* Katharina Pistor, *A Legal Theory of Finance,* 41 J. COMP. ECON. 315, 315 (2013) ("Financial assets *are* contracts the value of which depends in large part on their legal vindication …. Which financial assets will or will not be vindicated is a function of legal rules and their interpretation by courts and regulators.").

[19] *See, e.g.,* Collins, *supra* note 17, at 40 ("Without Delaware's anonymous shell companies, where would child pornographers and sex traffickers go to incorporate and collect revenue for their criminal enterprises?"). *But see* William J. Moon, *Anonymous Companies,* 71 Duke L. J. 1425, 1444-58 (2022).

[20] *See* Stephan W. Schill, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 227-28 (2009) (investment treaties may allow an investor to "strip off" its nationality in order to claim protection.)

[21] Thomas Wainwright, *Emerging onshore-offshore services: the case of asset-backed finance* in HANDBOOK ON THE GEOGRAPHIES OF MONEY AND FINANCE (Ron Martin & Jane Pollard, eds.) 434-35 (2017) (citations omitted).

This article proceeds as follows: Part 1 describes the global market for company law and explains the features of English company law that make it successful as architecture for the global law market. Part 2 notes the development of these features by demonstrating their use in solving specific problems in business entities. Part 3 assesses how English company law has enabled the contributions of IFCs to the transnational law of business entities, facilitating their success in the global market for business entity law. Part 4 concludes.

1. The Structure of the Market for Company Law

"Company law lies at the heart of our economy," noted the President of the UK Board of Trade (an official body of advisors to the UK government) at the beginning of the 1998 review of English company law.[22] Her observation rings true because economic activity would be difficult to organize without a legal framework for collective enterprise. [23] As enterprises grow more complex around the world, expanding the variety of "on the shelf of potential forms" of readily applicable business entities is increasingly necessary.[24] Business entities law is thus a critical part of the legal infrastructure that enables economic growth and accessibility to appropriate business forms central to providing order and stability in today's global economy.

In general, the business entities law provides legal infrastructure that enables the creation of economic value by reducing the transaction costs of collaboration among and between individuals and groups of individuals.[25] Business entities are either created under company law or under laws influenced by it.[26] A wide array of uses of IFC business entities exist, creating multiple niches in which jurisdictions can compete.[27]

Most jurisdictions recognize that businesses can choose the jurisdiction which provides its organizational law (the internal affairs doctrine in the United States means the place of incorporation provides the law for corporations; civil law and English-derived choice of law

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[22] Margaret Beckett, *Foreword,* in United Kingdom, Board of Trade, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY i (1998). See also Micklethwait and Wooldridge: "The company has been one of the West's great competitive advantages." John Micklethwait & Adrian Woolridge, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA xx (2003).

[23] When the Cayman Islands first sought to develop its economy beyond turtle fishing and sending its men abroad to serve in the U.S. merchant marine, the first law it passed was a company law. Tony Freyer & Andrew P. Morriss, *Creating Cayman as an Offshore Financial Center: Structure & Strategy Since 1960,* 45 AZ. ST. L. J. 1297, 1315 (2013).

[24] PALMER'S LIMITED LIABILITY PARTNERSHIP LAW (2nd ed.) (Geoffrey Morse, et al. eds.) v (2011). Joseph A. McCahery, *Introduction: Governance in Partnership and Close Corporation Law in Europe and the United States,* in THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS: US AND EUROPEAN PERSPECTIVES (Joseph A. McCahery, Theo RA Aijmakers & Erik P. M. Vermeulen, eds.) 2 (2004).

[25] *See, e.g.,* GRUNDY'S TAX HAVENS: A WORLD SURVEY 28 (Milton Grundy, ed., 6th ed., 1993) (describing how Belize's IBC law, which he helped draft, "embodies model provisions which apply in the absence of anything to the contrary in the instrument itself; they have the virtue of shortening and simplifying the trust instrument (and perhaps even making it less expensive)."

[26] *See, e.g., Obeid v. Hogan*, 2016 WL 3356851 (Del. Ch. June 10, 2016) (when LLC has adopted corporate-style governance courts will look by analogy to corporate law).

[27] Spitz, *supra* note 1, at 15 ("Other products on the shelves of the offshore supermarkets are finance subsidiaries, captive banks, captive insurance companies, shipping and trans-shipment companies, licensing companies, headquarters companies, limited liability companies, foundations, management services companies, manufacturing and export bases, and tax shelters.").

rules are sometimes more complex but generally allow businesses to select the law.)[28] As a result, jurisdictions can compete for the organization of business entities by offering a package of laws, courts, lawyers, and service providers that is sufficiently attractive to induce those organizing a business to incur the additional transaction costs of making use of a jurisdiction other than their own. This is nothing new: this law market was vigorous even in the nineteenth century at the dawn of modern business entities law. For example, the use of French business entities by British firms seeking limited liability was important in spurring the adoption of general limited liability in England and Wales in 1855[29] and Britain's and Belgium's leapfrogging of France in making general incorporation readily available in turn spurred reform of French company law in the 1890s.[30]

Erin O'Hara O'Connor and Larry Ribstein set out the most comprehensive framework for analyzing law market competition in their 2009 book *The Law Market*,[31] although others have also discussed the idea, particularly with respect to Delaware's success in attracting public companies in the United States to incorporate there.[32] As O'Hara O'Connor and Ribstein noted, the same ideas are applicable internationally and avoid the potential impediments that a higher-level sovereign, such as the U.S. federal government, can impose within federal or supra-national systems.[33] We first describe their framework and then examine how it functions differently in the international context.

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[28] *See* Marco Ventoruzzo, *Cost-Based and Rules-Based Regulatory Competition: Markets for Corporate Charters in the U.S. and the E.U.*, 3 N.Y.U. J. L. & BUS. 91 (2007); William J. Moon, *Delaware's Global Competitiveness,* 106 IOWA L. REV. 1883, 1699 (2021) ("Today, a number of major jurisdictions around the world allow firms to shop for corporate law, including Brazil, Canada, China, India, Japan, the United Kingdom, and the United States.").

[29] United Kingdom, Board of Trade, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY 12 (1998) ("The final push to the granting of general limited liability in 1855, according to the speech of the Vice-President of the Board of Trade when moving the Bill, was that British businessmen were seeking to set up companies under French and American laws so as to give their shareholders limited liability when operating in this country. It seemed also that those doing this in France were somewhat unhappy with the costs involved. They clearly wanted a cheaper British option.").

[30] Charles E. Freedeman, THE TRIUMPH OF CORPORATE CAPITALISM IN FRANCE, 1867-1914 49-50 (1993) ("In 1896, 60 companies were incorporated under Belgian law by foreigners to operate outside of Belgium, of which 20 were French; in 1897 there were 72 such companies, of which 30 were French. Costs for founding a company in England were less than one-half of those for France, and incorporation was even cheaper in Belgium. … The most important reasons French promoters went elsewhere were lower costs, the ability to issue 25 francs shares, and the immediate negotiability of shares representing non-pecuniary assets."); Charles E. Freedeman, JOINT-STOCK ENTERPRISE IN FRANCE 1807-1867: FROM PRIVILEGED COMPANY TO MODERN CORPORATION 132 (1979) ("Prior to the enactment of [the English Company Act of 1856], English promoters often crossed the channel to found companies that operated in Britain with wholly British capital. In 1855, incorporating a company in France for English businesses cost £750. (This is the equivalent of more than £60,000 today. (Calculation performed using The UK National Archives historical currency converter at https://www.nationalarchives.gov.uk/currency-converter/#currency-result). Freedeman, JOINT-STOCK ENTERPRISE, *supra,* at 133.

[31] Erin O'Hara & Larry Ribstein, THE LAW MARKET (2009). Between publication of the book and now, O'Hara O'Connor changed her name. We will refer to her by her current name in the text but cite the book by the name under which it was published.

[32] *See, e.g.*, Romano, *Product, supra* note 9; Barbara Gabor, REGULATORY COMPETITION IN THE INTERNAL MARKET: COMPARING MODELS FOR CORPORATE LAW, SECURITIES LAW AND COMPETITION LAW (2013) (discussing role of EU in regulatory competition). A great deal of this literature developed in American law journals and so it has focused primarily on competition within the U.S. federal system.

[33] O'Hara & Ribstein, *supra* note 31, at 224-225. *See also* id. at 13 (noting "vibrant" international law market that exists via securities from one country being listed on an exchange in another and in ship registries and insurance).

1.1. Elements of the Law Market for Business Entities Law

O'Hara O'Connor and Ribstein define a law market as the "ways that governing laws can be chosen by people and firms rather than mandated by states. This choice is created by the mobility of at least some people, firms, and assets and the incentives of at least some states to compete for people, firms, and their assets by creating desired laws."[34] Thus, for a law market to exist there must be both buyers and sellers. To have buyers requires only that some individuals, firms, or organizations prefer laws with particular features over alternatives and are able to make themselves subject to their preferred set of laws. Even a cursory examination shows both an astonishing diversity of business entities in various jurisdictions and considerable creativity deployed in adapting the defaults provided by a legal system for any particular entity to serve a wide range of ends. This is beneficial for, as Ribstein separately argued, "A single set of business association rules issued by a central planner cannot meet the needs of various types of firms or respond to firms' changing business needs. Central planning is hostage both to inherent limits on human knowledge and foresight and to interest group politics. Rather, firms should be able to pick suitable rules by making both 'horizontal' choices among the various jurisdictions and 'vertical' choices of business forms within jurisdictions."[35]

The existence of a "seller" of law can sound disreputable, such as where a politician is bribed to enact a law or turn a blind eye to behavior.[36] Yet we see law "bought" and "sold" regularly in legitimate ways that do not involve corruption: businesses choose what jurisdiction's law will govern a contract's interpretation through choice of law clauses and select the jurisdiction whose law will govern relations among its owners by forming the entity under that jurisdiction's laws. Businesses that do not like a particular jurisdiction's laws can threaten to boycott the jurisdiction unless it changes its laws.[37] Jurisdictions may change their laws to attract specific individuals or groups to move to them.[38] Organized interest groups lobby for changes to specific laws to benefit their members; some even draft proposed legislation (some of which gets enacted).[39] Thus, there are many people, firms, and institutions that act as if jurisdictions are indeed "selling" law.

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[34] Id. at 65.

[35] Larry E. Ribstein, *The Evolving Partnership* in THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS: US AND EUROPEAN PERSPECTIVES (Joseph A. McCahery, Theo RA Aijmakers & Erik P. M. Vermeulen, eds.) 154 (2004).

[36] *See, e.g.*, Dillon De Shong, *Antigua: Leroy King jailed for assisting Allan Stanford*, LOOP (Feb. 25, 2021) available at https://caribbean.loopnews.com/content/antigua-leroy-king-jailed-assisting-allan-stanford (former head of Antigua Financial Services Commission jailed for 10 years for role in Stanford Ponzi scheme). See also Andrew F. Cooper, *Confronting Vulnerability through Resilient Diplomacy: Antigua and the WTO Internet Gambling Dispute with the United States* in THE DIPLOMACIES OF SMALL STATES: BETWEEN VULNERABILITY AND RESILIENCE (Andrew F. Cooper & Timothy M. Shaw, eds.) 211 (2009).

[37] David K. Li, Jane C. Timm and Adrianne Morales, *MLB pulls All-Star Game from Atlanta in protest of restrictive new voting law*, NBC NEWS (April 2, 2021) available at https://www.nbcnews.com/news/us-news/mlb-pulls-all-star-game-georgia-wake-restrictive-new-voting-n1262930#.

[38] *See* T.A. Larson, *Woman Suffrage in Wyoming*, 56 PAC. N.W. Q. 57, 57 (1965) (quoting Cheyenne *Leader* in March 1870 that passage of the law meant "We now expect quite at once an immigration of ladies to Wyoming"); Grundy, 1997 edition, *supra* note 14, at 75 (discussing law passed to lure one individual to relocate to Israel).

[39] *See, e.g.*, Rob O'Dell & Nick Penzenstadler, *You elected them to write new laws. They're letting corporations do it instead*, USA TODAY (Apr. 3, 2019) available at https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002/

A crucial issue for the law market is why the governments are providing law that meets particular needs. It could be, of course, that governments have simply been paid under the table to create a particular law.[40] However, there would be no reason to think that laws procured by bribery would be desirable. For there to be a functioning global law market without corruption, there must be a reason for sellers (governments) to respond to buyers' desires for laws that meet the buyers' preferences other than someone paying off a politician. Thus, for sellers to exist, there must be "a political mechanism that causes governments to legislate in response to movements in and out of a state."[41] In most cases, the potential buyers are not present in the seller jurisdictions, so there must be some mechanism that alerts the jurisdictions to the potential buyers' preferences and persuades them to adopt laws that meet those preferences.

O'Hara O'Connor and Ribstein identify "exit-affected groups" as that mechanism. For competition for U.S. corporate charters, they point to Delaware lawyers as the group filling this function: "Lawyers clearly stand to gain or lose legal business on account of the laws of the states in which they are licensed to practice. The more parties that are attracted to a state, its laws, and its courts, the more potential clients are available to the lawyers licensed in that state."[42] Not only do lawyers have the necessary interests, they have the means to influence the law's development: "Lawyers obviously have lower lobbying costs than most groups because they don't need highly paid outside experts to make their legal case. They also have ready-made organizations—bar associations—through which they can coordinate their political activities."[43] Finally, they are incentivized to devote themselves to such efforts: "Participating in law reform helps lawyers to acquire an aura of professionalism and enhances their reputations for expertise in particular areas of the law. Lawyers can gain similar benefits by writing forms, manuals, treaties, continuing legal education materials, and other material to explain new laws."[44]

Thus because Delaware lawyers would lose clients if public corporations moved away from using Delaware as their state of incorporation, Delaware lawyers are motivated to lobby the Delaware government to adopt laws and create and maintain institutions (e.g. the Delaware Court of Chancery) that encourage the use of Delaware for incorporation. Delaware is motivated to pay attention to these groups because the state derives substantial revenue from the corporate charter business, both directly and indirectly. As Romano explained: "a state budget largely dependent on franchise revenue is an asset that pre-commits the state to not welching on its corporate customers by radically revising its corporate law policy to the detriment of their interests, because there is so much at stake to the state if corporations do leave en masse."[45]

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[40] *See, e.g.*, the Abscam scandal in the United States, in which FBI agents conducted a sting operation involving bribes to members of Congress to secure their support for legislation. *See* Robert W. Greene & Edoardo Ballerini, THE STING MAN: INSIDE ABSCAM (2013);

[41] O'Hara & Ribstein, *supra* note 31, at 73.

[42] Id. at 74-75. ("Because it is costly to be licensed in a particular state [in the United States], lawyers tend to be licensed only in the state where they reside and maybe one or two others. Lawyers therefore have an incentive to attract clients and cases to the states and the courts where they are licensed.").

[43] Id. at 74-75.

[44] Id. at 74-75.

[45] Romano, *Product*, *supra* note 9, at 235. See also Delaware jurist, Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 J. CORP. L. 673, 680 (2005) on the economic importance of Delaware's leadership in corporation law accounting for thousands of jobs in the small state and nearly a quarter of the state's budget revenue.

These same types of interests exist in IFCs. Lawyers, accountants, company managers, insurance managers, trust companies, and other service providers all benefit from bringing business entity formation and management to their jurisdiction. Much as Delaware does within the United States, IFC governments benefit from direct revenue (from fees and taxes paid by business entities making use of them) and indirect revenue (from revenue derived from the people servicing these entities). The global competition for business entity formation is thus a close analogue to the domestic competition within the United States that Delaware dominates.[46] (Indeed, William Moon, the U.S. corporate law academic who has paid the most attention to the global competition, suggests Delaware shows "surprising weakness in the emerging international market for corporate law.")[47] It is thus a place where "evolution through experimentation" will produce "efficient evolution" of business entities laws.[48]

1.2. Competing on Substantive Rules

Jurisdictions can compete on the substance of legal rules. In examining the diffusion of four legal rules from corporate law, Romano found that certain states were "consistent innovators."[49] In our examination of the diffusion of business entities across IFCs, we found a similar pattern.[50] Spitz identified "useful differences" in 2001 among IFC business entity laws:

> what information must be contained in the by-laws? Can the true promoters and beneficial owners be kept entirely out of the picture? What are the costs of incorporation? How much time is involved, and can it be accelerated? Are there limits on the powers of the company? Is there any limitation of liability? Can there be bearer shares, no par value shares, preference shares, redeemable shares, shares with special rights?[51]

Bickley made a similar point when he introduced his treatise on Bermuda, BVI, and Cayman company law by stating that these jurisdictions' laws are "full of innovative provisions in relation to reductions of capital, use of share premium, mergers/amalgamations and continuations or domestications with certain provisions borrowed from Canada or Delaware."[52] Some jurisdictions compete primarily at this level. For example, both Liberia and Panama are jurisdictions with corporate laws largely derived from versions of Delaware's,[53] and their sales

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[46] Note that Delaware dominates the market for public corporations. Other jurisdictions are dominant in other markets. For example, Maryland dominates the market for REIT formation. *See* Spencer C. Ebach, *A Reputation to Uphold: Maryland Courts and the Continued Development of REIT Law*, 80 MD. L. REV. 73 (2021). Nevada has carved out a niche in providing greater protection for corporate directors and officers. *See* Michael Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012).

[47] Moon, *Global Competitiveness*, *supra* note 28, at 1687.

[48] Ribstein, *supra* note 35, at 165.

[49] Romano, *Product*, *supra* note 9, at 238.

[50] Andrew P. Morriss & Charlotte Ku, *IFCs: Pioneers in Transmission of Legal Information*, IFC REVIEW (14 Jan 2021) available at https://www.ifcreview.com/articles/2021/january/ifcs-pioneers-in-transmission-of-legal-innovation/#_ednref31.

[51] Spitz, *supra* note 1, at 15.

[52] Christopher Bickley, BERMUDA, BRITISH VIRGIN ISLANDS AND CAYMAN ISLANDS COMPANY LAW xvi (2004).

[53] GRUNDY'S TAX HAVENS: A WORLD SURVEY 77 (Milton Grundy, ed., 5th ed. 1987); (Panama);Liberian Corporate Registry, *Why Liberia Now?* (2019) available at https://liberiancorporations.com/wp-content/uploads/2012/09/Why-Liberia-Now_05.02.2019.pdf. Liberia also adopted the "non-statutory law" of Delaware to interpret its corporations

pitches are largely based on providing inexpensive, quick means to create entities with legal personality and little more.[54] Moon's review of SEC disclosures found that "foreign firms listed in American stock markets are largely choosing to opt out of rules that are mandatory under Delaware law," further illustrating how competing on the basis of omitting some rules can be successful.[55]

A jurisdiction's law also needs to adapt to innovations in the practice of law. For example, when Wachtell, Lipton, Rosen & Katz lawyer Martin Lipton invented the poison pill takeover defense in 1982, based on a 1979 article he had written,[56] shareholders of existing Delaware corporations would not have factored in the impact of such measures into their evaluations of the merits of Delaware law.[57] In 1985 the Delaware Supreme Court approved the poison pill, which became what leading corporate law expert John Coffee said is one of the "most valuable tactics that a lawyer came up with in corporate practice."[58] Advising a client on the legality of a Delaware-incorporated company's poison pill was thus easier (lower transaction costs) for a lawyer than evaluating a poison pill for a company incorporated in many other U.S. states.[59] Adapting to innovations thus provides a competitive advantage.

