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THE DIALOGIC ASPECT OF SOFT LAW IN INTERNATIONAL INSOLVENCY: DISCORD, DIGRESSION, AND DEVELOPMENT

*John A. E. Pottow**

The United Nations Commission on International Trade Law (“UNCITRAL”) is well known for its success in promulgating soft law instruments in the insolvency realm, offering a panoply of practice guides, legislative guides, principles, and, of course, model laws.¹ While not shy about drafting hard law conventions, UNCITRAL does seem to have developed a penchant for the model law “technology” as its preferred vehicle for cross-border insolvency matters.² Model laws occupy a special space in the soft law universe. They certainly seem quite “soft” under most definitions of the term “soft law,”³ at least in their initial stage. But model laws are often drafted with the hope of “hardening” into full domestic law. Thus, it is perhaps better to think of them as exercises of *semi-soft law* or *contingently soft law*.⁴

Moreover, the hard law toward which soft laws ultimately aspire is good old domestic law that binds private citizens, not the creation of an international obligation under, for example, traditional Westphalian statist notions to bind only states *inter se*. Thus, a model law’s contingency is to ripen into what we might think of in the international law sphere as *super-hard law*: binding duties on domestic citizens under municipal law. Furthermore, model laws are not just teleological in their evolutionary trajectory. They also carry the risk that they will never complete their journey. Specifically, they are go-it-alone exercises of faith that one country enacts

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1. See U.N. Comm’n on Int’l Trade Law, A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law (Jan. 2013), <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>.

2. Susan Block-Lieb & Terence Halliday, *Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law*, 42 TEX. INT’L L.J. 475, 479 (2007).

3. Amelia H. Boss, *The Evolution of Commercial Law Norms: Lessons To Be Learned from Electronic Commerce*, 34 BROOK. J. INT’L L. 673, 674 n.9 (2009).

4. Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT’L L. 655, 664 (2009); John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 24 VA. J. INT’L L. 935, 984–88 (2005).

domestically to bind its private actors with no guarantee of reciprocation (and, indeed, no liability precondition of reciprocity) from other states.⁵

Assuming for the sake of this discussion that the model laws promulgated by UNCITRAL are indeed soft laws, we might learn much from studying these instruments to learn how they exploit the unique status of soft law to incrementally advance international cooperation in insolvency.⁶ This would not be the first such analysis. The path-breaking sociological studies of Block-Lieb, Carruthers, and Halliday offer elegant insight into the heterogeneous factors at play in even such seemingly technocratic an international regime as insolvency.⁷ The analysis of this modest Article, however, will bring something new to the table by being the first to tackle an important new development: UNCITRAL's Model Law on Cross-Border Recognition and Enforcement of Insolvency-Related Judgments ("IRJ model law"), which is hot off the presses, having been adopted by the Commission just in the summer of 2018.

In this study, I describe three important articles in the IRJ model law and discuss their development, drawing in part upon my experience as a delegate to UNCITRAL Working Group V. In doing so, I want to situate these developments within the broader discussions of international law and international relations theory regarding soft law. Doing so will both vindicate and puzzle some of the conventional understanding of how soft law instruments tend to function, although some of the conclusions must necessarily be conjectural at this stage.

The literature on international soft law is enormous, and while there is far from uniform consensus regarding such matters as its legitimacy (its "pathology" in Weil's words),⁸ or even its efficacy,⁹ few as a descriptive matter deny its prevalence. Despite these spirited disagreements, some common threads do seem to emerge. One is a consensus that soft law on the

5. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 188–92 (2010). To be precise, the international drafting of a model law by an institution such as UNCITRAL is a two-stage exercise, with risk at both the international and national level. The first (international) risk is that UNCITRAL adopts the law but no country enacts it. The second (national) risk is that described in the text: that an enacting state subjects itself to restrictions that may not be reciprocated by exploitative, free-riding, or simply clueless peers.