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and LLC laws. Michael Wray, *Liberia Updates Its Corporate Legislation,* HFW Briefings (July 2020) available at https://www.hfw.com/Liberia-Updates-its-Corporate-Legislation-Jul-20.

[54] The Liberian Corporate Registry lists as its advantages its over 70-year history, its worldwide network of offices for customer support, that it has an electronic registry, that it is efficient at incorporations and issuing documents, that it provides apostilles and acknowledgments, cost efficiency, lack of annual reporting and audits, exemption from Liberian taxes, a registered agent, being OECD white-listed, and allowing dual language filings. Liberian Corporate Registry, *Unique Advantages, https://liberiancorporations.com/about-the-registry/.* Similarly, a Panamanian law firm offers to "unravel the enigmatic world of the Panama Corporations," describing the Panama Corporation as "an entity that marries privacy, ease of operations, and favorable fiscal policy in an attractive package." Delvalle & DelValle, *The Concept of Panama Corporation* at https://www.delvallepanama.com/guides/panama-corporation. Neither Liberia nor Panama gave any evidence of courts or jurisprudence to back up their business entities. For example, we examined published decisions of the Liberia Supreme Court between 1981 and July 1, 2023 and found just sixteen cases dealing with corporate law among the 1,749 opinions, less than 1% of the court's opinions.

[55] Moon, *Global Competitiveness, supra* note 28, at 1690.

[56] Martin Lipton, *Takeover Bids in the Target's Boardroom,* 35 BUS. LAW. 101 (1979).

[57] Shira Ovide, *Marty Lipton: Why I Invented the Poison Pill,* WSJ (Dec. 29, 2010) available at https://www.wsj.com/articles/BL-DLB-30356

[58] Roy Strom, *Twitter's Poison Pill Began with Marty Lipton's Valuable Memo,* BLOOMBERG LAW (April 21, 2022) available at https://news.bloomberglaw.com/business-and-practice/twitters-poison-pill-began-with-lawyers-most-valuable-memo. See Dosoung Choi, Sreenivas Kamma & Joseph Weintrop, *The Delaware Courts, Poison Pills, and Shareholder Wealth,* 5 J. L., ECON. & ORG. 375, 384 (1989) ("The results support our main hypothesis that the differential valuation effects of poison pill adoptions between Delaware firms and non-Delaware firms are due to Delaware's judicial specificities in terms of consistency and predictability in applications of corporate law; that is, the market considers Delaware courts to be more consistent and predictable than the courts in other states in judging the legality of such discriminatory rights issues.").

[59] On certainty *see, e.g.*, Ethan Klingsberg, Paul Tiger & Elizabeth Bieber, *Poison Pills after* Williams: *Not only for when lightning strikes,* Harvard Law School Forum on Corporate Governance (March 21, 2021) available at https://corpgov.law.harvard.edu/2021/03/21/poison-pills-after-williams-not-only-for-when-lightning-strikes/#2 Note also that the Delaware courts have continued to refine Delaware's approach to poison pills, with the state Supreme Court upholding a 2021 Court of Chancery decision voiding a poison pill that the court had found was overly aggressive in its aim of quelling shareholder activism. The Williams Companies Stockholders Litigation, 2021 WL 754593 (Del. Cha., Feb. 26, 2021) *aff'd by* The Williams Companies, Inc. v. Wolosky, 264 A.3d. 21 (table), 2021 WL 5112495 (Del. Nov. 3, 2021).

Competition on substance can also require more complex responses than a simple rule. With respect to business entities, an important area of competition is the approach a jurisdiction takes to insolvency of businesses. Whether a jurisdiction is seen as creditor-friendly or debtor-friendly can be important. For example, where an entity has been formed for investment purposes (such as a hedge fund), a key element in attracting investors will be forming the entity in a creditor-friendly jurisdiction where the investors can be confident their interests will be paramount if the entity becomes insolvent. As two Caymanian lawyers noted in an article in *The Hedge Fund Journal*, that is just what Cayman offers compared to the United States or United Kingdom:

> The Cayman Islands have no bankruptcy reorganisation regime comparable to US Chapter 11 or to administration in the UK, each of which provides extensive protection for the debtor by way of moratoria on secured creditor action and a 'breathing space' in which the business can re-structure. … The legislative and practical focus is on protecting the interests of those with the direct financial interest in a fund, i.e. its creditors and investors.[60]

A debtor-friendly, flexible approach to reorganizing an insolvent business in a large economy like the United States may make sense there, but undermines confidence in investment vehicles. For these entities, the reasons to attempt to salvage a business (protecting employees and the community in which the business is located, for example) are unimportant relative to reassuring investors that they will be protected. The Cayman regime contrasts favorably for creditors with the United States, about which Hannesman and Kraakman note, "[b]ankruptcy law in the United States sometimes fails, in practice, to give full respect to the relative priorities among the creditors of a business, advantaging junior creditors and equity holders at the expense of senior creditors."[61] Having insolvency rules that are particularly useful for particular types of firms is another type of advantage a jurisdiction can offer.

1.3. Competing on Supporting Institutions

The law market for business entities law extends beyond providing statutory frameworks and administrative agencies to receive registrations and collect fees. The "law" for sale by a jurisdiction includes not just the words of a statute, code, or body of precedent, but also the courts that will interpret and apply those materials and resolve any disputes that arise for clients[62] and the community of lawyers and service providers which create and maintain business entities and.[63] These are frequently listed as important features in domestic U.S. jurisdictional

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[60] Aristos Galatopoulos & Ben Mays, *The Treatment and Rights of Creditors of Cayman Islands Funds*, HEDGE FUND JOURNAL (Sept. 2007) available at https://thehedgefundjournal.com/the-treatment-and-rights-of-creditors-of-cayman-islands-funds/.

[61] Henry Hausmann & Reinier Kraakman, *The Essential Role of Organizational Law*, in THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS: US AND EUROPEAN PERSPECTIVES (Joseph A. McCahery, Theo RA Aijmakers & Erik P. M. Vermeulen, eds.) 50 (2004).

[62] As Gabor noted, "A growing literature shows that the law on the books in a jurisdiction can be 'as good as' in the best performing countries and yet their effect may be minimal. A significant factor in the quality of the law and its actual impact is enforcement by the national courts." Gabor, *supra* note 32, at 101.

[63] *See, e.g.*, Grundy, 1993 edition, *supra* note 25, at 30 (commenting favorably that "Those who knew the BVI only a few years ago will find many more qualified people now working in the business sector and the choice far from limited.").

competition for corporations. For example, Delaware's Court of Chancery is "the country's most expert corporate court,"[64] and is staffed by judges recognized for their expertise in corporate law.[65] This expertise further allows for quick resolution of corporate litigation with appeals in important cases completed as quickly as overnight.[66]

Many states are establishing business courts in an effort to attract more legal business to their legal systems,[67] and IFCs are as well.[68] It does not appear that the quality of the judiciary has been a selling point for Liberia or Panama, distinguishing them as jurisdictions from IFCs which have invested more in their judiciaries. (Both were below the mean (3.9) on judicial independence when that was ranked in 2013 by the World Economic Forum in its *Global Competitiveness Report*: Panama was 118 (2.7) and Liberia 83 (3.4).)[69] By contrast, many of the jurisdictions connected to Britain have made such investments, including Bermuda, the Cayman Islands, Guernsey, the Isle of Man, and Jersey.[70] For example, when Bermuda set up its Court of Appeal in 1964, it initially staffed it with judges from other Commonwealth jurisdictions drawing on "a cosmopolitan cohort rather than a purely parochial one."[71] Litigation over offshore matters in Bermuda in the 1980s attracted top commercial litigators from London because big cases were rare there.[72] Further, the retention by many IFCs of links to the Privy Council as a final court of appeal is known to be a key attractive feature.[73]

Judges are critical components of jurisdictional competition both for their predictability and their ability to exercise discretion--two characteristics that may appear to be in tension, but both important for legal practice and development.[74] Judges able to distinguish when it is more important to behave predictably and when exercising discretion is more appropriate is a crucial

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[64] O'Hara & Ribstein, *supra* note 31, at 118.
[65] Id. at 117.
[66] Leo Herzel & Laura D. Richman, *Delaware's Preeminence by Design,* in R. Franklin Balotti & Jesse A. Finkelstein, 1 THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS lxv (1989 supplement).
[67] Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 36-37 (1995). *But see* John F. Coyle, *Business Courts and Interstate Competition,* 53 WM. & MARY L. REV. 1915, 1983 (2012) (expressing skepticism that they attract business).
[68] Ian R.C. Kawaley, *Specialist Commercial Courts and the Development of Offshore Commercial Law* in OFFSHORE COMMERCIAL LAW IN BERMUDA (2nd ed.). (Ian R.C. Kawaley, ed.) 253 (2018) (Bermuda, BVI, and Cayman all created in 2000s).
[69] World Economic Forum, GLOBAL COMPETITIVENESS REPORT 2013-2014 at 415, Table 1.06, available at https://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf .
[70] *See* Moon, *New Competition*, *supra* note 3, at 1438-40 (describing quality of judiciary for commercial cases in Bermuda, BVI, and the Cayman Islands).
[71] Ian R.C. Kawaley, *Legal Development of Bermuda as an Offshore Financial Centre* in OFFSHORE COMMERCIAL LAW IN BERMUDA (2nd ed.) (Ian R.C. Kawaley, ed.) 31 (2018).
[72] Geoffrey R. Bell, *Commercial Dispute Resolution: An Introduction* in OFFSHORE COMMERCIAL LAW IN BERMUDA (2nd ed.). (Ian R.C. Kawaley, ed.) 251 (2018).
[73] Robert Stewart, A GUIDE TO THE ECONOMY OF BERMUDA 330 (2003) (A major attraction of this legal system is the right of appeal from the Bermuda courts to the English legal system, and ultimately to the Judicial Committee of the Privy Council."); Conyers, *The Judicial Committee of the Privy Council: A Strong Selling Point for Bermuda, the British Virgin Islands and the Cayman Islands*, JDSupra (Oct. 3, 2022) available at https://www.jdsupra.com/legalnews/the-judicial-committee-of-the-privy-6700831/ ("International financial centres such as Bermuda, the British Virgin Islands and the Cayman Islands have benefitted enormously over the years from the JCPC acting as their final court of appeal.").
[74] John Goldsworth, *Introduction*, in TOLLEY'S TAX HAVENS: A PRACTITIONER'S GUIDE TO THE LEADING TAX HAVENS OF THE WORLD 8 (1992, 2nd ed.)

element of a jurisdiction's success if it is marketing more than a set of statutes and inexpensive registration.[75] Common law judges also have a reputation among business lawyers of being more focused on the parties' wording than do civil law judges.[76]

The extensive case law from English architecture jurisdictions, including Britain, is another crucial resource. As Romano noted in her study of U.S. jurisdictional competition in corporate law, a body of case law is both valuable and "not easily replicated."[77] IFCs using an English architecture have no need to develop their own case law *sui generis* as they have access to the entirety of English-architecture case law. By comparison, it is Delaware's that appears sparse for, as prolific as the judges of the Chancery Court are, their number is small relative to the collective judiciaries of IFC courts of first instance and appeal.

The different approaches of BVI and Cayman courts from English courts on the impact of arbitration clauses in insolvency cases illustrate another aspect of certainty.[78] For example, the English Court of Appeal held that courts could exercise discretion to stay a winding up application where the debtor contests whether it owes the debt if the existence of the debt is covered by an arbitration clause, deferring the issue to arbitration.[79] By contrast, the BVI High Court (Commercial Division) rejected what it termed England's "uncompromising approach"[80] and was willing to allow insolvency proceedings to go forward to address the question of whether the merits of an alleged debt before deciding the issue of whether there should be a stay pending arbitration where the judge found that "there is … no substance to the defence advanced by the BVI company whatsoever. It is simply a put-up job. I do not accept that those behind the BVI company have any belief in its veracity." Based on this conclusion, the court ordered appointment of a liquidator despite the arbitration clause.[81] Far from favoring the BVI entity as a locally-biased court might have, the court's decision focused on efficient dispute resolution by avoiding a needless detour to an arbitration. And although one could argue that the BVI court overrode the shareholder's agreement (as the debtor argued unsuccessfully), we contend that upholding the debt without requiring arbitration first where the debtor was engaged in a "put-up job" provided greater certainty overall.

The Cayman Court of Appeal similarly declined to apply the English approach in somewhat different circumstances, providing another illustration of how a judiciary capable of

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[75] Two Bermuda litigators made a similar point on where the law might be uncertain and subject to reasoned argument. "…business entities and lawyers appreciate the benefits of legal certainty; on the other hand, business entities and lawyers can also take advantage, in appropriate circumstances, of legal uncertainty (especially in the event of a dispute)." Narinder K Hargun & Alex Potts, *Commercial Litigation in Bermuda* in OFFSHORE COMMERCIAL LAW IN BERMUDA (2nd ed.). (Ian R.C. Kawaley, ed.) 276 (2018).
[76] Baum & Solomon, *supra* note 3, at 416-17.
[77] Romano, *Product*, *supra* note 9, at 280.
[78] *See generally* Peter Ferrer, Christopher Pease, & Romane Duncan, *Offshore courts' approach to liquidation in the face of arbitration agreements*, Reuters (Dec. 3, 2021) available at https://www.reuters.com/legal/legalindustry/offshore-courts-approach-liquidation-face-arbitration-agreements-2021-12-03/
[79] Salford Estates (No. 2) Limited v Altomart Limited [2014] EWCA Civ 1575] at ¶39.
[80] In the Matter of Anonymous Company Ltd and the Insolvency Act 2003 Between A Creditor and Anonymous Company Ltd [2021] available at https://www.eccourts.org/judgment/a-creditor-v-anonymous-company-ltd, at ¶14.
[81] Id.

exercising discretion in a sophisticated way can enhance a jurisdiction's legal product.[82] A minority shareholder sought to wind up a Cayman entity on "just and equitable grounds," a procedure more common offshore than onshore and is designed to address oppression of a minority shareholder.[83] In contrast to English law which includes additional remedies, Cayman statutory law provides only this remedy for minority shareholders complaining of unfairly prejudicial conduct of a company's affairs by the majority.[84] In this case, the minority shareholder alleged the majority shareholder had reneged on agreements which protected the minority shareholder by restricting the majority shareholder from engaging in self-dealing with subsidiaries of the majority shareholder. In particular, it alleged the majority shareholder had removed the minority's representatives from positions in which they could monitor the majority shareholder's behavior, which it contended was a breach of fiduciary duty by the directors representing the majority shareholder.[85] If true, these facts would support a just and equitable winding up.[86]

An important issue was whether a shareholder's agreement which required that all disputes arising out of that agreement be submitted to arbitration barred the minority shareholder from seeking the just and equitable winding up before going through arbitration.[87] The court distinguished English and Australian precedents. It also found that the parties had neither used an agreement to opt out of the court's role nor, as they were entitled to do under the statute, made an express agreement not to present a winding up petition to the court.[88] The Cayman Court of Appeals thus chose the certainty of preserving a statutory right to petition the court for relief in the absence of an explicit agreement to refrain from seeking such relief over a broad construction of the arbitration agreement. In doing so it left a clear path for a business entity's incorporators to make such an express agreement if they wished to forego their statutory remedies.

1.4. Competing by Offering Alternative Business Forms

Jurisdictional competition also occurs by offering business forms that other jurisdictions do not offer. A clear example of this is Britain's adoption of the limited liability partnership (LLP), an entity which owes much to company law and only a small amount to partnership law.[89]

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[82] Familymart China Holding Co. Ltd. and Ting Chuan (Cayman Islands) Holding Corporation [2020] CICA (Civil) Appeals Nos: 7 & 8 of 2019 available at https://www.ciarbcaribbean.org/resources/articles/Newsletter%201-13%20CICA%27s%20CVS%20Judgment.pdf.

[83] Ferrer, Pease, & Duncan, *supra* note 78.

[84] Familymart, *supra* note 82, at ¶95.

[85] Id. at ¶¶15-28.

[86] Id. at ¶29 Note that Moon identified the ability to opt out of Delaware's restrictions on self-dealing as a reason Chinese companies might prefer using an IFC's corporate law, as "Delaware's elaborate legal regime policing 'self-dealing' transactions clashes with China's contemporary market dynamics, where firms operating as corporate groups routinely engage in 'self-dealing' transactions as part of normal business." Moon, *Global Competitiveness, supra* note 28, at 1717.

[87] Familymart, *supra* note 82, at ¶69.

[88] Id. at ¶124 (quoting *In the Matter of Rhone Holdings LP* [2016] (1) CILR 46; ¶¶126, 133).

[89] PALMER'S, *supra* note 24, at 7 ("In essence, therefore, an LLP is a body corporate with limited liability (in the sense that its members are not generally personally liable for its debts beyond their financial interests in the LLP itself) but unlimited capacity, incorporated by registration with an incorporation document providing information for third parties, and subject to many of the ongoing disclosure and accounting requirements and other controls applicable to companies.").

(The UK LLP is closely analogous to the U.S. LLC).[90] In Britain, accountants and other professionals became concerned over the growing number of professional liability suits being brought against their firms in the 1990s. When Jersey created a new limited liability partnership entity in 1997, the major accounting firms in London began to consider shifting their businesses to Jersey LLPs, precipitating the UK government's efforts to create a UK version of the Jersey law.[91] After a lengthy legislative and consultative process, it succeeded.[92]

In general, what IFCs offer international businesses is "the ability to establish corporate vehicles that are subject to sound legal systems, flexible but clear laws, tax neutral and relatively easy to maintain, an infrastructure conducive to international business and professionals able to support the business."[93] As we describe elsewhere, in addition to the LLP, IFCs played important roles in the spread of the US-derived LLC, the protected cell company, the incorporated cell company, the non-charitable purpose trust, the international business company, and private foundations.[94] (They also helped innovate in multiple regulatory areas, spreading independent regulators, anti-money laundering legislation, licensing of company and trust administrators, and anti-terrorism legislation.)[95]

1.5. IFCs as Competitors in the Global Law Market

The description above of the global market for business entities law shows that jurisdictions seeking business entities have a marketplace in which to compete and explains some of the margins along which they do so. Just as the main competitors in the U.S. law market for business entities are smaller states, so small jurisdictions play important roles in the international competition. Dominance in one area of business entities law does not automatically translate to dominance in related areas and one way the U.S. law market functions is through specialization among jurisdictions in providing specific types of business entities for different purposes.[96] This same pattern occurs in the global law market as well.