6. Pottow, *supra* note 4, at 984–92.

7. Susan Block-Lieb & Terence C. Halliday, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS* (2017); Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1135–02 (2007).

8. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 413 (1983).

9. Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 167–82 (1996).

whole is less costly than hard law and hence, by corollary, easier to enact.¹⁰ Indeed, as others have observed, the less certain the preferences of international policymakers, the more attractive soft law becomes.¹¹ Second, soft law is rarely intended to be static and often serves as a way-station toward hard law (most transparently in the technology of a model law) and thus often anticipates change.¹² Thus, soft law is both comparatively easy and intentionally transient.

Building on this second point, and interweaving one of the more interesting attempts to justify the normative authority of international law, is a Habermasian view that international law in general and soft law in particular has an intrinsically discursive (and recursive) nature.¹³ That is, whatever the transparency of an international norm's origination, its ultimate justification comes through contestation and debate in the international public space. From this, I draw the conclusion (shared by Chinkin and others) that a principal attribute of soft law is an intentionally inchoate character, where it deliberately seeks to be dialogue-provoking.¹⁴ In short, soft law instruments seek to further a conversation about evolving international norms in a context where there is not yet uniform consensus; intentionally, their softness allows for flexibility and, in terms of Abbot and Snidal's axes of commitment, precision, and obligation, for further development along various "pathways."¹⁵

10. Guzman & Meyer, *supra* note 5, at 177.

11. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int'l Org.* 421, 441–44 (2000).

12. C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *INT'L & COMP. L.Q.* 850, 856–57 (1989) (“[T]hat the principles contained in a soft law instrument have become transformed into hard law[] rest[s] upon an assertion that subsequent State practice has changed the status of the principles. It may also be urged that this very transformation was a major goal of the formulation of the principles. The requisite State practice may be the inclusion of principles originally expressed in soft law forms into treaties, although it is likely that the language would have to be adapted to create hard obligations. Such action represents a deliberate choice on the part of States parties to the treaty to change the status of the principles.”).

13. *E.g.*, Matthias Goldmann, *We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 *LEIDEN J. INT'L L.* 335 (2012).

14. Others have delved into more detail on the forces at play. *E.g.*, Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 50 (Eyal Benvenisti & Moshe Hirsch eds., 2009) (identifying both three important dimensions of cooperation (substantive content, participation, and legalization) and three “pathways” to cooperation that correspond to the three dimensions); *see also* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 *MINN. L. REV.* 706 (2010) (arguing that international hard and soft law instruments can serve not only as alternatives or complements but also as antagonists to each other).

15. Abbott & Snidal, *supra* note 14. Again, I do not claim this is unique to soft law. As mentioned in the text, many justify international law itself through such a discursive attribute, but it strikes me that this particular dialogic aspect of law is magnified in soft law, which, on

With these attributes of soft law in mind, I turn to analyze the IRJ model law (in particular, three specific articles) to show some of the benefits and pitfalls of this dialogic aspect of soft law. While the analysis proceeds skeptically, suggesting that the dialogic aspects of soft law may be overrated, it ultimately ends on a positive note, highlighting an important development in international jurisdictional law the IRJ model law advanced—an advancement made possible by its soft nature. To understand the IRJ model law, however, we must start with UNCITRAL’s Model Law on Cross-Border Insolvency (“MLCBI”),¹⁶ to which the IRJ model law was a modular refinement.¹⁷

I. SOFT LAW’S INVITATION FOR DISCOURSE: THE MLCBI

UNCITRAL’s enactment of the MLCBI transformed the field of international bankruptcy. Its history is well-documented elsewhere,¹⁸ but it bears repeating just how precarious the international environment was that forged the MLCBI. Various states harbored strongly held (and divergent) convictions regarding insolvency jurisdictional policies that are often referred to as “territorialism” and “universalism.”¹⁹ The MLCBI cut through the Gordian knot (roughly contemporaneous with what would become the cognate EU Insolvency Regulation) by pushing modest acclimation of foreign insolvency law along a proceduralist vector.²⁰ This approach permitted the buy-in of skeptical states worried about the unwelcome sovereignty costs of ceding some international control in bankruptcy cases that might force them to subject locally situated assets to foreign rules of priority and distribution, some of the most sensitive aspects of insolvency law.