Just as small U.S. states compete effectively in the domestic U.S. law market, IFCs are the ones that are making the effort to compete globally (along with the same U.S. states, in many instances). Being small means that "the local business and legal communities cooperate with the government in each jurisdiction and respond relatively quickly to the demands of the market. This allows innovative legislation or enhancements to existing legislation to be implemented

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[90] Id. at v (It was, and really is, an LLC rather than an LLP.).
[91] Id. at 8-10.
[92] Limited Liability Partnerships Act 2000. On process, see PALMER'S, *supra* note 24, at 8-12.
[93] Bickley, *supra* note 52, at xvi.
[94] Morriss & Ku, *Pioneers*, *supra* note 50.
[95] Charlotte Ku & Andrew P. Morriss, *IFC Regulatory Innovation: Vital to the Maintenance of a Healthy Global Financial Ecosystem*, IFC Rev. (Jan. 12, 2022) available at https://www.ifcreview.com/articles/2022/january/ifc-regulatory-innovation-vital-to-the-maintenance-of-a-healthy-global-financial-ecosystem/.
[96] Delaware for public corporations, Massachusetts leads in statutory trusts for businesses, most mutual funds used either Massachusetts trusts or Maryland corporations, Maryland has most of the Real Estate Investment Trust (REIT) business, Florida does well with law for closely held firms, and Delaware, Nevada, and Wyoming regularly appear on lists for the best place to start an LLC. *See* O'Hara & Ribstein, *supra* note 31, at 120-21; Lars Lofgren, *The Best States to Form an LLC*, QuickSprout (May 30, 2023) available at https://www.quicksprout.com/best-states-to-form-an-llc/; Belle Wong & Kelly main, *Best States to Form an LLC in 2023*, Forbes (Oct. 16, 2022) available at https://www.forbes.com/advisor/business/best-state-form-llc/.

expeditiously."[97] On the supply side, for example, there are regular efforts by IFCs to persuade outsiders to use their jurisdictions by modifying their legislation to make it more attractive.[98] As Grundy, who drafted statutes for various jurisdictions and wrote guides to offshore jurisdictions for almost thirty years, observed: "The trend here is for governments – with the encouragement of the private sector, or, sometimes having suffered considerable pressure from the private sector – to enact legislation designed to attract more sophisticated offshore transactions to their jurisdiction."[99] For example Bermuda developed local commercial laws "to cater directly to fund investors' requirements."[100]

IFCs have the same motive globally that Delaware does in the U.S. market: the fees paid by those registering entities supply government revenue, as do taxes on the income and/or spending of the professionals paid to create and administer those entities.[101] Just as in the U.S. market, there are groups of professionals in IFCs that serve as the exit-affected groups needed to press for improvements in the law. Indeed, in many IFCs, these groups are capable of exit themselves, as many are expatriates and the global nature of the industry allows movement across jurisdictions.[102] Even where the local bar is dominated by lawyers from the local jurisdiction, the nature of practice and the shared language of business entities law within legal families gives practitioners options to move among IFCs and non-IFC jurisdictions.

The demand side is similarly robust. For decades, multinational businesses have operated networks of hundreds, even thousands, of entities operating in multiple jurisdictions.[103] Modern finance often requires separate entities for specific assets in order to maximize security for those assets and to minimize exposure to a host of risks.[104] Extended, high-net-worth families seek cost-effective, robust structures to manage property and investment portfolios spread across multiple jurisdictions.[105] Investors seek precisely defined exposures to specific risks, requiring new investment instruments that demand separate legal identities for members in a class of assets.[106] There is thus robust demand for business entities with a variety of characteristics.

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[97] Bickley, *supra* note 52, at xvi.
[98] Naren Prasad, *Small but Smart: Small States in the Global System* in THE DIPLOMACIES OF SMALL STATES: BETWEEN VULNERABILITY AND RESILIENCE (Andrew F. Cooper & Timothy M. Shaw, eds.) 49-50 (2009).
[99] Milton Grundy, ESSAYS IN INTERNATIONAL TAXATION 54 (2001).
[100] Kenneth ET Robinson, *Partnership Law and Corporate Commercial Practice in Bermuda: A Professional Development Perspective* in OFFSHORE COMMERCIAL LAW IN BERMUDA (Ian R.C. Kawaley, ed.) (2nd ed.) 64 (2018)
[101] For example, financial services makes up 37.5% of Jersey's economy, the single largest sector and more than double the next largest sector. Statistics Jersey, *Measuring Jersey's Economy, GVA and GDP – 2021*, available at https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20GVA%20and%20GDP%202021%2020221005%20SJ.pdf. Note that this is not true of all jurisdictions where such corporate revenues are not available as is the case for the EU. Paul L. Davies & Sarah Worthington, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 143 (10th ed., 2016).
[102] For example, of the 30 partners listed on Ogier's Jersey office website, 10 are also admitted in at least one other offshore jurisdiction and virtually all are also qualified in Britain. https://www.ogier.com/people/?location=Jersey
[103] Charlotte Ku & Andrew P. Morriss, *International Financial Centers as a Model: Facilitating Growth and Development by Connecting to International Legal Frameworks*,14 LAW & DEV. REV. 429 (2021).
[104] Hausmann & Kraakman, *Essential Role*, *supra* note 61, at 51. *See* Esteban C. Buljevich & Yoon S. Park, PROJECT FINANCING AND THE INTERNATIONAL FINANCIAL MARKETS 94 (1999) at 95, 113, 114, 120, 170.
[105] *See* Alan V. Ytterberg & James P. Weller, *Managing Family Wealth Through a Private Trust Company*, 36 ATEC L. J. 623 (2010).
[106] Swiss Re, *The fundamentals of insurance-linked securities*, 8 (2011) available at https://www.institutdesactuaires.com/global/gene/link.php?doc_id=871&fg=1.

Further, the considerable heterogeneity in the demand means there is room for multiple jurisdictions to find niches. Not all firms are interested in the same law.[107] As Grundy concluded, "There is, to my mind, no such thing as the 'best' offshore centre. The best one is the one best suited to the transaction in hand."[108] That there is room for multiple niches within the global business entities law market and jurisdictions can succeed with quite different strategies, from low-cost, mass-produced entities (e.g., the BVI International Business Company from its creation in 1984 to its replacement in 2005 by the BVI Business Company)[109] to complex entities that suit particular types of firms (e.g. the Guernsey protected cell company and captive insurers and investment funds).[110]

Finally, IFCs have an opportunity in the market for business entities because other jurisdictions generally are poor competitors. Most continental European jurisdictions (other than Liechtenstein) have not been agile competitors in business entities law. For example, adapting the law to meet the needs of small firms (often by simplifying it), is one means by which a jurisdiction can differentiate its law to meet the needs of a particular market segment. Few European jurisdictions have done more than provide separate entities for large and small businesses. McCahery and Vermuelen noted "the persistence of the suboptimal statutory frameworks is explained by the failure of small firms to lobby lawmakers to create a new business organization form that benefits their special needs."[111] Pistor, et al., found "lethargy" and "erratic change" to be important patterns in the development of six larger countries that received transplants of corporate law from Britain, France, Germany, and the United States.[112]

Regardless of size, "family firms" (generally those with significant control resting with members of a single extended family) also have unique legal needs. In particular, they need careful structuring to enable the family to cope with the complexity of adding emotional and relational bonds to the mix of managing business interests.[113] McCahery and Vermuelen conclude generally that EU companies law "seems to be immune from the evolutionary pressures of competitive lawmaking due largely to the implementation of the European Directives that have given the substantive corporate law of the member states a mandatory quality."[114] The United States, where states offer a multiplicity of business entities, has the disadvantage of

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[107] Barzuza, *supra* note 46, at 942.
[108] Grundy, 1997 edition, *supra* note 14, at viii
[109] British Virgin Islands International Finance Centre, *New Legislation to Replace Companies Act and IBC Act*, MONDAQ (Jan. 24, 2005) available at https://www.mondaq.com/finance-and-banking/30545/new-legislation-to-replace-companies-act-and-ibc-act-bvi-companies-to-be-exempted-from-income-tax-bvis-appeal-to-international-clients-to-be-enhanced.
[110] Christopher Anderson & Konrad Friedlander, *Protected Cell Companies in Guernsey*, Carey Olsen (June 7, 2022) available at https://www.careyolsen.com/briefings/protected-cell-companies-in-guernsey.
[111] Joseph A. McCahery & Erik P.M. Vermeulen, *The Evolution of Closely Held Business Forms in Europe*, in THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS: US AND EUROPEAN PERSPECTIVES (Joseph A. McCahery, Theo RA Aijmakers & Erik P. M. Vermeulen, eds.) 192 (2004).
[112] Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Evolution of Corporate Law: Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791, 840-41 (2002).
[113] Ian MacDonald, *Family businesses and business families*, in BUSINESS FAMILIES AND FAMILY BUSINESSES (Simon Rylatt, ed.) 9-10, 15 (2018). Joanna Boatfield & Gregory Smye-Rumsby, *Structuring the Family Business*, in BUSINESS FAMILIES AND FAMILY BUSINESSES 94 (Simon Rylatt, ed.) (2018).
[114] McCahery & Vermeulen, *supra* note 111, at 195

subjecting those entities to federal securities, bankruptcy, and tax law. Developing countries, whose business entities laws often derive from that of former colonial powers, may lack the resources to develop a full array of business entities laws.[115] English law and jurisprudence can fast track enterprises from these countries to a global market even as the country develops its own version of a law. Familiarity with the English-architecture companies law makes this possible with specific applications developed by jurisdictions like IFCs who take advantage of the need to offer a more extensive menu of business entities.

Moreover, Christopher Bruner makes a persuasive case that many of the differences among Australian, Canadian, Delaware, and English company laws can be attributed to differences in political climates in those jurisdictions.[116] Although Bruner does not focus on the impact of this on the international market for business entities law, his account of why the four "Anglo-Saxon" jurisdictions differ suggests another reason why IFCs have been able to create a niche for themselves: Unlike these large jurisdictions, IFCs are free to shape their externally facing business entities law without regard to domestic political issues. For example, a defining characteristic of the many IBC statutes adopted by IFCs following BVI's success was that the IBC cannot do business within its domicile.

Similarly, many IFCs offered special tax rules for "exempt companies" (or other similarly named entities) that did not do business within the jurisdiction or, if they did, would be taxed only on the local business.[117] Many jurisdictions responded to this model of the exempt company by allowing companies tax exemptions on outside earnings plus allowing a local place of business.[118] Thus while we find Bruner's critique persuasive of much of the comparative law of corporations for relying too heavily on a transaction-cost-reducing perspective on the law's functions and neglecting history, culture, and politics,[119] it is IFCs' ability to strip away history, culture, and politics from the entities they provide to clients from elsewhere that gives them a competitive advantage.

2. Business Entities Law as the Foundation for IFCs as Competitors

A common element in many definitions of jurisdictions as IFCs is that they attract individuals and business entities from outside their borders. People and businesses in onshore jurisdictions are thus choosing to locate entities, assets (usually held by entities or trusts), and transactions (again, usually involving use of entities or trusts) in IFCs. A key reason for choosing an IFC is to gain the benefit of the IFC's law, legal community, and judiciary. The margins upon which IFCs compete are thus related to these components of the legal environment surrounding

[115] Olufunmilayo B. Arewa, DISRUPTING AFRICA: TECHNOLOGY LAW AND DEVELOPMENT 257 (2021).
[116] Bruner, CORPORATE GOVERNANCE, *supra* note 5, at 4-5 ("stronger stakeholder-oriented social welfare policies and legal structures have permitted the U.K. corporate governance system to focus more intently on shareholders without giving rise to political backlash.").
[117] *See* Grundy, ESSAYS, *supra* note 99, at 50 (discussing popularity of non-resident companies). Avoiding the U.S. withholding tax by using a Netherlands Antilles entity was foundation of Curacao's business in 60s-70s. Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles,* 45 TEX. INT'L L. J. 377, 406-10 (2009).
[118] Grundy, 1997, *supra* note 14, at 58, 73.
[119] Bruner, CORPORATE GOVERNANCE, *supra* note 5, at 112.

business entities and trusts laws.[120] We first examine the functions business entities law serves, as this puts the customer base for IFC's into perspective. Next, we explain English law's role as *lingua franca,* including its role as the functional "grammar" and "vocabulary" of IFC business entities law.

2.1. The Functions of Business Entities Law

Business entity law generally – that is, the law governing the internal affairs of business entities – is the starting point for our analysis for five reasons.[121] First, it is important. Company law is part of nations' "basic infrastructure."[122] It helps provide "security and predictability of the business environment".[123] The lack of a law facilitating the creation of such entities can impede economic development.[124]

Second, it is common. For example, virtually every legal system has something like the corporation.[125] There are differences across jurisdictions in the way businesses are organized, which may lead to demand for different types of business entities, but there are also commonalities across jurisdictions in designing solutions to common problems which arise in collective investments into business enterprises.[126] Details matter, of course. For example, European firms are financed more by banks than equity markets, the reverse of the pattern in the

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[120] We view trust law as complementary to company laws rather than an co-equal part of the IFCs' legal infrastructure with respect to the competition to provide business entities even though the development of trust law may have played an important role in a jurisdiction's development as an IFC. *See* Andrew P. Morriss, *Offshore Trust Law,* in OXFORD HANDBOOK OF COMPARATIVE TRUST LAW (forthcoming 2024/25). We do so for three reasons. First, many business transactions in IFCs of which we are aware involving trusts use the trust component as a part of a transaction involving business entities. David Kilshaw & Robert A Clifford, *Sheltering Income and Gains Overseas for UK Domiciled Individuals: Problems and Solutions,* in TOLLEY'S INTERNATIONAL TAX PLANNING: VOL. 2, NON-CORPORATE (Malcom J Finney & John C Dixon eds.) 26-25 (1993). Second, where a trust (which in common law jurisdictions is a relationship, not an entity) is used instead of a business entity, offshore trust law has evolved to provide non-charitable purpose trusts, which differ in some important ways from a traditional trust. David Hayton, *Anglo-Trusts, Euro-Trusts and Carribo-Trusts: Whither Trusts?* in MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW (David Hayton, ed.) 8-9 (1999). Third, the spread of the civil law private foundation into common law jurisdictions is a sign of the appearance of an entity that competes for this business which is frequently (albeit sometimes misleadingly) described as having similar characteristics to the common law trust. Andrew P. Morriss, *Importing Private Foundations into the Common Law,* IFC REVIEW (Sept. 29, 2021) available at https://www.ifcreview.com/articles/2021/september/importing-private-foundations-into-the-common-law/.

[121] While a case might be made that the general partnership might be an appropriate starting point because it developed before the corporation, the lack of limited liability and legal personality makes them categorically different from entities that possess those characteristics. We thus chose the corporation as a starting point.

[122] Board of Trade, *supra* note 29, at 12. *See also* Freedeman, TRIUMPH, *supra* note 30, at xiii ("Bowing to growing economic and political pressures, most western countries in the 1860s and 1870s adopted legislation permitting free incorporation with limited liability, though subject to restrictions deemed necessary to protect shareholders and the general public.").

[123] Board of Trade, *supra* note 29, at 12.

[124] Catherine R. Schenk, INTERNATIONAL ECONOMIC RELATIONS SINCE 1945 89 (2011) ("The weak legal framework for capitalist enterprise led to uncertainty for foreign companies that wanted to engage with the Chinese economy.").

[125] Reinier Kraakman, et al., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1 (2004) ("Business corporations have a fundamentally similar set of legal characteristics—and face a fundamentally similar set of legal problems—in all jurisdictions.").

[126] In the Victorian era, Parliament saw partnerships as the appropriate form for smaller firms and companies as the appropriate form for larger ones**.** Paul L. Davies, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 5 (8th ed., 2008).

United States; family firms have different agency problems than publicly traded ones.[127] All of these distinctions have consequences for the types of problems the law is used to resolve. However, the underlying structure of these laws is sufficiently similar to allow meaningful comparisons.

Third, the law of business entities is uniquely suited to jurisdictional competition as virtually every major jurisdiction allows them to choose the law governing their internal affairs, albeit with some constraints.[128] Within the United States, the competition among the states is a well-known story;[129] competition also occurs among European Union jurisdictions, where freedom of establishment is a core value.[130] Prior studies have shown that firms regularly make use of their ability to select jurisdictions with the laws they want.[131] Not only is there considerable evidence of this within the United States and European Union, but both the sales pitches for many offshore jurisdictions[132] and the vast numbers of business entities formed in successful IFCs[133] demonstrate that promoters forming business entities are indeed shopping for the 'right' laws and jurisdictions are competing to be chosen. Though often associated with tax avoidance, 'right' may also be where a jurisdiction's law provides a good legal solution for non-tax purposes.[134]

Fourth, there is considerable variation in the institutions and substance of law across jurisdictions.[135] Whatever these variations are, however, company law is the primary "competitor" for other entities.[136] Further, while one of company law's strengths is the

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[127] Gabor, *supra* note 32, at 57-58.
[128] *See* note 28 *supra.*
[129] *See* notes 31-32 *supra.*
[130] Horst Eidenmuller, Luca Enriques, Genevieve Helleringer, & Kristin van Zweiten, *Centros at 20: Regulatory Arbitrage and Beyond—An Introduction*, 20 EUR. BUS. ORG. L. REV. 399, 399 (2019). *See also* Freedeman, JOINT STOCK, *supra* note 30, at 133-34 (discussing French establishment of mutual recognition of business entities in the nineteenth century to secure French businesses' ability to operate outside France).
[131] *See, e.g.*, Carsten Gerner-Beurle, et al., *Why do busineses incorporate in other EU Member States? An empirical analysis of the role of conflict of laws rules*,56 INT'L REV. L. & ECON. 14 (2018); R.R. Drury, *Migrating Companies*, 24 EUR. L. REV. 362 (1999); Randall A. Heron & Wilbur G. Lewellen, *An Emprical Analysis of the Reincorporation Decision*, 33 J. FIN. & QUANT. ANAL. 549 (1998).
[132] *See, e.g.*, Walkers, *Why MENA-based startups are choosing to incorporate in the Cayman Islands and British Virgin Islands*, JDSUPRA (July 20, 2022) available at https://www.jdsupra.com/legalnews/why-mena-based-startups-are-choosing-to-9081601/ (listing flexibility, investor familiarity with laws, trusted legal system, tax neutrality, speed of incorporation, and confidentiality).
[133] For example, the Cayman Islands has close to 120,000 active company registrations as of the end of the first quarter of 2023. Cayman Islands General Registry, *Companies Register Statistics*, https://www.ciregistry.ky/companies-register/company-statistics/.
[134] IFC-critics often point to the fact that the number of corporations (and all business entities) in IFCs can greatly exceed the number of people living in those jurisdictions or that thousands are registered at a single address (usually that of a corporate service provider) as a sign that these entities are disreputable, as when then President Barack Obama called Caymanian law firm Maples & Calder's building either " the largest building in the world or the largest tax scam in the world." Joshua E. Keating, *House of 19,000 Corporations*, THE ATLANTIC (Jan. 24, 2012). *See also* note 108 *supra* and associated text.
[135] Kraakman, et al., *supra* note 125, at 4 (noting the "underlying commonality of structure that transcends national boundaries" in corporate law).
[136] Davies, GOWER AND DAVIES', *supra* note 126, at 1 ("In other words, the company has many competitors in the shape of other legal vehicles for carrying on business, but it is perhaps not much of an exaggeration to say that for all these other vehicles their primary competitor is the company.").

considerable variation in potential uses for it, particular versions may be more suitable for one purpose than another. For example, while the corporation often has considerable advantages over partnerships and trusts for "the association of large numbers of people for the carrying on of large-scale business,"[137] it can also serve as an effective means organizing smaller businesses or making a particular asset be legally separated and/or bankruptcy remote from other assets if a jurisdiction has developed a version of it suited to those uses.[138]

One of the most important aspects of company law is its ability to partition assets.[139] Much of the internal organizational structure of a business owned by a relatively small number of people and institutions could be replicated through contracts amongst owners. As the number of owners grows, and as ownership interests are traded, this becomes cumbersome. Contracts are a particularly poor substitute for business entities law in partitioning the assets of the business from those of its owners. Fundamental to business entities is the ability of owners to not have all their personal assets at risk.[140] Company law's limitation of owners' liability to the amount they have invested in the business enables the owners to delegate to the managers the day-to-day operation of the business without the need for constant monitoring.[141] Most importantly, it does so by restricting the rights of the business's creditors with respect to the assets of the owners.[142] In a general partnership, by contrast, all the partners are usually liable for debts incurred through the actions of any one partner.[143] Importantly, business entities law also restricts access of the owners' creditors to the entity's assets.[144] Business entities law's role in asset partitioning is thus crucial to modern enterprises of any significant size.

Asset partitioning is valuable in other ways as well.[145] Financing of a particular asset can become much easier if the asset can be segregated from a business's other assets and liabilities.[146] This can be done in a variety of ways in most legal systems, but isolating the asset in a separate entity that is bankruptcy remote from the main business is an important one.[147] This type of asset partitioning is also crucial to securitizing assets, which enables firms to convert

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[137] Id. at 11.
[138] Kraakman, et al., *supra* note 125, at 7.
[139] Hausmann & Kraakman, *Essential Role*, *supra* note 61, at 24. As Hausmann and Kraakman argue, business entities provide a "truly essential" service: "the shielding of the assets of the entity from claims of the creditors of the entity's owners or managers." Id. at 61, 65, 68.
[140] Id. at 24.
[141] Joseph A. McCahery, *Introduction: Governance in Partnership and Close Corporation Law in Europe and the United States* in THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS: US AND EUROPEAN PERSPECTIVES (Joseph A. McCahery, Theo RA Aijmakers & Erik P. M. Vermeulen, eds.) 4 (2004).
[142] See Hausmann & Kraakman, *Essential Role*, *supra* note 61, at 35 ("Affirmative asset partitioning eliminates much of the risk that a firm's finances will be affected by unrelated changes in the personal and business affairs of its owners. It assures that the creditors of a firm will have first right to the assets of that firm against any personal creditors, or other business creditors, of the firm's owners.").
[143] Id. at 27.
[144] Id. at 24.
[145] Id. at 26-27.
[146] *See, e.g.*, id. at 26-27.
[147] Id. at 37.

future income streams into current cash.[148] It can also play an important role in segregating risks.[149]

Business entities solve several multiple problems for those engaged in a common enterprise. First, because the contractual arrangements between the participants are invariably incomplete, it provides a framework for resolving any disputes between them.[150] In theory, many of the rules to be applied in such disputes could be contractually agreed by the parties, but the transaction cost of doing so on a comprehensive basis would be immense. Business entities law addresses aspects of relations between firms and their creditors, among owners, and between owners and managers.[151] Jurisdictions that offer an ecosystem of rules that provides an implicit promise to keep those rules up-to-date, a body of legal materials that make decisions about disputes more predictable (court opinions in a common law system), a decision making body which is credibly committed to making decisions within the framework of those rules, and a community of practitioners knowledgeable and comfortable with the framework can readily lower the transaction costs of organizing a joint enterprise.

In short, what business entity laws provide are the means of solving the problem of how an enterprise will be governed. As Nobel Prize winning economist Oliver Williamson noted, "governance is viewed as the means by which to infuse *order,* thereby to mitigate *conflict* and realize *mutual gains*."[152] Note that different firms require different types and scales of governance and that small jurisdictions may be able to provide forms with which larger jurisdictions struggle. For example, investments in close corporations are often illiquid, raising the problem of oppression of minority shareholders (who are often unable to sell their shares on the open market).[153] While there are contexts where this is a concern, the *ex ante* commitment to not exit can also be a valuable attribute of an entity, particularly where there is a high density of match-specific assets.[154] Illiquidity can thus be useful to both the majority and the minority shareholders in some circumstances. A large economy with a diverse array of firms may struggle to articulate a rule that can distinguish between cases of genuine oppression and those where the arrangement was intended to lock both parties in.[155] A smaller jurisdiction providing specialized law offshore can focus on the latter case without being concerned about the former.

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[148] Id. at 50.

[149] *See* Antony Ireland, *Corporations Get Creative with Cells,* RISK & INSURANCE (Aug. 3, 2016) available at https://riskandinsurance.com/corporations-get-creative-cells/.

[150] Gabor, *supra* note 32, at 126-27 ("Both simple and complex financial transactions can be thought of as incomplete contracts, the value of which is partially determined by the behavior or the supplier after the point of purchase.")

[151] Hausmann & Kraakman, *Essential Role, supra* note 61, at 61.

[152] Oliver E. Williamson, *Transaction cost economics: an overview,* in THE ELGAR COMPANION TO TRANSACTION COST ECONOMICS (Peter G. Klein & Michael E. Sykuta, eds.) 9 (2010).

[153] Derek French, MAYSON, FRENCH & RYAN ON COMPANY LAW (35th ed.) 8 (2018) ("The most common disputes resolved in company law are between a minority of members in a company and the majority….").

[154] Edward B. Rock & Michael L. Wachter, *Waiting for the Omlet to Set: Match-Specific Assets and Minority Oppression in Close Corporations,* in THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS: US AND EUROPEAN PERSPECTIVES (Joseph A. McCahery, Theo RA Aijmakers & Erik P. M. Vermeulen, eds.) 108, 130 (2004).

[155] *See, e.g.,* Richie v. Rupe, 443 S.W.3d 856, 864-66 (Tex. 2014) (describing courts' struggle to define term). With respect to locking parties into entities, see John Armour & Michael J. Whincop, *An Economic Analysis of Shared Property in Partnership and Close Corporations Law* in THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS: US AND EUROPEAN PERSPECTIVES (Joseph A. McCahery, Theo RA Aijmakers & Erik P. M.

Further, as Williamson pointed out, "*all complex contracts are unavoidably incomplete.*"[156] Crucially, in addressing this incompleteness, parties can opt for the formation of an entity for which the law provides a framework that specifies which disputes can be referred to a court and which are left to the internal hierarchy of the firm.[157] Business entities are institutional arrangements "designed by trading partners to mediate particular economic relationships."[158] And where there are "stable legal institutions, relatively efficient courts, and reasonable default rules for contract terms … contracts tend to be less complete," lowering the transaction costs of forming such arrangements.[159]

In addition, through structuring, a business can make use of this feature to allocate different assets to different business purposes, making this asset partitioning play a crucial role in a wide variety of transactions. For example, an entity with two lines of business can use separately incorporated subsidiaries to shield the less risky line from the financing costs imposed by the greater risk of the other line.[160] Because it must bind third parties, asset partitioning is something that cannot be accomplished without business entity laws.[161]

To win business, laws thus need to provide crucial functions for many businesses and transactions: allowing creation of an entity with flexible internal governance rules; offering a statutory framework that binds third parties on which to build solutions; and providing a mechanism for resolving unanticipated future disputes.

2.2. English Company Law as *Lingua Franca*

English company law spread throughout the world with the British Empire as colonial territories adopted laws modeled on English examples. These laws often remained the basis for company law even after independence and continue to influence more modern company law statutes adopted by Britain's Crown Dominions, Overseas Territories, and former colonies, even as the sources of law in many of those jurisdictions expanded to include ideas drawn from Canadian, New Zealand, and even U.S. company laws.[162] In this section, we first explain how English company law serves as the common architecture for other business entities, making it an appropriate baseline in comparing jurisdictions. We discuss the evolution of English company

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Vermeulen, eds.) 84 (2004) ("This guaranteed freedom from liquidation is useful for small firms that want to 'lock in' assets during a developmental phase, and it ensures that value is not destroyed by unbundling complementary assets.").

[156] Williamson, *supra* note 152, at 10-11.

[157] Id. at 16-17 ("In effect, the *contract law of internal organization is that of forbearance*, according to which the firm becomes its own court of ultimate appeal.)

[158] Peter G. Klein, *Transaction Cost economics and the new institutional economics*, in THE ELGAR COMPANION TO TRANSACTION COST ECONOMICS (Peter G. Klein & Michael E. Sykuta, eds.) 29 (2010).

[159] Id. at 30.

[160] Hausmann & Kraakman, *Essential Role*, *supra* note 61, at 32.

[161] Id. at 38.

[162] *See, e.g.*, Grundy, 1997 edition, *supra* note 14, at 17 (noting that Barbados 1982 company law was based on Canadian law). Arewa, *supra* note 115, at 257-59 (Nigerian company law's English heritage). Indeed, IFCs sometimes draw on other legal traditions than their own to bring in ideas which they think will be popular. For example, Aruba's Aruba Exempt Company is "not essentially different" from the BVI IBC, despite the IBC originating in a English language common law jurisdiction and being transplanted into a Dutch language civil law one. Grundy, 1997 edition, *supra*, at 11.

law, various versions of which serve as the core bodies of rules and approaches for those IFCs which have inherited or chosen English law as the architecture for their own business entities as well as an important point of comparison for other jurisdictions. Finally, we examine how the evolution of IFCs' business laws make use of the concepts drawn from English law.

2.2.1. Why English law?

English company law rather than some other jurisdiction's serves as the baseline for much offshore business entities law for two reasons. First, it is the source of more of the offshore world's company law than any other jurisdiction's.[163] By our count, thirty-four of the forty-nine jurisdictions that have made a serious effort to become an IFC have a company law originally derived directly from some version of an English Companies Act (one could quibble about one or two on the margin either way).[164] No other source jurisdiction comes close: Three have Dutch origins[165] and two (Panama and Liberia) have predominantly American origins,[166] although there are some cases where some variant of American corporate law has at least influence on a particular statute (e.g., the BVI IBC Act).[167] France and the Napoleonic Code are a distant second to English companies law with only five jurisdictions tied to French law although even that may be over inclusive.[168] English law's widespread use alone makes treating it as the baseline logical. Second, English company law is also a source of law for a large number of non-IFC jurisdictions, particularly many former British colonies, protectorates, dominions, and other affiliated jurisdictions (e.g., Australia, Canada, India, New Zealand, Nigeria, and Malaysia), although these jurisdictions each deviate in their own ways from the English model.[169] Third, multiple guides to IFCs have pointed to the English company law heritage of a jurisdiction as an

[163] Board of Trade, *supra* note 29, at 12 ("The company law framework introduced by the Victorians … had immense influence world-wide. Other countries, both within the British Empire and beyond, often followed the UK to introduce similar arrangements. Thus for the bulk of the last 150 years, though often with substantial time lags, broadly similar frameworks were put in place in many countries around the world.").

[164] For example, Mauritius has a mixed legal system which draws from both French and English law. Mauritius International Financial Centre, *Our Legal System*, available at https://mauritiusifc.mu/our-jurisdiction/our-legal-system.

[165] Aruba, Curacao, and Sint Maarten, all originally part of the Netherlands Antilles, are now constituent members of the Kingdom of the Netherlands. *See* Lammert de Jong & Ron van der Veer, *Reformation of the Kingdom of the Netherlands: what are the stakes?*, in THE NON-INDEPENDENT TERRITORIES OF THE CARIBBEAN AND PACIFIC: CONTINUITY OR CHANGE? (Peter Clegg & David Killingray, eds.) 61 (2012).

[166] *See* note 53 *supra.*

[167] Colin Riegels, *The BVI IBC Act and the Building of a Nation*, IFC Review (March 1, 2014) available at https://www.ifcreview.com/articles/2014/march/the-bvi-ibc-act-and-the-building-of-a-nation/ ("the legislation was based upon Delaware corporation law, which was thought to be the most modern in the world at the time, but incorporating additions from innovative company legislation in other jurisdictions as well.").

[168] Andorra, Anjoun, Mauritius, Mwali, and Vanuatu all have some French legal heritage, although Mauritius and Vanuatu are mixed heritage, with a significant English component as well.

[169] Bruner, CORPORATE GOVERNANCE, *supra* note 5, at 28 (highlighting differences among Australia, Canada, U.K., and U.S. (Delaware) corporate law). As Davies and Worthington noted in 2016 reflecting on both its quality and its widespread use around the world as a source of law, "globalization means that the international dimension of British company law is not restricted to the EU, nor, indeed, has it ever been." Davies & Worthington, GOWER'S PRINCIPLES, *supra* note 101, at 2.

advantage.[170] Finally, English law is widely accepted by business lawyers around the world, often enough that it frequently serves as the "default choice" for cross-border deals.[171]

2.2.2. The Characteristics of English Companies Law

What is the baseline that English company law establishes? The unsurprising answer is "it depends." English company law is a moving target, and the important statutes that form part of this body of law have changed significantly since 1855 when England took the crucial step of allowing acquisition of limited liability simply by registration. Moreover, English company law is a mix of court decisions and statutes (far more so than U.S. corporation law is, as Delaware's and other states' corporation statutes are more comprehensive than any of England's) and many important principles of English company law are expressed only in case law.[172] Thus, exactly when a jurisdiction imported English law affects both statutory form and the details of how Commonwealth case law informs it.[173]

The conduit for English precedent also varies. Many of the jurisdictions considered here retain (or only recently severed their link with) the Judicial Committee of the Privy Council as final court of appeal while others look to regional or domestic courts.[174] Even for those with English-architecture law which do not retain a formal link to the Privy Council, English and other Commonwealth precedents often remain highly persuasive.[175] Thus treating "English company law" as a baseline requires focus on its core concepts rather particular version's details.

Treating "English company law" broadly then, we first identify three core substantive concepts which are less frequently present outside the family of English-derived laws.[176] The substantive core elements are:

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[170] *See, e.g.*, Grundy, 1987 edition, *supra* note 53, at 2 (Anguilla); Grundy, 1969 edition, *infra* note 262, at 35 (Cayman); GRUNDY'S TAX HAVENS: A WORLD SURVEY 37 (Milton Grundy, ed., 3rd ed., 1974); (Channel Islands); Grundy, 1972 edition, *infra* note 202, at 53 (Gibraltar); Grundy, 1969 edition, *supra*, at 57 (Hong Kong); Grundy, 1983 edition, *supra* note 7, at 170 (Nauru); Grundy, 1987 edition, *supra*, at 87 (Turks & Caicos); Grundy, 1983 edition, *supra*, at 215 (Vanuatu).

[171] Baum & Solomon, *supra* note 3, at 418-19, 425-26.

[172] Delaware also has a corporate law that includes substantial content from case law, which is an important factor in its success. Our point is that Delaware's General Corporate Law is, partly as a result of the Delaware legislature's far greater responsiveness to the Delaware bar, a more systematic statute than the English Companies Act 2006 (or its various predecessors). While the current English Act is quite lengthy, it is less systematic in its coverage of issues than Delaware's (a polite way of saying it is less well drafted in some respects).

[173]. *See* Tom Hadden, COMPANY LAW AND CAPITALISM (2nd ed.) 22 (1977) (describing major amendments to English company laws through 1967). The same is true of other imports as well – Panama adopted the 1927 version of Delaware's corporate law.

[174] The most look to the Privy Council as a court of last resort (from our list: Anguilla, Antigua & Barbuda, Bahamas, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cook Islands, Cyprus, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Mauritius, Montserrat, Niue, St. Kitts & Nevis, St. Vincent & the Grenadines, and Turks & Caicos Islands); three to the Caribbean Court of Justice (Barbados, Dominica, and St. Lucia); three to the Supreme Court of the Netherlands (Aruba, Curacao, and Sint Maarten); and the rest have their own final courts of appeal.

[175] *See* D. Hoadley, et al., *A Global Community of Courts? Modelling the Use of Persuasive Authority as a Complex Network*, 9 FRONTIERS IN PHYSICS art 665719 (2021).

[176] Hein describes the "essence of corporateness" as including immortality, a succession by many persons considered the same, the right to sue and be sued, the right to purchase and hold real property, the right to a seal, and the right to govern itself through bylaws and "private statutes." Leonard W. Hein, *The British Business Company: Its origins and its control*, 15 U. TORONTO L. J. 134, 134 (1963).

1. *Permissive structure*. A central feature of English company law is that it leaves to each individual company to create the rules regulating its internal affairs to a greater extent than do most other legal systems.[177] Substantial variation in structure is permissible. For example, the company limited by guarantee provided an alternative means of creating limited liability entities to the creation of shares.[178] This permissiveness generally distinguishes English-architecture laws from those derived from continental European sources.[179]

2. *Choice of law for internal affairs.* English law has generally left the internal affairs of companies to be governed by the jurisdiction where the company has its registered office.[180]

3. *Availability of single-member companies.* An important decision in 1897 the House of Lords established the legality of single-person companies, making incorporation "as readily available to the small private partnership and sole trader as to the large public company."[181] This is not the case in many jurisdictions.[182]

In addition to these substantive features, the process of administering and adapting the law to changed circumstances provided additional important components of the legal environment for business entities. While these are not as uniquely English, we have not identified any other jurisdictions other than Delaware where the combination of these process features plays as important a role as they do in English-architecture jurisdictions.

1. *Responsiveness to competition.* From its start, English company law was influenced by competition.[183] Britain continues to be relatively responsive to competition

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[177] Davies & Worthington, GOWER'S PRINCIPLES, *supra* note 101, at 59 (contrasting the German and American approaches which "can be said to be based on the principle that the allocation of powers to the organs of the company is the result of a legislative act" even if the shareholders within limits "may alter the initial legislative allocation" with the English approach which "can be said to represent the view that the shareholders constitute the ultimate source of managerial authority within the company and that the directors obtain their powers by a process of delegation from the shareholders, albeit a delegation of a formal type which, so long as it lasts, may make the directors the central decision-making body on behalf of the company.").

[178] This had the advantage that when a member exited there was no need to deal with the exiting member's shares. Davies & Worthington, GOWER'S PRINCIPLES, *supra* note 101, at 9.

[179] McCahery, *supra* note 141, at 4.

[180] Davies & Worthington, GOWER'S PRINCIPLES, *supra* note 101, at 118.

[181] English company law originally required multiple incorporators. Bruner, CORPORATE GOVERNANCE, *supra* note 5, at 31 ("shareholder power remains the true heart of the U.K. conception of the corporation."). L. C. B. Gower, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 99 (4th ed., 1979). The case is *Salomon v Salomon & Co.* [1897] A.C. 22, H.L.

[182] For example, the following require a minimum of two or more shareholders: Argentine *Sociedad de Responsabilidad Limitada;* Brazilian *Sociedade Limitada;* Chilean *Sociedad de Responsabilidad Limitada*; Chinese Limited Liability Company; French *Societe Anonyme;* Indian Private Limited Company; Japanese *Kabushi Kaisha* (with board of directors)*;* Mexican *Sociedad de Responsabilidad Limitad* and *Sociedad Anonima*; Peruvian *Sociedad de Responsabilidad Limitada;* Thai limited company; United Arab Emirates Limited Liability Company (outside of the DIFC).

[183] For example, in the parliamentary debate over the 1855 Act, its proponents argued that the lack of limited liability "tended to drive capital abroad into other countries where similar obstacles did not exist," that making

compared to other large jurisdictions, introducing the Limited Liability Partnership in 2000, the Community Interest Company in 2004, and the "micro-entity" in 2013.[184] In addition, English business entities have internal competition from Scottish law; both Scottish Limited Partnerships and Scottish Limited Liability Partnerships are popular alternatives to some English business entities.[185]

2. *Learning by doing.* Modern English company law evolved through case law, repeated early statutory interventions in response to events, and practice.[186] We count at least twenty-eight statutes between 1855 and 1908 which made changes to various aspects of English company law or affected it by changing other statutes as England worked out how it wanted its company law to operate. Indeed, while modern law reform bodies continue to sporadically draft amendments and new versions of the basic statute, English company law today evolves in large part as the result of the courts' resolution of cases and the practices of lawyers and their clients.[187]

In addition to these characteristics, which the versions exported to the IFC jurisdictions with English architecture share, modern English company law has four negative characteristics that successful IFCs' laws do not share, which create opportunities for IFCs to compete:

1. *Infrequent Parliamentary attention.* In general, Parliamentary attention to English company law is sporadic and slow moving; Davies termed the process "leisurely" and "glacial" with the last completed updating requiring twenty-four years from conception to implementation that still left inconsistencies and gaps.[188] The British government seems disinclined to change this because "[o]nce there, ministers are likely to take the view that company law has had its turn for some while and will be

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limited liability generally available was consistent with equal treatment and would enable even those of modest means to "have the benefit of combining in the employment of their capital", and to encourage "prudent men" in forming companies rather than just the "rash and reckless" willing to do so under unlimited liability. Ronald Ralph Formoy, THE HISTORICAL FOUNDATIONS OF MODERN COMPANY LAW 119 (1923 [reprint ed]).