Many credited the MLCBI’s status as soft law as critical to its success. Yet the various axes of softness matter, for it was not just along the vector of commitment that the MLCBI was of course soft (which, to be, sure, played a large role in its attractiveness to many states) but also its preci-

at least a teleological conception, envisions *transformation* into hard law. The mechanism of this transformation on this teleological view is premised upon ongoing dialogue.

16. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3 (1997) [hereinafter MLCBI].

17. John A. E. Pottow, *International Insolvency Law’s Cross-Roads and the New Modularity*, in 4 MODERNIZING INTERNATIONAL TRADE LAW TO SUPPORT INNOVATION AND SUSTAINABLE DEVELOPMENT: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW: PAPERS PRESENTED AT THE CONGRESS 30 (2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/17-06783_ebook.pdf.

18. See, e.g., U.N. Comm’n on Int’l Trade Law, *supra* note 1.

19. Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2277 (2000).

20. Pottow, *supra* note 4, at 988–1001.

sion.²¹ Specifically, many of the substantive provisions were left intentionally open-ended, such as the concept of adequate protection of creditors,²² just as the scope of obligation remained often discretionary—lots of *mays* amidst the few *shalls*.²³ To be fair, though, it was not 100 percent soft all the way down. There was perhaps an intermediate level of commitment. Namely, although the MLCBI was awash with *mays*, there were also some key *shalls*, the most important of which pertained to the recognition of foreign proceedings.²⁴ This mandatory term implemented a jurisdictional hierarchy favoring the *lex fori concursus* when the insolvency proceeding was being conducted at the debtor’s Centre of Main Interests (“COMI”).²⁵ Still, the point remains that the precision dimension was at most intermediate. Some of the most contentious issues (for example, choice of law rules) were elided.

This “mostly softness” allowed low-stakes buy-in for matters of procedural cooperation and discretionary assistance in insolvency proceedings. Thus, the soft law project of the MLCBI was necessarily incomplete. Both the doctrinal scaffolding (COMI) and the scope of cooperation (“may assist”) were left to be tested through future use. Similarly, the international amenability for cooperation was left to mature over time, likely with the intention that with greater familiarity and usage would come greater willingness to allow foreign insolvency law to affect locally situated assets and creditors. Indeed, an express provision of the Model Law commands consideration of its international origin in domestic interpretation, telegraphing that the filling in of content was meant to be conducted over time and across borders.²⁶ The discourse promoted by soft law was not just foreseen but planned.

Accordingly, the half-full (more than half-full, really) analysis of the MLCBI is that it succeeded in garnering an international consensus when

21. John A.E. Pottow, *Cross-Border Corporate Insolvency in the Era of Soft(ish) Law*, in RESEARCH HANDBOOK ON CORPORATE BANKRUPTCY LAW (Barry Adler ed., forthcoming 2019).

22. See, e.g., MLCBI, *supra* note 16, art. 21, ¶ 2.

23. E.g., *id.* arts. 19, 21.

24. Scoring the delegation of a model law is a difficult affair: it is bipartite because, at stage one, no state is obligated to do anything other than perhaps consider in good faith whether to enact the model law as domestic legislation (low delegation), but at stage two, once enacted, the legal obligation for enforcement catapults to complete justiciability in domestic courts (high delegation).