[184] Limited Liability Partnerships Act 2000; Companies (Audit, Investigations and Community Enterprise) Act 2004 (introducing the Community Interest Company); Small Companies (Micro-Entities' Accounts) Regulations 2013.

[185] *See Scottish Limited Partnerships vs. English Limited Partnership*, Coddan, available at https://www.coddan.co.uk/same-day-llp-formation-in-united-kingdom/register-a-limited-partnership-in-scotland/scottish-lp-vs-english-lp/; Jonathan Hardman, *Reconceptualizing Scottish limited partnership law*, 21 J. CORP. L. STUD. 179 (2020).

[186] English companies law has never been codified, with legislation providing generally sporadic and often only partial consolidations of statutory rules. See for example, the authoritative Palmer's *Company Precedents*, first published in 1877 and in its 17th edition by 1979, collected important models and decisions. "The unifying influence formerly exercised by this famous book is probably unparalleled elsewhere in English law." Gower, GOWER'S PRINCIPLES, *supra* note 181, at 17, n. 74. For lists of relevant statutes, see Formoy, *supra* note 182, at 135-36; Francis Gore-Browne & William Jordan, HANDBOOK ON THE FORMATION, MANAGEMENT & WINDING UP OF JOINT STOCK COMPANIES 1-3 (28th edition, 1908).

[187] The rich history of English company law precedents are not mere historical curiosities. Even today, major English company law treatises continue to list numerous nineteenth century precedents. Although the pace of change slowed thereafter, through the 1908 consolidation English companies law was being regularly modified as experience showed where points of friction or gaps existed. *See, e.g.*, Hein, *supra* note 176, at 150-51.

[188] Davies, GOWER AND DAVIES', *supra* note 126, at v. As the Board of Trade noted in launching the 1998 review, "The pattern was that the Board of Trade appointed a Committee at intervals of around 20 years to review company law."). Board of Trade, *supra* note 28 at 4.

reluctant to devote additional parliamentary time to proposals for its further reform."[189] For example, although the 1998 review proposed more frequent, smaller scale reviews by a new standing Company Law and Reporting Commission, the Government rejected this proposal, leaving the process to ad hoc review.[190] This creates an opening for other jurisdictions to make more frequent adjustments and innovations to meet changing business needs.

2. *Impact of tax law on organizational decisions and in driving complexity.* Tax considerations played a significant role in the creation of companies under English law. Gower noted in 1979 that "it is probably fair to say that in the last 60 years more companies have been formed because of the real or imagined taxation advantages than for any other single reason."[191] As a result, English law has often focused on eliminating these practices and given courts an increasing willingness to consider whether corporate structures should be disregarded in tax cases.[192] As a result, the question of whether the courts would accept a corporate structure is increasingly unpredictable, since "[e]ach case where they have regarded the subsidiary as an agent of the parent can be matched with another in which they have refused to do so."[193] This uncertainty reduces the attractiveness of English company law and introduced additional complexity. Further, the combination of additional taxes on businesses and inheritance by the mid-1970s has complicated succession planning for family businesses.[194]

3. *Complexity.* Some of the evolutionary advantages of the gradual development of English company law are offset by the lack of serious efforts at periodic rationalization, the dispersed nature of rules derived from case law, and the sporadic nature of modernizing amendments. The Board of Trade review pointed out that the sporadic reviews which "concentrated on current scandals and perceived deficiencies" led to "a constant addition of new rules and regulations to companies legislation without any reexamination of its fundamental principles. Company law thus grew in bulk and complexity, but there was no attempt to slim down the basic structure and remove sections designed to deal with practices and situations which, often, no longer happened."[195] This created risks of "trapping the unwary," further diminishing the attractiveness of English company law.[196]

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[189] Davies & Worthington, GOWER'S PRINCIPLES, *supra* note 101, at 53.
[190] Id. at 53."
[191] Gower, GOWER'S PRINCIPLES, *supra* note 181, at 239.
[192] *See, e.g., Littlewoods Stores v I.R.C.* [1969] 1 W.L.R. 1241. *See* GOWER'S PRINCIPLES, *supra* note 181, at 125.
[193] Gower, GOWER'S PRINCIPLES, *supra* note 181, at 129.
[194] Hadden, *supra* note 173, at 292-93.
[195] Board of Trade, *supra* note29, at 4. The overlay of EC directives after Britain joined the European Economic Community in 1972. Id. at 5. The result was to leave English company law "in a worse state than at any time this century." Id. at 5 (quoting Gower).
[196] *See* Gower, GOWER'S PRINCIPLES, *supra* note 181, at 166 ("business men were reluctant to leave matters to implication…[h[ence, memoranda, far from sharing the simplicity of Table B, have come to contain statements of some twenty or thirty objects and ancillary powers, covering every conceivable business and all the incidental powers which might be needed to accomplish them."); *Bell Houses Ltd. v. City Wall Properties Ltd.* [1966] 2 Q.B. 656, C.A. Gower notes that "this comes close to saying that the company could carry on any business it chose, a

4. *Insufficient differentiation between the law for large and small companies.* Until 1908, English law did not distinguish between small and large companies and even then no separate entity was provided.[197] When a distinction was initially introduced (exempting smaller companies from some requirements for filing accounts), it quickly led to large public companies reorganizing themselves through subsidiaries in an effort to gain the benefits of the exemption. An effort to prevent this created greater confusion and complexity, leading to its abandonment in the 1968 Companies Act.[198] Not until 2006 did the default articles provided by English law make a distinction.[199] As small firms "differ radically [from large ones] in the capability of investors to be actively involved in the design of governance processes that lower agency costs," this created considerable room for competing jurisdictions to provide business entities customized to the needs of small firms.[200]

We next examine how these characteristics of English architecture company law helped shape the law market for business entities in IFCs.[201]

3. Evolution of IFCs and Offshore Business Entities Law

Jurisdictions have been marketing themselves as the legal location for business entities since the 1920s, when Panama and Liechtenstein adopted business entities laws with the specific intent of attracting foreign businesses.[202] There was also pre-World War II use of Bermuda as the domicile of an entity to resolve the complex International Match bankruptcy, which spanned multiple jurisdictions, due to the ability Bermuda offered to leverage its tax neutrality to preserve the assets for the creditors; International Match was thus "the company most responsible for world-wide recognition of Bermuda."[203] Additionally, Bermuda offered a strong and legitimate

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formula which had been thought impermissible on the authority of *Re Crown Bank*, {[1890] 44 Ch.D. 634}. Id. 167-68.

[197] Gower, GOWER'S PRINCIPLES, *supra* note 181, at 13.

[198] Id. at 54.

[199] Davies & Worthington, GOWER'S PRINCIPLES, *supra* note 101, at 60. This meant that "different sizes and types of company can adjust these matters to suit their own particular situation, whereas in Germany [by comparison] to relieve private companies of the demands of the *Aktiengesetz* has been seen to require the enactment of a separate and more flexible statute for private companies (the *GmbHGesetz*)". Id. at 13.

[200] Armour & Whincop, *supra* note 155, at 73.

[201] A reader may wonder "why not Delaware" at this point, since Delaware law shares many of the advantages and lacks some of the disadvantages of English law. Here the answer is the path dependency of history – English law spread with the British Empire to more of the types of jurisdictions likely to become IFCs than did Delaware law and so it is the English version that has greater global presence.

[202] Milton Grundy, THE WORLD OF INTERNATIONAL TAX PLANNING 40 (Cambridge 1984) ("Panama has been in the tax-haven business for a very long time. Their Companies Law, modelled on that of the state of Delaware, was enacted in 1927, and it has never been substantially changed despite the various changes of regimes since that time."); GRUNDY'S TAX HAVENS: A WORLD SURVEY 103 (Milton Grundy, ed., 2nd ed., 1972) (commenting on Liechtenstein's "open-minded legislation and the modern and differentiated codification of its own individual and corporate law, which not only provides for its own forms of association, but also recognizes the forms known to the legal system of other states.").

[203] Gordon Phillips, FIRST, ONE THOUSAND MILES …: BERMUDIAN ENTERPRISE AND THE BANK OF BERMUDA 126 (1992); Kawaley, *Legal Development, supra* note 71, at 14 (referring the successful winding up through a special purpose vehicle of the more than 400 companies involved in the bankruptcy of the International Match Co. through a Bermuda entity as "the founding act of the 'Switzerland of the Atlantic'").

banking system.[204] (The first Bermuda exempted company had been established shortly before the International Match one, in 1935.)[205] Bermuda also benefited from pre-World War II uncertainty in Europe bringing money to the island.[206] Shell Oil and American International Group created Bermuda subsidiaries in 1947, which "ushered in the era of international business for Bermuda."[207] AIG's arrival "sowed the seeds of interest in insurance and the wider fields of reinsurance."[208] Enough British taxpayers made use of Guernsey and Jersey in the 1920s by using personal holding companies to avoid the high tax rates imposed to pay off Britain's World War I debts to alarm the British tax authorities and lead to official pressure on the Islands to limit the use of Island-based holding companies by British taxpayers.[209]

These early efforts pioneered some of the practices that later produced larger scale jurisdictional competition in business entities law. Our focus is on the more organized competition that began after World War II, as additional jurisdictions joined the competition and even early entrants began to up their game by investing in the updating of their statutes. In the 1960s and 1970s, business entities could be used to avoid UK taxes in particular through relatively simple structures.[210] Entry in to the market was therefore relatively straightforward: a business entities statute, fees that were not too high, reasonable communications with the target markets, and advantageous tax laws—classic features of a tax haven.[211] Local practice communities – the exit-affected actors – were key in pressing for updates. For example, the president of the Guernsey Society of Chartered and Certified Accountants expressed concern that despite Guernsey's company law's "considerable gaps regarding receiverships, liquidations and many other items," the government had not acted on working party's consultative documents issued over a year earlier.[212]

3.1. Starting down the evolutionary path from tax havens to IFCs

The level of investment made by jurisdictions varies, as our earlier discussion of Liberia's and Panama's offerings suggests. Like those two, some jurisdictions do not go far beyond adopting a statute allowing formation of a particular entity.[213] These jurisdictions may

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[204] Id. at 92.
[205] Id. at 125. AIG's arrival in particular was important as its activities created interest in insurance. In 2002, Bermuda's former finance minister and premier, David Saul noted that "When you reflect back on the beginning of this industry, you would have to give as much credit as possible to the American International Group." Id. at 226.
[206] Kawaley, *Legal Development, supra* note 71, at 16.
[207] Stewart, *supra* note 73, at 99.
[208] Former Finance Minister and Premier of Bermuda, David Saul quoted in Id. at 226.
[209] Richard Hogart, AN ISLAND ASSEMBLY: THE DEVELOPMENT OF THE STATES OF GUERNSEY 1700-1949 113 (1988) (describing 1927 agreement with UK to limit investment holding companies); Johns, *supra* note 13, at 128; Richard Graham, AT THEIR MAJESTIES' SERVICE 262 (2015).
[210] *See, e.g.,* Malcolm J. Finney, *Controlled Foreign Corporations* in TOLLEY'S INTERNATIONAL TAX PLANNING (Malcolm J Finney & John Dixon, eds.) 6-01 (3rd ed. 1996) ("So long as a number of anti-avoidance provisions were not breached (e.g. transfer pricing) and the company could not be regarded as resident in the UK, the income and gains of the foreign company remained outside the scope of UK taxation (other than, of course, on UK source income)."
[211] Malcom J. Finney, *Tax Havens: Measures to Prevent Abuse by Taxpayers* in TOLLEY'S INTERNATIONAL TAX PLANNING (Malcolm J Finney & John Dixon, eds.) 27-01 to 27-04 (3rd ed. 1996).
[212] Steve Falls, *Local Companies Law Has Many 'Gaps' That Justify Reform,* GUERNSEY EVENING PRESS & STAR (16 Nov. 1983).
[213] Ronen Palan, THE OFFSHORE WORLD: SOVEREIGN MARKETS, VIRTUAL PLACES AND NOMAD MILLIONAIRES 83 (2006)

not experience more than modest revenue from fees, as they fail to develop the professional infrastructure needed to climb the value chain. [214] For example, while Grundy described Nauru in the 1983 edition of his guidebook as having "modern trust and company legislation" which was "designed by the Government to enable Nauru to be used as a shelter from taxation in respect of operations elsewhere", he also noted that "[t]here are no lawyers or accountants practicing in Nauru and all tax haven activity is handled by two corporation agents and a trust corporation. Legal advice is normally obtained from lawyers resident in such places as Hong Kong and Australia who are familiar with the Nauruan legislation."[215] In Liberia's case, users of its company law could set up a legal entity using the Liberian sponsored service provider, International Trust Company of Liberia, whose offices were largely outside Liberia. The Liberian-sponsored service provider with offices in Monrovia, New York, and Zurich was set up explicitly to expedite and facilitate formation of new trusts and companies using Liberian law.[216] In these cases, we see that without developing professional infrastructure, an IFC was limited in its ability to climb the value chain and provide more sophisticated products and services.

Nor was simply adopting laws a formula that could survive the anti-avoidance measures onshore jurisdictions soon implemented, as these required there be more than a company in existence elsewhere.[217] As Grundy noted: "Most of us can remember a time – and it isn't all that long ago – when one could conduct a quite respectable offshore advisory practice by knowing about discretionary trusts and underlying companies. Maybe in some parts of the world one still can, but anti-avoidance legislation in many countries has made it increasingly difficult …."[218] In other cases, we see jurisdictions that did climb the value chain and successfully transition to new markets when an existing market closed. The Cayman Islands is such an example:

> The first rush of business was mainly from rich Englishmen, for whom the Cayman laws provided a way of exploiting a loophole in British tax law. The British Labour government soon closed the loophole, but the Caymanians could still provide tax-free benefits to companies and individuals all around the world, particularly in the United States and Latin America. Grand Cayman was well placed, for it was on the same time zone as New York, and it was in easy reach of Miami, Panama, and other Latin American centers-so that it became part of the classic escape route of money from South to North America. [219]

In many cases, external forces created opportunities for developing an IFC. Thus, 1960s exchange control regimes gave some jurisdictions an advantage in attracting customers from

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[214] See Christopher J. Bruner, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD 194-96 (2016).
[215] Grundy, 1983 edition, *supra* note 7, at 166-67.).
[216] Grundy, 1987 edition, *supra* note 53, at 57. *See also* Brett Richmond, THE BOOK ON OFFSHORE WEALTH: THE REALITIES, THE STRATEGIES, THE PLACES 113 (1979).
[217] Clarke, *supra* note 10, at 127 ("Tax is not saved merely by setting up offshore trusts and companies …. [i]t is equally necessary to ensure that the arrangements cannot be characterized as a sham and that the entities concerned are genuine.")
[218] Grundy, ESSAYS, *supra* note 99, at 27.
[219] *See, e.g.*, Anthony Sampson, THE MONEY LENDERS: THE PEOPLE AND POLITICS OF THE WORLD BANKING CRISIS 281-82 (1981).

particular places while hindering use by potential clients from elsewhere.[220] For example, the Bahamas' status as part of the sterling area but with an effectively U.S. dollar-based local economy gave it opportunities to allow businesses to operate in both currencies.[221] BVI's 1959 switch to using the U.S. dollar as legal tender[222] and in everyday use to facilitate its tourist industry created "a territory which for all practical purposes is both inside and outside the sterling area," enhanced its appeal to potential American clients.[223] As a result, shares in BVI entities denominated in dollars counted as non-sterling assets that could be bought without paying the investment currency premium otherwise required within the sterling area.[224] The UK's 1972 contraction of the sterling area to the Crown Dependencies and Ireland (adding Gibraltar in 1973) gave the Channel Islands' and Isle of Man's finance sectors a boost by cutting off their competitors in former-sterling-area jurisdictions (e.g., Bermuda, Bahamas, and Cayman) from sterling-denominated business. At the same time, their expulsion from the sterling area pushed these jurisdictions to develop new markets "enabl[ing] the subsequent establishment of a more truly internationally based offshore centre." [225] For example, the official history of the Bank of Bermuda takes a "when life gives you lemons, make lemonade" tone, observing:

> North American business had previously been ultra-cautious about the control exercised over the Bermuda economy by the British Government, but the Bank now had a new sort of freedom, a new set of rules. A wonderful opportunity presented itself and in its exploitation the Bank made it abundantly clear that any foreign currency transactions were free of local exchange control interest rates. Abandonment of sterling also allowed Bermuda to escape the consequences of the immediate rapid decline in the value of the pound.[226]

Among other reactions, the Bank set up a banking subsidiary in Guernsey, trust subsidiaries in both Guernsey and Jersey, and an office in Hong Kong.[227]

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[220] The sterling area exchange control system has been described as "a high fence of exchange restrictions was constructed around the entire sterling region. Inside the area, payments could still be made freely and flexibly. But with respect to payments outside the area – and, in particular, with respect to payments in the United States – the system became rigid and discriminatory. The sterling area became a formal collective arrangement for discriminating against the scarce dollar." Benjamin J. Cohen, THE FUTURE OF STERLING AS AN INTERNATIONAL CURRENCY 81 (1971).

[221] Alvin Rabushka, *History of the Monetary Systems and the Public Finances in the Bahamas, 1946-2003*, Nassau Institute 21-26 (2010) available at https://www.nassauinstitute.org/files/Monetary%20Historyweb.pdf.

[222] Legal Tender (Adoption of US Currency) Act 1959.

[223] Grundy, 1972 edition, *supra* note 202, at 35.

[224] Id. at 36. "Security dollars" were foreign currency funds held by UK residents derived from sales of foreign securities to non-UK residents, which were allowed to be used for foreign security purchases and which carried a premium of 7-10%. Christopher McMahon, STERLING IN THE SIXTIES 68-69 (1964).

[225] Johns, *supra* note 13, at 102 Roger Rawcliffe, NO MAN IS AN ISLAND: 50 YEARS OF FINANCE IN THE ISLE OF MAN 79 (2009).

[226] Phillips, *supra* note 203, at 184.

[227] Id. at 186-88.

Some jurisdictions have also gone beyond the initial "brass plate" company[228] stage in which the focus is on facilitating tax arbitrage to develop sophisticated legal systems offering an array of business entities.[229] Robinson notes that

> [i]n the late 1970s Bermuda still had a long way to develop as a first-choice domicile for international business clients. … Increasing numbers of international business clients utilizing the jurisdiction generated a requirement for local professional support: as numbers of international clients increased so did the numbers of local professionals. Thus, the growing concentration of local support professionals in the jurisdiction in the early years paved the way for the later explosive growth of international business.[230]

Even for these jurisdictions, an initial base in company law was crucial to the evolutionary process. Without the revenue from those early transactions and the individuals who seeded the larger professional communities that developed later, climbing the value chain to more sophisticated businesses (investment funds, captive insurance, and securitization) likely would not have been possible.

English company law provided useful architecture at this point. Lawyers and clients from the UK and other Commonwealth nations would have been familiar with the simple business entities created using laws with an English architecture. For example, a key development for Bermuda was its creation of the exempted company in 1950, allowing it to distinguish offshore from local businesses with legislation that set fees and provided that exempted companies could not do business locally.[231] By the mid-1950s, exempted companies were bringing Bermuda's economy £500,000 yearly.[232] The exempted company would have been familiar since the English non-resident company was widely used for tax planning by non-UK residents – often at a lower cost than IFCs could offer – until its use was restricted, possibly because it was proving too popular with residents of other EEC countries.[233]

An English architecture was not always necessary. The Netherlands Antilles' success in becoming one of the major Caribbean offshore centers in the 1960s and 1970s using a Dutch-

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[228] "Brass plate" companies are often described as "existing in name only" without a physical presence beyond a brass plate with their name on an office wall, employing no locals, and not conducting business within the jurisdiction where they are legally established. *See, e.g.,* UK Parliament, Quadripartite Committee, Scrutiny of Arms Export Controls (2011): UK Strategic Export Controls Annual Report 2009 at ¶37, https://publications.parliament.uk/pa/cm201011/cmselect/cmquad/686/68609.htm#a4.

[229] Rates are just one margin on which tax arbitrage is possible, although they often get the most public attention. "All governments tax, but in different ways and at different rates. They tax income, both personal and corporate, and assets, including real property like houses, land, machinery, and even clothing. They tax interest, dividends, and capital gains on land and houses and financial assets. They tax transactions—sales, purchases, imports and exports, births and deaths. Most governments have a virtually unlimited need for revenues; the larger revenues are, the larger expenditures can be, and larger expenditures enhance political support." Robert Z. Aliber, THE INTERNATIONAL MONEY GAME 238-39 (5th ed. 1987).

[230] Robinson, *Partnership Law*, *supra* note 100, at 65-66.

[231] Kawaley, *Legal Development*, *supra* note 71, at 24-25. Note that until 1970, Bermuda continued to require each company incorporated to be created by special legislation. Id. at 25.

[232] Phillips, *supra* note 203, at 126.

[233] Grundy, ESSAYS, *supra* note 99, at 47-49.

law-based company act (for which there was no official English translation) and the Netherlands-United States double tax treaty[234] and Panama's success in using a Delaware-based company law (modest before 1970 and growing after that)[235] demonstrate that English-architecture law was not necessary, at least for U.S. clients and straightforward entities. But both also illustrate the limits of non-English-architecture-law models. The Netherlands Antilles was unable to adapt to the loss of treaty access, while BVI developed the IBC in reaction to losing its access to the UK-US treaty network.[236] Panama remains a brass plate jurisdiction focused on company and ship registration and has not developed into a more sophisticated high-value-added jurisdiction, with its brass plate business suffering a significant setback when the "Panama Papers" leak delivered a major blow to its reputation.[237] Indeed, so long as the margin of competition was simply the applicable tax rate, Grundy's observation that "[a] zero-tax company is (to borrow from the late Miss Stein) a zero-tax company" illustrates the problem that jurisdictions faced in marketing their brass plate business entities and helped drive some to develop more sophisticated ones.[238]

3.2. Taking steps down the evolutionary path

Changes in the world economy influenced the pace of development into higher-value-added jurisdictions and in which jurisdictions those developments took root. The larger opportunities that higher taxes in industrialized economies, the complexities of exchange controls, the increased risks in international transactions caused by the development of floating exchange rates, and the development of the eurocurrency markets, as well as macroeconomic trends such as the 1970s inflation, fueled the overall development of offshore finance.[239] This encouraged business entities and their tax planners to look for options to finance overseas operations in forms of the transaction and the group structure through which the arrangements would be made. This included understanding the accounting, exchange control and currency implications "in the context of a dynamic tax environment in which legislative developments in any jurisdiction may have significant results on the effectiveness of his arrangements."[240] For jurisdictions, this demand and the British government's commitment to allow a relatively unregulated Euromarket in London in the 1960s created opportunity for jurisdictions connected

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[234] Boise & Morriss, *supra* note 117, at 406, 409.

[235] Armando Jose Garcia Pires, *The business model of The British Virgin Islands and Panama*, Norwegian Center for Taxation, SNF Institute for Research in Economics and Business Administration (7-8) (2013), available at https://openaccess.nhh.no/nhh-xmlui/bitstream/handle/11250/166676/A31_13.pdf?sequence=1. Robert E. Bauman, PANAMA MONEY SECRETS 70 (2nd ed. 2007). Bauman links Panama's growth as a tax haven to "the enactment of Decree No. 238 in July 1970, a very liberal banking law that, among other things, abolished all currency controls." Id. at 72. *See also* Michael L. Conniff & Gene E. Bigler, MODERN PANAMA: FROM OCCUPATION TO CROSSROADS OF THE AMERICAS 8 (2019) on the 1970 creation of the International Banking Center.

[236] Boise & Morriss, *supra* note 117, at 419-26 The cancellation was handled poorly and caused significant disruption of bond markets until corrective action was taken. Frith Crandall, *The Termination of the United States-Netherlands Antilles Tax Treaty: What Were the Costs of Ending Treaty Shopping*, 9 NW. J. INT'L L. & BUS. 355, 374-76 (1988-1989). Marshall J. Langer, *1972 Survey of Caribbean Taxation*, 4 U. MIAMI INTER-AM. L. REV. 220, 228 (1972) (BVI treaty); Riegels, *supra* note 167 (BVI treaty).

[237] *See* Carrie Kahn, *Panama Papers Fallout Hurts a Reputation Panama Thought It Had Fixed*, NPR (May 4, 2016) available at https://www.npr.org/sections/parallels/2016/05/04/476745041/panama-rises-despite-dents-to-its-reputation-from-papers-leaks.

[238] Grundy, 1997 edition, *supra* note 14, at vi.

[239] Freyer & Morriss, *supra* note 23, at 1333-36.

[240] John Dixon, *Financing Overseas Operations* in TOLLEY'S INTERNATIONAL TAX PLANNING (Malcolm J Finney & John Dixon, eds.) 12-26 (3rd ed. 1996)

to Britain particularly the banking sectors in Bahamas, Bermuda, Cayman, Guernsey, Jersey, and Singapore.[241]

In tracing these developments, an important feature of offshore business entities law is that it develops within the networks that span jurisdictions acting as, and attempting to become, international financial centers. These networks, which include advanced business service professionals – bankers, lawyers, accountants – "act as boundary spanners between these culturally distinct spaces of finance and inherently link them with each other." [242] Unsurprisingly, jurisdictions such as Nauru, though functioning as tax havens but with no local accountants or lawyers, lacked such networks and could not climb the value chain.[243]

Successful IFCs have means of remaining alert to opportunities to differentiate themselves. For example, when Jersey correctly forecast that the UK courts were moving toward restricting the "rule in *Hastings-Bass*," a trust law doctrine allowing equitable relief where trustee decisions had unforeseen negative consequences for beneficiaries, it quickly put together a joint industry-government working group and amended Jersey's trust law to preserve the rule for Jersey trusts.[244] Bermuda's private act tradition for company formation has continued in parallel with the incorporation-by-registration statute, allowing Bermuda to vary provisions for particular client needs and to have a "testing ground for new or innovative regulation that was implemented more widely by the way of the Bermuda Act."[245]

In addition, successful IFCs tend to have multiple products,[246] tying them into multiple communities of practice and so enabling cross-pollination of ideas across legal categories. Here again, jurisdictions with English-architecture laws had an advantage, for lawyers trained in English company law could readily transfer those skills into those jurisdictions, a key advantage from speaking the most important *lingua franca*. Many of the most successful jurisdictions were built on legal professions in which significant numbers were trained in British universities, including the earliest movers in developing offshore financial industries: Bahamas, Bermuda, Cayman, Guernsey, Isle of Man, and Jersey.[247] Many of the non-British-trained Caribbean

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[241] *See* Sampson, *supra* note 219, at 142. *See also* Catherine R. Schenk, *International Financial Centres, 1958-1971: Competitiveness and Complementarity*, in EUROPEAN BANKS AND THE AMERICAN CHALLENGE: COMPETITION AND COOPERATION IN INTERNATIONAL BANKING UNDER BRETTON WOODS (Stefano Battilossi & Youssef Cassis, eds.) 79 (2002) ("Partly, this support was due to the desire to maintain the attractiveness of sterling, but as international transactions came increasingly to be denominated in dollars this rationale receded and instead, the City was supported as a net earner for the balance of payments.").

[242] Sabine Dorry, *Regulatory spaces in global finance*, in HANDBOOK ON THE GEOGRAPHIES OF MONEY AND FINANCE (Ron Martin & Jane Pollard, eds.) 423 (2017).

[243] Grundy, 1983 edition, *supra* note 7, at 166-67 and Bruner, RE-IMAGINING OFFSHORE, *supra* note 214, at 194-95.

[244] Andrew P. Morriss, *International Financial Centers & the Law Market: Jersey and Bermuda's Statutory Adoption of the 'Rule in* Hastings-Bass' (working paper) (2023).

[245] Bickley, *supra* note 52, at xvi, 386.

[246] TOLLEY'S TAX HAVENS: A PRACTITIONER'S GUIDE TO THE LEADING TAX HAVENS OF THE WORLD (Adrian Ogley, ed.) 12 (1990, 1st ed.) ("a progressive tax haven will also try to ensure that it attracts a diversity of work …so as not to be vulnerable to changes in legislation.").

[247] *See, e.g.*, Freyer & Morriss, *supra* note 23, at 1333 (noting key role of British lawyers in development in Cayman).

lawyers were trained at the University of the West Indies law school, receiving an education in the British tradition.[248]

3.3. Meeting Demand for New Business Entities

A key reason offshore business entities law developed because of the failure of onshore jurisdictions to innovate sufficiently or quickly enough to meet the needs of investors and businesses adapting to a global economy. Given that using an IFC incurs additional transaction costs, the demand for IFC business entities is a consequence of the failure of onshore jurisdictions to offer a means of accomplishing the same end at a cost approximating that of making use of the offshore jurisdiction.

The initial demand for IFC business entities was for relatively simple corporate entities to hold assets to allow tax arbitrage transactions, something for which onshore jurisdictions could not provide complete substitutes for their own citizens but for which they too could have played the role of the offshore jurisdiction in at least some circumstances.[249] For example, through 1965 forming a small corporation to own an existing business was a tax strategy within the UK as a means to avoid surtax by retaining profits within the company, transform unearned income (profits) into earned income (directors' fees), and avoid death duties by distributing shares within the family.[250] Once such a strategy was part of the domestic tax planning arsenal, it was only small step to considering forming an entity offshore.

These entities did not require complex structures or much internal governance – they were often simply vehicles to legally locate revenue streams or assets in the lower tax offshore jurisdiction. Because the United States moved early against them with its creation of "controlled foreign company" tax legislation ("Subpart F") in 1962,[251] much of this business involved UK-tax-resident individuals seeking to move assets out of the UK as tax rates climbed steeply to pre-Thatcher highs, in some cases, of 98%.[252] However, U.S. tax authorities worried that Caribbean bearer share entities in particular were being used to evade U.S. taxes, although these were schemes based on illegal failures to pay tax, not legal avoidance strategies, as were possible for UK taxpayers.[253]

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[248] Phillips, *supra* note 203, at 129-30 (noting key role of James Pearman, a Bermuda lawyer educated at Oxford); Kawaley, *Legal Development, supra* note 71, at 5 ("Most offshore jurisdictions, like Bermuda, have neither law faculties nor law schools, although the Commonwealth Caribbean is served by a regional university…").

[249] Grundy, 1997 edition, *supra* note 14, at 153 ("The function of most offshore companies, however, is to hold assets and derive income and capital gains from them."). Note that Britain and the United States have, and still, play this role for non-domestic taxpayers in many respects. *See* Offshore Protection, *International Offshore Jurisdiction Review – UK as a Tax Haven* (Jan. 28, 2023) available at https://www.offshore-protection.com/united-kingdom-tax-havens; Ana Swanson, *How the U.S. Became One of the World's Biggest Tax Havens,* Wash. Post (April 5, 2016) available at https://www.washingtonpost.com/news/wonk/wp/2016/04/05/how-the-u-s-became-one-of-the-worlds-biggest-tax-havens/.

[250] Hadden, *supra* note 173, at 40.

[251] Rexford R. Cherryman, *The New 'Subpart F' Foreign Income Provisions of the Internal Revenue Code,* 4 WM. & MARY L. REV. 172 (1963). This "relatively obscure and highly technical part" of the tax code touched "only a few taxpayers who happen to be engaged in certain bizarre financial maneuverings abroad" using "foreign 'tax havens'," particularly Switzerland. Id. at 172-73.

[252] Martin Daunton, JUST TAXES: THE POLITICS OF TAXATION IN BRITAIN, 1914-1979 337 (2002).

[253] Statement of William J. Anderson, Director, General Government Division, General Accounting Office, in TAX EVASION THROUGH THE NETHERLANDS ANTILLES AND OTHER TAX HAVEN COUNTRIES, HEARINGS BEFORE A

The simple holding company model made the English architecture especially useful as it reassured their owners that the directors they appointed in a faraway jurisdiction would remain under shareholders' control. However, despite periodic efforts to modernize English company law, there were problems with using English law for these purposes. Perhaps most important was the complexity of a body of law that had to cover publicly traded companies as well as sole owner holding companies. This is not a problem only for English company law, "[u]ntil recently, European countries were not eager or even likely to adopt statutory innovations to their corporate law regimes" due to a lack of incentive resulting in "creation of inefficient legal codes and a paucity of limited liability business vehicles."[254] The IFCs attracting this business thus began with English law and simplified it for offshore companies, giving them an advantage over UK and European company law.

For example, the English Companies Act 1948 had divided the "private company" created by the Companies (Consolidation) Act 1908 (which had to have fewer than 50 members, restricted share transfer rights, and no invitation to the public to invest) into exempt and non-exempt versions through an "elaborate definition" of exempted companies. These became the only companies with "the two most important advantages accorded to private companies, namely, freedom from the obligation to file accounts and permission to make loans to directors."[255] The resulting "complexity of the definition" produced "unfair and capricious results" and the distinction was abolished by the Companies Act 1967, which also ended the right to make loans to directors that small companies had had and added a requirement for filing annual accounts for "[a]ll companies however small."[256] Those jurisdictions whose company laws derived from pre-1967 or which had made adjustments thus retained the ability to register companies which did not need annual accounts and could make loans to directors, both attractions for some offshore incorporators.

For many jurisdictions, modernizing their company tax law was the starting point for their offshore financial sector. For example, Grundy concluded that "Gibraltar became firmly established as a tax haven with the passing of legislation in the shape of the Companies (Taxation & Concessions) Ordinance, which grants income tax and estate duty concessions to companies incorporated in Gibraltar and registered as 'exempt' as provided in the Ordinance."[257] Many IFCs began with company acts that were either well out-of-date or nonexistent. For example, BVI's entry in Grundy's 1969 guide to tax havens noted that the "most suitable vehicle" was a company formed under BVI's 1885 Company Law, which was patterned on English law from that period and remained the vehicle for offshore companies until BVI created the IBC act in 1984[258] while the Cayman Islands, which had not even had a company law until

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SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, APRIL 12 AND 13, 1983 9 (1983) (Treasury "suspects that U.S. citizens are taking advantage of the anonymity provided by the Antilles bearer share companies to evade U.S. taxes.").

[254] McCahery, *supra* note 141, at 2-3.

[255] Gower, GOWER'S PRINCIPLES, *supra* note 181, at 13. *See also* Hadden, *supra* note 173, at 151-52 (describing extension of requirement of filing accounts to all English companies in 1967).

[256] Gower, GOWER'S PRINCIPLES, *supra* note 181, at 14.

[257] Grundy, 1972 edition, *supra* note 202, at 53-54.

[258] TAX HAVENS: A WORLD SURVEY (Milton Grundy, ed.) [1st edition] 32 (1969); Grundy, 1987 edition, *supra* note 53, at 29.

1960, modelled its law on the 1948 English statute.[259] Similarly, Guernsey and Jersey's company laws were based on the English 1861 statute until they modernized them in the 1980s and 1990s;[260] Hong Kong's on the 1929 statute with "some of the 1948 Act amendments;"[261] the New Hebrides (later Vanuatu) on a mixture of the 1948 English statute with the 1967 English statute and regulations from the Bahamas;[262] and Gibraltar's on the 1929 English statute (and not updated until 2000).[263]

Even those with more well-developed statutory regimes had problems as bad or worse than England's in terms of the lack of ease of use (e.g. Bermuda, which passed eight separate acts dealing with companies between 1923-1970, "all of which must be read together,"[264] and required separate legislative action for each new entity until 1970).[265] For most jurisdictions launching offshore financial sectors in the 1960s and 1970s, simply having a company law was sufficient to enable them to start attracting business if they could (a) offer a low-tax or tax-neutral environment, (b) had modern communications and transportation infrastructure, and (c) were able to communicate their advantages to prospective customers. Even requiring the paperwork to be completed in Dutch under a statutory regime for which there was no official English-language translation was not a sufficient obstacle to the Netherlands Antilles becoming a major offshore center for U.S. businesses in the 1960s and 1970s given that that jurisdiction could use the extension of the Netherlands-United States tax treaty to give U.S. businesses access to the cheaper capital available in Eurocurrency markets.[266] For such straightforward transactions, having low transactions costs from cookie cutter entities and an efficient services sector was enough to overcome even the disadvantage of a language barrier and unfamiliar (and, to some extent, unknowable without mastering Dutch) legal environment.

The Netherlands Antilles aside, there was an opening for IFCs to develop business entities laws that further reduced transaction costs and having a more sophisticated company law became a competitive advantage. Grundy's 1987 review, for example noted that Bahamas company law "was not so sophisticated as those of the Cayman Islands."[267] IFCs were helped in that some of the onshore competition was getting worse: By the end of the twentieth century, even the British government admitted that English companies law had become so complex that

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[259] Freyer & Morriss, *supra* note 23, at 1314-16; Grundy, 1997, *supra* note 14, at 36.
[260] Grundy, 1983 edition, *supra* note 7, at 52 (Jersey modernizing company law); 55 (both islands' laws based on 1861 English law); Guernsey Legal Resources, *Orders in Council* available at https://www.guernseylegalresources.gg/CHttpHandler.ashx?documentId=81399 (Guernsey modernization of law in 1990).
[261] Grundy, 1969 edition, *supra* note 262, at 61.
[262] Grundy, 1972 edition, *supra* note 202, at 142-43.
[263] Id. at 53 (origin of Gibraltar statute); IMF, *Gibraltar: Assessment of the Regulation and Supervision of Financial Services* 50 (Oct. 2001) available at https://www.imf.org/external/np/ofca/2001/eng/gbr/103101.pdf (updating). Note that Gibraltar's original appeal for company registration came from the Companies (Taxation & Concessions) Ordinance, which was repealed in 2010. https://www.gibraltarlaws.gov.gi/legislations/companies-taxation-and-concessions-act-222. Grundy, 1983 edition, *supra* note 7, at 93 ("Gibraltar became firmly established as a tax haven with the passing of the Companies [Taxation and Concessions] Ordinance, which grants income tax and estate duty concessions to companies incorporated in Gibraltar and registered as 'exempt' as provided in the Ordinance.").
[264] Langer, *supra* note 236, at 147.
[265] GRUNDY'S TAX HAVENS: A WORLD SURVEY (Milton Grundy, ed., 3rd ed.) 15 (1974).
[266] Boise & Morriss, *supra* note 117, at 380-81.
[267] Grundy, 1987 edition, *supra* note 53, at 6.