25. MLCBI, *supra* note 16, art. 29(a)(ii).

26. See *id.* art. 8. Doubtless to the horror of some reactionary legislators, U.S. courts are now not just permitted but instructed to look at foreign jurisprudence interpreting provisions of the MLCBI. 11 U.S.C. 1508 (2012). And that has happened. See *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 206–08 (Bankr. S.D.N.Y. 2017); *In re Tri-Continental Exch.*, 349 B.R. 627, 633–34 (Bankr. E.D. Cal. 2006). This pluralistic development of a sort of “common law,” *cf.* Guzman & Meyer, *supra* note 5, at 201–07 (discussing common law aspects of international law), has benefits to harmonization, which in turn facilitates future cooperation.

countless attempts at prior international insolvency conventions (both regional and global) failed. The half-empty analysis, of course, is that it did not do all that much and hid from all the tough subjects. But the more optimistic view seems to have won the day. For example, the COMI concept rolled out and became solidified (and clarified) in the EU Insolvency Regulation Recast, and a body of jurisprudence has now developed in an at least somewhat-harmonizing field of cross-border insolvency.²⁷ Moreover, the adoption rate of the MLCBI has been, despite some doom-and-gloomers, relatively impressive in terms of its breadth.²⁸

Risk abounds in such instruments that depend upon future agents to delineate their content: as with a box of chocolates, you never know what you're gonna get. And while it might appear that fragmenting interpretation pluralistically offers some diversification benefit, as was learned the hard way in 2008 with the derivatives market, sometimes it can actually concentrate risk. In this context, the risk is that, when a renegade opinion crops up, other states might feel obligated to propagate it through deferential interpretation under the above-mentioned foreign interpretation clause. To be sure, there may be an expected-value neutrality to this risk as "crazy" opinions could equally number "helpful" ones, but states are not immune from risk aversion in areas of uncertainty.²⁹ And that risk of the renegade opinion is exactly what unfolded in the second decade of the MLCBI's international discourse.

In 2012, the United Kingdom, an important commercial jurisdiction, issued what many considered a renegade opinion that surprisingly restricted the scope of available relief under the MLCBI. In *Rubin v. Eurofinance*, the U.K. Supreme Court (née House of Lords) held that a default judgment entered in a U.S. chapter 11 proceeding, which was a foreign main proceeding afoot in the debtor's COMI under the jurisdictional hierarchy of MLCBI, could *not* be enforced under the MLCBI's expansive relief provisions in the United Kingdom.³⁰ In contrast to the broad reach other courts applied to the MLCBI,³¹ the *Rubin* court went out of its way to explain that open-ended terms like "additional assistance" provided no textual foundation for relief

27. Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1. Paragraph 13 of the preamble states: "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." *Id.*

28. See Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143 (2005).

29. Abbott & Snidal, *supra* note 11, at 441–44.

30. *Rubin v. Eurofinance SA* [2012] UKSC 46.

31. See *e.g.*, *In re Rede Energia S.A.*, 515 B.R. 69, 98–99 (Bankr. S.D.N.Y. 2014) (declining to apply public policy exception despite potential distributional differences because "Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence."); *In re Vitro S.A.B. de C.V.*, 473 B.R. 117, 123 (Bankr. N.D. Tex. 2012) (construing "manifestly contrary to the public policy of the United States" as requiring contravention of the "most fundamental policies of the United States"), *aff'd*, 701 F.3d 1031 (5th Cir. 2012); *In re Rede Energia*, 515 B.R. 69.

that the United Kingdom deemed unavailable under domestic law—namely, the recognition of an *in personam* judgment emanating from an insolvency proceeding in which jurisdiction was exercised in a manner not found under the common law *Dicey* rules.³² In other words, without attempting to show a violation of core norms of British fundamental justice or due process (the sort of standard indicated by MLCBI’s Guide to Enactment (“GTE”) regarding sparing use of its public policy clause),³³ the *Rubin* court merely bristled at the idea that the Americans “do it differently” in their rules of personal jurisdiction and forbade assistance. Indeed, the opinion went to pains to disparage the vague language of the MLCBI and to note that, rather than provide flexibility to facilitate progressive development of remedies, its text provided a lack of clarity that should be construed strictly.³⁴