"companies and their directors cannot clearly identify and understand their legal responsibilities."[268] Problems included "over-formal language," "excessive detail," "over-regulation," and "complex structure."[269] Even features that should have been transaction cost reducing, such as the default model memorandum and articles of association provided the English acts, were "written in technical, legalistic language" rather than "Plain English".[270]

Offshore jurisdictions took advantage of these flaws to offer versions of English law better suited to particular markets, which often meant simplifying the laws inherited from England. For example, "[i]n 1981, Turks and Caicos overhauled its company and banking laws, and rapidly acquired a reputation for quick and cheap incorporation in the context of what are essentially English laws and institutions."[271] Other IFCs pioneered new business forms. For example, Gibraltar combined the English company limited by guarantee with the company limited by shares to create the "hybrid company" with both guarantors and shareholders, which had "a number of advantages, both fiscal (*e.g.* in replicating the features of the discretionary trust without coming within provisions directed at offshore trusts) commercial (notably in structuring the ownership of time-sharing) and legal (especially in overcoming the 'forced heirship' rules of civil law countries)."[272]

IFCs were also more agile than Britain at regularly updating their laws and creating new business forms with governments "anxious to bring their own jurisdictions a share – or a greater share – in the offshore boom".[273] For example, the Cayman Islands Companies Act 2023 consolidation lists 65 amendments to the law since 1962 as well as 4 additional non-statutory instruments affecting it; Bermuda's Companies Act 1981 has been amended 87 times through 2023.[274] This is on a par with Delaware's 70 amendments to its General Corporate Law since 1980.[275] Some of these amendments added entirely new business entities to the law (e.g. segregated portfolio companies)[276] or new regulatory requirements (e.g. beneficial owner registries).[277] In total, amendments increased the Cayman statute from roughly 20,000 words in 1961 to almost 85,000 words in 2023.[278] This is a substantial increase but even the most recent version is still less than 14% of the length of the June 2023 compilation of the English Companies Act 2006's more than 620,000 words. Similarly, the 2023 compilation of Bermuda's

[268] Board of Trade, *supra* note 29, at 6.
[269] Id. at 6-7.
[270] Id. at 6.
[271] Grundy, 1987 edition, *supra* note 53, 87.
[272] Grundy, 1993 edition, *supra* note 25, at 41.
[273] Grundy, ESSAYS, *supra* note 99, at 34
[274] Cayman Islands, Companies Act (2023 Revision), *Publishing Details*, 2 available at https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/1961/1961-0003/CompaniesAct_2023%20Revision.pdf; Bermuda Companies Act 1981, 1981: 59, at 251-53 available at http://www.bermudalaws.bm/laws/Consolidated%20Laws/Companies%20Act%201981.pdf.
[275] Calculated by searching Delaware session laws on Westlaw with the search: ("Title 8" & DA(aft 01-01-1980) & SU("Title 8")) on July 4, 2023.
[276] The Companies (Amendment) (Segregated Portfolio Companies) Law 1998.
[277] Companies (Amendment) Law 2017; Beneficial Ownership (Companies) Regulations 2017.
[278] Calculated by the authors by copying statutory text from the PDFs of the statutes available into Word documents and using Word's word count feature. This likely slightly overstates the number of words in each statute to the extent it includes header and footer information, etc.

1981 statute and its amendments is only just over 100,000 words, less than a sixth of the English act's length.

Further, while the IFCs were simplifying English law, English law was becoming more complex: Companies Acts went from 462 sections and 18 schedules in 1948, to 747 sections and 25 schedules in 1985, to 1,300 sections and 16 schedules in 2006 even as the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 moved material from the Companies Act to separate statutes and "most of the schedules in the earlier Acts" were moved to "regulations in statutory instruments."[279] Complexity is costly, since it increases the risk people will mistakenly act in ignorance of a provision. For example, in *Re Bradford Investments plc (No 2)* four individuals mistakenly transferred their business to a public company in return for shares in the acquirer without realizing that a part of the statute required an independent report on the value of the business. Two years later, the acquirer (under new management) sued for the issue price of the shares. Since they did not have a valuation as required by the statute, the court ordered them to pay over £1 million.[280]

English company law contains many criminal sanctions for violations of various provisions, which is recognized as a problem. In the review leading up to the 2006 Act, the Department of Trade and Industry noted that "it is commonly suggested that the existing Companies Act too readily invokes criminal penalties, when civil remedies would be more appropriate."[281] However, the Company Law Steering Group rejected the idea of changing this and instead recommended higher penalties and new offenses.[282] The Cayman Islands Companies Law, by contrast, contains only a few criminal penalties, all connected with either fraud or failure to comply with the beneficial owner registry requirements.[283] Similarly, Bermuda's statute includes criminal penalties only for falsifying statements and books, failing to make required statements, and inappropriate exercise of voting rights after being required to divest shares by a court order.[284]

A comparison of Cayman's company law in 1961 to its source in the English Companies Act 1948 and the Cayman law in 2023 with English law in 2023 provides a useful case study of the differences. The 1961 statute is relatively short (106 sections compared to 279 sections in 2023, with the 2023 statute also containing 7 schedules). Some things have been simplified. For example, the 1961 law has a complex section (taking 2 pages of text) explaining the reasons and processes for a company to change its memorandum of association.[285] The 2023 revision needs only a single sentence to authorize such changes.[286] Other things have become more complex: the 1961 statute contains just 8 definitions, while the 2023 revision has 33, including a list of 11

[279] French, *supra* note 153, at 13.
[280] Id. at 13. *Re Bradford Investments plc (No 2)* [1991] BCLC 688. The relevant statutory provision was CA 1985 s 103, now CA 2006 s 593.
[281] Quoted in French, *supra* note 153, at 16.
[282] French, *supra* note 153, at 16.
[283] Cayman Companies Act 2023 revision, secs. 19 (concealment of creditor names), 134-37 (fraud in winding up), 173 (false declaration of exempted company), and 274—77 (beneficial ownership registry).
[284] Bermuda Companies Act 2023 revision, sec. 116, 244, and 277.
[285] Cayman Islands Company Act 1961, sec. 8.
[286] Cayman Islands Company Act 2023 Revision, sec. 10.

other statutes that are "regulatory laws" within the Companies Act's meaning.[287] Some of the new provisions deal with changes from outside Cayman (37 sections dealing with the externally imposed obligation to establish a beneficial ownership register, for example), while others reflect new entities created by Cayman (15 sections on segregated portfolio companies, for example).

There remain vast swaths of the English statute which simply have no analogous provisions even in the 2023 version of the Cayman or Bermuda statutes. For example, the English 2023 compilation includes 27 sections dealing with company names, including five dealing with details of changing names.[288] The 2023 Cayman statute merely requires some specific words in particular types of companies' names (e.g. "limited") and gives general powers to the registrar with respect to names in general.[289] Bermuda limits the use of particular words (e.g., "municipal" and "chartered") and gives the Registrar the power to reject "undesirable" names or names to similar to other companies[290] as well as providing some broad powers to the Registrar regarding name changes.[291] Similarly, the English statute provides considerable detail on directors, with over 100 sections on directors' duties, appointment, removal, their registration, etc., while the Cayman statute has fewer than 30 analogous sections, focused primarily on procedural matters.[292] Bermuda's statute has fewer than 20 sections directly addressing directors' roles, also mostly focused on procedural matters.[293]

The English statute provides elaborate rules severely limiting (with criminal penalties) a company's acquisition of its own shares, allowing it only where capital is being reduced, a court has ordered it to do so, or where a shareholder has surrendered shares for failure to pay for them.[294] Cayman, by contrast, has a single, admittedly lengthy, section which allows a company to purchase its own shares if it is authorized to do so by its articles of association or a resolution of the company, the shares are paid up, and there will still be remaining shares outstanding.[295] (The Cayman statute's prolixity on this issue is due to considerable detail about the process and provisions relating to the impact of an insolvency or winding up of the company on share repurchases.) Bermuda similarly permits companies to purchase their own shares if their memorandum or by-laws authorize it, with a variety of restrictions akin to Cayman's.[296]

Of course, not all IFCs were more adept than Britain in updating their laws. For example, Hong Kong's company statute was, according to Grundy in 1972, "often less restrictive" than English law also "frequently less up to date."[297] Not until his 1983 edition did he drop the

[287] Cayman Islands Company Act 1961, sec. 2; Cayman Islands Company Act 2023 Revision, sec. 2.
[288] Part 5, Chapter 5, secs. 77 to 81.
[289] Cayman Companies Act 2023 revision, sec. 30 (restrictions on names), 31 (change of name), 52 (publication of name), 53 (nonpublication), and 80 (nonprofits able to not include "limited").
[290] Bermuda Companies Act 2023 revision, sec. 8.
[291] Bermuda Companies Act 2023 revision, sec. 9, 10, 10A.
[292] English 2023, secs. 154-259; Cayman 2023 secs. 63-69, 71-87. Some other sections (e.g. section 96) mention directors but are not primarily about directors.
[293] Bermuda Companies Act 2023 revision, sec 91, 91A, 91B, 92A, 92B, 93, 94, 95, 96, 156N,
[294] English 2023, secs. 658-659. *See also* French, *supra* note 153, at 250-52 (on development of the English rule).
[295] Cayman 2023, sec. 37.
[296] Bermuda Companies Act 2023 revision, sec. 42A
[297] Grundy, 1972 edition, *supra* note 202, at 64-65.

criticism of the law as a result of "very substantial amendments" then under discussion,[298] which suggests there was an impact of competitive pressures on Hong Kong.

An important factor in the development of offshore business entities law has been the engagement of many of the jurisdictions with practitioners about the substance of the business entities laws. One of us documented elsewhere the collaborative relationship between the Cayman government, the regulator, and the financial community in creating the laws undergirding the Cayman financial sector.[299] This is not unique to Cayman. The BVI legislative draftsman similarly engaged with practitioners in creating the IBC Act;[300] in Turks and Caicos "the Government took the views of a number of practitioners in the international tax planning field" and hired a Bermuda law firm to draft its 1981 Companies Ordinance.[301]

This engagement has sometimes resulted in the creation of new business entities. For example, the creation Guernsey's Protected Cell Company and its subsequent expansion around the world is illustrative and involves events in four jurisdictions. Steve Butterworth, an accountant working as an insurance regulator in Cayman in the early 1980s, noticed some association captive members spent considerable effort (and attorneys' fees) attempting to contractually insulate themselves from liability for other group members' actions.[302] He began to think about how this might be done more efficiently via statute: "The thought was of a company that had separate parts, with statutory force, each protecting a block of assets from the liabilities of the other parts, whilst still being a single legal entity."[303] When Butterworth moved to a regulatory position in Guernsey he continued to mull over the idea. After an initial failed effort with one lawyer to produce a draft statute, Nik van Leuven, a local advocate, produced a draft that accomplished Butterworth's goals.

> When I read his draft, I was delighted, as it was very user-friendly and very much how I had imagined the concept, with one remarkable exception. I had not envisaged that individual cells would be able to issue 'cell shares'. Was this consistent with the concept of the 'single legal entity'? I had always considered that the cell participants would receive their profits back by way of return premiums or even by way of loans, but I was thinking only of insurance operations and was persuaded that having the ability to have cell shares, and thus pay dividends, was the only way that the legislation would be acceptable to potential participants.[304]

Most importantly, Butterworth now saw that the "the legislation was an extension of company law," and so, "as an ex-practitioner in offshore company management, I could envisage myriads

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[298] Grundy, 1983 edition, *supra* note 7, at 106.
[299] Freyer & Morriss, *supra* note 23, at 1395-96.
[300] Lewis Stephenson Hunte, MEMOIRS OF A CARIBBEAN LAWYER: THE AUTOBIOGRAPHY OF LEWIS STEPHENSON HUNTE, QC 180-92 (2018) (describing drafting of statute).
[301] Milton Grundy, THE WORLD OF INTERNATIONAL TAX PLANNING 64 (1984) (took views); Langer, *supra* note 236, at 132.
[302] Steve Butterworth, *Foreword to the First Edition* in Nigel Feetham & Grant Jones, PROTECTED CELL COMPANIES: A GUIDE TO THEIR IMPLEMENTATION AND USE xv-xvi (2nd ed.) (2010).
[303] Id. at xvi.
[304] Id. at xvi.

of opportunities, especially in the asset management sector."[305] His insight was correct and the use of the PCC quickly spread from insurance to funds and securitization, for example.[306]

Meanwhile in Bermuda, something similar was possible via private legislation for specific captives since 1992, derived from Bermuda's pre-registration method of creating companies via private acts.[307] Guernsey adopted Butterworth's innovation in 1994 and it quickly spread to other IFCs, including Bermuda in 2000. Guernsey's speed in adopting and expanding the idea was important to its success in the cell captive market.[308] In 2006, Jersey took the next step in the development of the concept and introduced the incorporated cell company, in which the barriers between cells were strengthened by incorporating each cell separately , giving them legal personality and the ability to contract with one another (with some increase in the transaction costs, of course). This innovation also spread rapidly.[309]

The rapid spread of the PCC was important to its acceptance. When only Guernsey had it, there were concerns "whether Courts in other jurisdictions would accept the structure or set it aside, especially in cases concerning PCC debts and assets in other jurisdictions."[310] To address these, Guernsey consulted with a leading UK lawyer and, on his advice, "amended the legislation to make clear that the provisions as to limitation of liability are, under the rules of international law, substantive and not merely procedural. The authorities believe that the legislation, as amended, will be effective in protecting the assets of individual cells from the liabilities of other cells."[311] Once it had been accepted by multiple jurisdictions, PCCs began to replace contractual cell structures in both insurance and funds.[312]

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[305] Id. at xvii.

[306] Feetham & Jones, *supra* note 302, at 105. It is also useful "in international transactions where investing in a single corporate entity, via separate classes of shares with differing investment objectives and to which specific assets are attributed, is essential." Id. at 110.

[307] Warren Cabral, Neil Horner, & Maryssa Gabriel, *Insurance Law* in OFFSHORE COMMERCIAL LAW IN BERMUDA (Ian R.C. Kawaley, ed.) (2nd ed.) 91 (2018). *See also* Jennifer Fraser & Claudia Jackson, *Winding Up Companies under Bermuda Insolvency Law* in OFFSHORE COMMERCIAL LAW IN BERMUDA (Ian R.C. Kawaley, ed.) (2nd ed.) 395 (2018) ("It had been considered desirable to segregate companies in this way for some time and contractual segregation was used mainly in the context of insurance companies for a lengthy period of time during the 1970s and 1980s, particularly in the captive insurance market. These structures did not succeed in segregating assets and liabilities in the event of insolvency and, subsequently, in the 1990s many private Acts of Parliament were introduced providing for legal segregation of assets and liabilities. Initially these were used almost exclusively in the insurance context but have become very common vehicles for mutual funds, especially following the introduction of the SACA 2000.").

[308] Feetham & Jones, *supra* note 302, at 69.

[309] Morriss & Ku, *Pioneers*, *supra* note 50. Accomplishing this requires more than a little statutory language. Guernsey's PCC statute contained over 6,500 words; Bermuda's version (termed the segregated account company) over 16,000 words; and Jersey's combined PCC/ICC statute over 25,000 words. Cayman's version of the PCC, the segregated portfolio company, added over 3,500 words to Cayman's Companies Act, almost 5% of the amended statute's total word count.

[310] Feetham & Jones, *supra* note 302, at 1.

[311] Id.at 2.

[312] Id. at 14-15 (describing conversion of a Gibraltar contractual cell created in 1996 to a PCC in 2007). The PCC structure was superior to its prior contractual alternative because it was readily enforceable against third party creditors. Id. at 13.

Feetham and Jones argue that the English law heritage (an even broader version of what we have called English-architecture) of the jurisdictions adopting the PCC structure was important:

> The prevalence of the use of English law as the governing law of certain types of insurance policies even where the risk is not situated in the UK has also historically attracted cell companies looking for contract certainty to the English legal system. Therefore it is common for a contractual cell captive to be incorporated in one jurisdiction (say, Guernsey or Gibraltar) but for the contracts between the parties (including the shareholders agreement) to be governed by English law.[313]

A second key role for the English architecture of Guernsey's PCC statute gave it an advantage over the Delaware series LLC, a functionally similar entity introduced through a statute a short time before the Guernsey statute. Just as the PCC allowed separate cells within an overall company structure, reducing transaction costs by requiring only a single entity, the Delaware statute allowed less expensive "series LLCs" within an overall LLC structure.[314] However, Delaware kept the series concept restricted to LLCs rather than extending it to other forms of business entities, restricting its marketability outside the United States, where the LLC had not yet spread.[315] Feetham and Jones also note that there are similar entities under French (*fonds communs de créances*), Irish (investment fund), Italian ("dedicated assets to a specified activity"), and Luxembourg law (*Société d'Investissement à Capital Variable*).[316] That none of these European entities (except Luxembourg's, in funds) have successfully competed with the PCC is, we think, further evidence of the advantages of the English company law architecture as refined by IFCs.

Over time, offshore business entities law thus provided two important innovations. First, in many instances, jurisdictions simplified English law, making it more suitable for particular classes of transaction by reducing complexity or by eliminating features not required for the type of transactions it sought to attract. For example, an entity created to hold the assets for a securitization transaction needs certainty over who controls it and affirming its bankruptcy remoteness from the original source of the assets but does not need extensive rules on disclosures to shareholders. Similarly, Grundy praised BVI's IBC act as "lucid and brief" while still providing "enough statutory powers" for company "to enable its memorandum and articles to be short."[317]

Second, sometimes offshore law provided a new entity not available elsewhere, and a clear framework for its operation was required to avoid transaction costs for those adopting it. For example, because onshore jurisdictions initially (and still, in many cases) lack an equivalent

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[313] Id. at 12.
[314] Jeffrey Simpson & Andrew Rennick, *The Series LLC and Captives – A Brief History*, CAPTIVE REVIEW 38 (March 2017) available at https://www.gfmlaw.com/sites/default/files/pdfs/P1%20Series%20LLC%20and%20Captives%20-%20A%20Brief%20History.pdf.
[315] Feetham & Jones, *supra* note 302, at 52. Delaware adopted its own PCC legislation in 2005 and continues to offer both entities. Id. at 52. 6 DE Code §18-215.
[316] Feetham & Jones, *supra* note 302, at 319.
[317] Grundy, 1987 edition, *supra* note 53, at 18.

to the protected cell company, developing more explicit provisions on accomplishing asset segregation within an entity provided a competitive advantage offshore.[318] It also helped Guernsey move up the value chain in IFC services from brass plate entities, since "a PCC is a very special creature and such companies therefore require special attention. … [T]he benefits of statutory segregation of liabilities in a PCC will not occur automatically simply because a company is incorporated as a PCC. It must also be managed and conduct its affairs in accordance with the terms of the operating legislation."[319] In these cases, however, IFCs did not write on blank slates but used their English company law architecture as a starting point.

3.4. Entrepreneurs

In many cases, IFC developments occur as the result of both private and public sector policy entrepreneurs. Jersey's transition from tax haven to IFC is due in significant part to Colin Powell, author of the 1971 report on Jersey's economy which outlined a strategy for developing the finance sector and who served as States Economic Advisor for over forty years.[320] The Cayman Islands development from mosquito-ridden "islands that time forgot" into a major IFC resulted from multiple collaborations, most notably between a group of English lawyers at law firms in Cayman, Sir Vassel Johnson, who served as Financial Secretary from 1965 to 1985, members of the Legislative Assembly, and the UK government.[321] Bermuda's success as an IFC owes a great deal to a small group of bankers and lawyers, as well as to the good fortune to have a banker's letter to *The Times* published in November 1956 pointing out the value of registering oil tankers in Bermuda.[322] The BVI IBC Act owes its origins to Lewis Hunte, then BVI's attorney general, and his work to learn what lawyers' clients needed, as well as to understanding the demand from abroad for a new business entity.[323]

The most successful jurisdictions continue to benefit from the efforts of policy entrepreneurs. Bermuda's insurance industry is widely attributed to the efforts of Fred Reiss, an American insurance manager who helped create the captive insurance industry there[324] and its

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[318] *See* Bickley, *supra* note 52, at 366-69 (describing characteristics needed for SPV and not including disclosures).
[319] Feetham & Jones, *supra* note 302, at 85.
[320] Government of Jersey, *Colin Powell CBE* (May 13, 2019) available at https://www.gov.je/News/2019/pages/colinpowellcbe.aspx ("When Colin's report appeared in 1971 it was clear that he had delivered much more than the brief; not only a detailed examination of the Jersey economy, but a blueprint for its future development."); G. Colin Powell, ECONOMIC SURVEY OF JERSEY (1971).
[321] Michael Craton, FOUNDED UPON THE SEAS: A HISTORY OF THE CAYMAN ISLANDS AND THEIR PEOPLE 253 (2003); Freyer & Morriss, *supra* note 23, at 1306.
[322] Phillips, *supra* note 203, at 128 ("A letter in *The Times* appeared in November 1956, complaining that under present restrictions British shipping was unable to compete in the oil tanker field with American and Greek ship owners using Panamanian and Liberian flags of convenience. David Graham's letter pointed out that Bermuda was 'British' and had at the ready Bermudian companies to provide for the competitive spirit of English owners. A flood of enquiries and a direct approach to the Treasury by Graham brought Pat Fitzpatrick over to London on behalf of the Bermuda Government. Bill Kempe and Graham were in attendance to provide a legal fine-tuning to an agreement whereby a form of shipping different to that carried in the United Kingdom would be considered as new business abroad and not a transfer of existing shipping, something at which the Treasury balked.").
[323] Colin Riegels, *British Virgin Islands: A Tough Act to Follow,* Mondaq (July 20, 2014) available at https://www.mondaq.com/offshore-financial-centres/327334/a-tough-act-to-follow. *See also* Hunte, *supra* note 300.
[324] Phillips, *supra* note 203, at 146 ("Credit for the Island's primacy in this field [captives] belongs to Fred Reiss, who set up a captive insurance management company in 1962 …."). Reis initially came to Bermuda as part of his efforts to secure insurance for a Youngstown, Ohio manufacturing client. He had approached Lloyd's of London about an insurance policy but was told Lloyd's would only deal with an insurer. After finding creating an insurance

post-1994 major role in reinsurance to the founders of the "Class of 1992" specialty reinsurers.[325] The Jersey bar collaborated with the government and regulator to create the Trust Law (Jersey) 1984 (the first substantive comprehensive trust statute and quickly copied by other jurisdictions) and continues to do so to keep it up to date.[326] Guernsey's pioneering protected cell company (PCC) was the result of a collaboration between Butterworth and van Leuven, an accountant and lawyer respectively.[327] Cayman's STAR trust and BVI's VISTA trust are both the result of private sector policy entrepreneurs who saw opportunities for expanding their jurisdictions' lines of business.[328] In each case where we have been able to trace the history of significant developments in successful IFCs, we have found a policy entrepreneur playing a critical role. This is also true within the United States, where jurisdictions like Vermont which provide considerable jurisdictional competition in areas like captive insurance owe their entries into those fields to the persistence of policy entrepreneurs and exit-affected interests.[329]

These policy entrepreneurs are incentivized to pursue initiatives when they can use a *lingua franca* that fits easily into the architecture of a jurisdiction's legal system to accomplish their goals. English company law provides that common language, as can be seen by the incorporation of pioneering new business entities' statutory language into company laws; Cayman, Guernsey, and Jersey have all located or moved their versions of protected cell companies into their general company laws. Selling new ideas outside the jurisdiction also becomes easier when they are built on an architecture that is established, recognized, and understood. Here the early experience with brass plate companies smoothed the way for later, more complex entities, since the potential clients' lawyers in London, New York, or elsewhere were already familiar with these jurisdictions.

3 Conclusion

This study began as an effort to understand the scope and depth of English company law as a global phenomenon serving as a foundation for companies' laws around the world. It soon became clear that its significance surpassed the initial influence English company law would naturally have had in jurisdictions that had been part of the British empire. It further became clear that English company law provided more than a point of entry for jurisdictions seeking to

company in the U.S. too difficult, he set one up in Bermuda to serve as a captive to reinsure with Lloyd's. Cabral, Horner, & Gabriel, *supra* note 307, at 97-98.

[325] Gavin Souter, *Andrew Made Bermuda a Global Center for Property Reinsurance*, Business Insurance (July 12, 2022) available at https://www.businessinsurance.com/article/20220712/NEWS06/912350962/Hurricane-Andrew-made-Bermuda-a-global-center-for-property-reinsurance-Florida.

[326] *See* Paul Matthams, *A Question of Trust: Jersey and Guernsey Trust Law Evolves*, IFC REVIEW (June 1, 2013) available at https://www.ifcreview.com/articles/2013/june/a-question-of-trust-jersey-and-guernsey-trust-law-evolves/ ("When first enacted Jersey's principal trust legislation, the Trusts (Jersey) Law 1984, was considered to be innovative and far reaching and it formed the model for similar statutes in a number of other jurisdictions…."); Morriss, *Hastings-Bass*, *supra* note 244.

[327] *See* note 302 *supra*.

[328] *See* Anton Duckworth, *STAR Trusts*, 19 TRUSTS & TRUSTEES 215 (2013).

[329] Vermont, Department of Financial Regulation, *Vermont Recognizes Pioneer of Captive Industry* (Feb. 22, 2021) available at https://dfr.vermont.gov/press-release/vermont-recognizes-pioneer-captive-industry ("Vermont is considered by the captive industry to be the 'Gold Standard' due to the expert regulatory staff, the vast infrastructure of service providers in Vermont, and the strong support of the legislature, all of which can be attributed to the work and vision of George Chaffee," said Deputy Commissioner of Captive Insurance, David Provost.").

join the global market. It served as a pathway for doing so, but crucially also provided these jurisdictions with opportunities to develop their own products and services that continue to the present day. The study finds that products and services derived from English-architecture company law have an immediate competitive advantage because of the deep and long-standing record and reputation of English company law from the nineteenth century on.

The case law and communities of judges and practitioners familiar with this jurisprudence are an invaluable resource for a jurisdiction developing or marketing a new legal product since it is not starting from a blank slate. Instead, it is building on and adding to a rich and widely recognized body of precedent and experience that has come before. The value of this expertise and jurisprudence is widely acknowledged for jurisdictions like Delaware in the United States, whose leadership in the area of U.S. corporate law relies on the reputation of the Delaware Court of Chancery as a business savvy, sophisticated court.[330] What provides English-architecture company law jurisdictions an ongoing competitive advantage in the global market is their ability to innovate, to legislate, and to market products and services that businesses adopt with confidence in short periods of time. For jurisdiction who share an English-architecture company law heritage, this may also make adopting innovations from another jurisdiction easier or reduce the cost of frictioneering.

The study comes to these conclusions by drawing on four frames for analysis.

1. Examining English company law as architecture that provides "unifying principles"[331] including common concepts and understandings curated over time by generations of practitioners, judges, lawmakers, and regulators.
2. Taking English-architecture company law jurisdictions together as a diverse but distinctive group, the study focuses on the experience of IFCs, less as offshore jurisdictions as differing from onshore jurisdictions than as smaller ones within a larger group of English-architecture company law jurisdictions that saw opportunity for economic advancement and pursued it.
3. Using the concept of the law market as a frame of reference to understand how opportunity is created and exploited to provide choices to meet needs. This includes the role frictioneering plays to lower the transaction costs of scaling up or adopting an innovation.
4. Focusing on the role of the community of practitioners (in law, business, accounting), judges, lawmakers, and regulators to maintain a strong market for their products and services.

The study chose company law as the focus because:

1. It is central to economic development at all levels from the local corner shop to the global multinational.
2. It is common—virtually every jurisdiction in the world has some form of company law.

[330] *See* notes 64-65 *supra.*
[331] Merrill & Smith, *supra* note 6, at 2021.

3. Business entities lend themselves to jurisdictional competition because competition allows entities to choose the law that governs its internal affairs.
4. There is variation in business entity forms and institutions.
5. Business entities have to solve multiple and potentially changing problems of governance, asset management, and obligations to third parties.

The findings here demonstrate how jurisdictions sharing a common legal architecture can maintain not only competitiveness but also responsiveness to the fast-paced changing needs of the global law market. The study focused on IFCs because they have a unique role in the global economy and there is a general lack of academic attention to the role IFCs play in the global economy beyond their role as tax havens.[332] The study examines the contributions IFCs have made to legal innovation and resilience by looking at where they have provided business entities as modes of good governance and engines of development rather than solely tax avoidance mechanisms.[333] The study further provides insight into one of the core global governance challenges today – how to maintain coherence in legal structures and processes and avoid fragmentation as the market exerts pressure to develop responses to the needs of various entities.[334] The need may be more acute today as international organizations like the OECD seek to overcome the fragmentation problem by imposing levels of uniformity to governance and financial responsibility in business entities around the world (albeit in ways that advantage their members over their smaller competitors). The law market will work to weaken or to defeat these policy objectives. The broad governance question raised is whether there is any alternative to a free unregulated market that is not top down imposing some form of homogeneity.[335] This study provides a possible alternative by looking at bodies of law—in this case, business entities law—through the lenses of legal architecture and practice communities.

English company law provides this global architecture for several reasons. It is permissive, leaving to each individual business more freedom to create the rules regulating its internal organization than do most other legal systems. It allows for choice of law to govern an entity's internal affairs. It is scalable with structures suited for everything from large multinational enterprises to single person enterprises. These characteristics are not only important for effective legal development in a diverse and fragmented world, they are well suited to addressing the challenges and opportunities of a global market that requires the agility to respond quickly, the ability to connect to global networks, and scalability.

Importantly, however, we see that legal architecture alone does not make for success in the global law market. It may allow for entry into the market, as we saw with start-up IFCs that used structures to take advantage of favorable tax rules as a way to generate fee revenue. However, as we saw in the cases of Liberia, Panama, and the Netherlands Antilles, generating income through "brass plate enterprises" alone was not enough to move these jurisdictions up the

[332] Moon, *New Competition*, *supra* note 3, at 1405 ("Until now, legal scholars have neglected to consider foreign nations as jurisdictions that compete with Delaware to supply corporate law.").
[333] Morriss & Ku, *Pioneers*, *supra* note 50.
[334] *See* UN International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006) UN Doc A/CN.4/L.682, https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.
[335] *See* Malcolm D. Knight, *Reforming the Global Architecture of Financial Regulation: The G20, the IMF and the FSB*, CIGI Papers No. 42 (September 2014), http://eprints.lse.ac.uk/61213/1/SP-6%20CIGI.pdf

value chain of developing new products and services. What was also needed was the community of practitioners, judges, and regulators that provide the essential human infrastructure not only to support effective and credible implementation of existing law, but also to enhance that law and develop credible solutions for new problems and needs. This community operating within jurisdictions using English-architecture company law can also move or transplant ideas to different jurisdictions with relative ease. This expands the market for products and services by reaching different target populations and keeps it updated through competition.[336]

Craig Simmons argues that the market for IFCs is becoming more competitive with the offshore product becoming "more homogenous than it was two decades ago" with "a narrowing of advantage."[337] However, he notes two areas that may be increasing the room for differentiation. First, as regulatory demands from outside IFCs continue to increase, jurisdictions' responses are differentiating them. Some are falling behind the ever-increasing demands from the OECD, FATF, etc. to build costly regulatory structures that could threaten their viability as financial centers.[338] Others are finding creative ways to demonstrate that they can deliver sound regulation without crushing their ability to innovate.[339] Second, as statutes and regulatory regimes develop greater homogeneity due to competition and outside pressure, the locus of differentiation is shifting to the supporting professional communities and courts. Jurisdictions able to sustain a "creative class"[340] of lawyers, accountants, insurance managers, trust administrators, and other professionals and to continue to staff their judiciaries with the best judges are likely to pull away from the crowd and continue to attract business. As Simmonds himself points out, "high value added services" need "large amounts of specialized human capital and financial innovation" to succeed.[341]

The smaller English-architecture company law jurisdictions bring a particular advantage to generating this human capital. This architecture does so through a culture of learning by doing, allowing business entities law to evolve through case law, repeated early statutory interventions in response to events, and practice.[342] In the smaller jurisdictions, practitioners are more able to see the implications of an approach since they may represent business, investors, and even the government over time. In larger jurisdictions with more specialized bars, practitioners may see only one side of an issue resulting in less robust law or regulation. Where these individuals represent "exit-affected interests" compelled to pursue change in order to maintain their practices, there is considerable pressure and incentive to stay current and

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[336] *See* Alan Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95-106 (1974).
[337] Craig Simmons, *Bermuda: Implications of an Offshore Economy* in OFFSHORE COMMERCIAL LAW IN BERMUDA (2nd ed.). (Ian R.C. Kawaley, ed.) 634 (2018).
[338] *See* Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign against Harmful Tax Competition,* 4 Colum. J. Tax L. 1 (2012); Richard Gordon & Andrew P. Morriss, *Moving Money: International Financial Flows, Taxes, and Money Laundering,* 37 HASTINGS INT'L & COMP. L. REV. 1 (2014).
[339] *See* Charlotte Ku & Andrew P. Morriss, *IFC Regulatory Innovation: Vital to the Maintenance of a Healthy Global Financial Ecosystem,* IFC REVIEW (Jan. 12, 2022) available at https://www.ifcreview.com/articles/2022/january/ifc-regulatory-innovation-vital-to-the-maintenance-of-a-healthy-global-financial-ecosystem/.
[340] *See* RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS, REVISITED 8 (2012). *See also* Ian R.C. Kawaley, *Conclusion* in OFFSHORE COMMERCIAL LAW IN BERMUDA (2nd ed.) (Ian R.C. Kawaley, ed.) 650 (2018) ("another hallmark of offshore commercial law in Bermuda is its creativity.").
[341] Simmons, *supra* note 337, at 632.
[342] *See* note 186 *supra.*

responsive to the market. The power and influence of these individuals may not be readily observable but is palpable if one traces the career paths of prominent business entity innovators around the world both individually and through their corporate or firm affiliations. For individuals working within the family of English-architecture company law, moving to another jurisdiction within the family to pursue opportunity is reasonably seamless because of the shared basis from which company law may work and reliance on a common pool of authoritative jurisprudence emanating from institutions like the Judicial Committee of the UK Privy Council. As we saw in the case of Cayman, some international financial centers gained sophisticated legal talent and expertise when lawyers moved away from London to pursue more interesting and higher value cases.

An important additional factor in maintaining a competitive edge in the global law market is legislative agility. Jurisdictions – large or small – need to be able to respond to needs and changes with some degree of efficiency. Though serving an important starting point, the complexity and glacial pace of legislating English company law (twenty-four years for its last update in 2006) today puts it at a disadvantage. Businesses will incur the additional transaction cost of going to a IFC to find a suitable structure because of the cost of being trapped into obligations that may not be fully clear or are outdated in English company law. As noted, offshore jurisdictions exist because of gaps left by onshore jurisdictions. Large onshore jurisdictions face more competing legislative demands and political pressures making the regular updating of business entities law harder. This is not the case for small jurisdictions like Delaware or IFCs which rely heavily on the income generated by their work with business entities or the financial sector. Compare, for example, the relative number of amendments of the English companies law as compared to Jersey's or Guernsey's laws.

For those seeking entry to the global market, English-architecture company law can supplement efforts to regulate and to channel funds through international institutions by connecting business innovation and product development to international regulation and governance. By doing so, it contributes to economic development by fast tracking the entry of jurisdictions and countries into the global market that either do not have a well-developed system of business law and regulation or wish to maintain and to expand its share of the law market in business entities. For example, the 1994 conclusion of Bermuda's Commission on Competitiveness noted that new industries into which Bermuda would have to move "won't be created by Bermuda, they will be created by individuals in other parts of the world seeking solutions to problems. Bermuda must be prepared to work with those people, to be partners with those people in developing and implementing the solutions to those problems."[343] Developing and implementing those solutions is easier when your tool kit includes the global *lingua franca*.

As successful IFCs know well, the advantage provided by being the first to offer a product or service is short-lived. The value that will drive business to it will be quality of the advisory and support services that can be offered in addition to the structure itself. After all, business entities law with an English architecture is as familiar to investors, particularly institutional investors, as the business entities law of Delaware—the heart of U.S. corporate law—negating part of Delaware's advantage, and the legal environment (courts, lawyers, regulators, etc.) in many IFCs offering an English architecture business entities law is as good or

[343] Stewart, *supra* note 73, at 573 (quoting report).

better than that offered by Delaware. English-architecture IFCs' main margin of competition with Delaware may thus be the specific package of business entities they offer, a margin on which they are capable of competing successfully.

Though competition may become keener, the global market will continue to reward jurisdictions that are able to respond with familiar structures and laws in a timely manner, but tailored to an entity's size, purposes, and needs. As Moon has noted, "corporate law preferences are not uniform for all firms, particularly if we account for firms that operate in markets that are vastly different from that of the United States…"[344] The ability to craft a bespoke solution efficiently and that is backed by existing jurisprudence and common understandings as to rights and responsibilities remains the gold standard for innovation in the law market. Given the intensity and tempo of global developments that demand more and more specialized solutions, it may be vital for us to understand and to replicate the elasticity and resilience that the experience of international financial centers and English-architecture company law provide.

Their experience demonstrates the characteristics of an effective governance model for a global world:

- Authority: The ability to draw on a widely recognized and accepted authority based on long years of collected practice and case law;
- Agility: Legislative and regulatory focus able to respond to opportunities to innovate and to exit affected interests.
- Adaptability: Using architecture that is adaptable to differing solutions.
- Scalability: In the case of business entities, this means reasonable (including cost-effective) solutions for a single person enterprise and major multinationals. It also means finding reasonable regulatory requirements that may differentiate between small and large jurisdictions including working with those being regulated to design appropriate reporting and accountability systems.
- Community: Entrepreneurs, regulators, and government officials working together to maintain a strong ongoing architectural platform to meet immediate needs and for the longer term to meet future needs. Smaller jurisdiction as part of a larger group of jurisdictions sharing an architecture are likely more able to see and to make the practical adjustments based on real world experience and more rapidly reveal weaknesses in any existing or prospective governing or regulatory regime.

In a fast-paced, ever-changing global economy with a dizzying array of known and unknown players, interests, and pressures, the English-architecture company law story tells us that finding the right architecture can harness knowledge and innovation from multiple sources to provide timely responses for collective benefit in an otherwise fragmented and chaotic world.

[344] Moon, *Global Competitiveness*, *supra* note 28, at 1733-34.