The bankruptcy commentariat were not amused, and *Rubin* suffered some deservedly withering criticism.³⁵ In fact, when UNCITRAL convened a colloquium to consider future projects for its insolvency working group shortly in the decision’s aftermath, high on the agenda was “fixing *Rubin*” (although more delicately and felicitously expressed).³⁶ Some took the view that *Rubin* was “just wrong” and so their own courts could simply interpret their versions of the MLCBI as not following that precedent. But others were worried about the spillover effect. For example, at one point, the Korean delegate to Working Group V noted that a Korean court would be inclined to consider the *Rubin* opinion as an interpretation of the MLCBI that could affect its scope in Korea.³⁷ Thus, the discursive aspect of a soft law instrument (or, more precisely, a hard law instrument that started its life as a soft law instrument) that expressly relied upon cross-border interpretation became a source of concern not just for the United Kingdom (whose own delegation supported the need to fix *Rubin*) but for Korea as well.³⁸

32. *Rubin*, [2012] UKSC 46 at 5. *Rubin* can probably be read more broadly to reject the notion that any form of judgment recognition is not a form of available relief under the Model law.

33. MLCBI ¶ 104.

34. *Id.* at 41.

35. Rebecca R. Zubaty, *Rubin v. Eurofinance: Universal Bankruptcy Jurisdiction or a Comity of Errors?*, 111 COLUM. L. REV. SIDEBAR 38 (2011).

36. Gordon Stewart, *The Recognition and Enforcement of Foreign Insolvency Derived Judgments – Rubin*, U.N. COMMISSION ON INT’L TRADE L., https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/b4_insolvency_derived_judgements_1_stewart.pdf.

37. See generally Min Han, *Recognition of Insolvency Effects of a Foreign Insolvency Proceeding: Focusing on the Effect of Discharge*, in TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW 345 (Muruga Perumal Ramaswamy & João Ribeiro eds., 2015) (discussing Korean law).

38. This is also true regarding hard law instruments, too. For example, international law generally commands states to consider other states’ interpretations of the text of a treaty. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (“There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the applica-

II. SOFT LAW'S RESPONSE TO THE INVITATION FOR DISCOURSE: THE IRJ MODEL LAW

The solution at UNCITRAL was to take on the project of the IRJ model law as a modular add-on to the existing MLCBI. This project would effectively “overrule” a hard law pronouncement by a national court of last resort with a soft law instrument (and, in the process, signal a certain confidence that this soft law would apparently make the jump to hard law in due course). One might have thought that states that enacted the MLCBI as domestic legislation could already tack this revision on as an amendment to clarify the scope of permissible cooperation. But, interestingly, UNCITRAL decided to create a standalone soft law instrument, not an amendment to the existing MLCBI. One reason for this was to enable jurisdictions that had not yet adopted the MLCBI to enact the IRJ model law independently. While it may seem curious to envision states that were unpersuaded by the benefits of the MLCBI to nonetheless adopt a new model law that in part fixes a potential loophole in the prior model law, there was a method to that madness. First, “fixing *Rubin*” was not the only animation for the project. Some states seemed genuinely supportive of the idea of facilitating the recognition and enforcement of cross-border insolvency-related judgments, and so *Rubin* was the inspiration, but not the sole justification, for the IRJ model law. Second, there were some state delegations who suggested off-record that, for whatever political reasons, although the MLCBI hit roadblocks to domestic enactment, a standalone law could get greater traction and maybe even bring some of the benefits of the MLCBI through the side door.³⁹ Indeed, the IRJ model law could conceivably do so by exposing reluctant states to the experience of (and benefits from) greater cooperation regarding insolvency-related judgments, which in turn could shift their preferences to lessen reflexive hostility to the MLCBI’s potential to subordinate local law.⁴⁰

Thus, UNCITRAL’s Working Group V decided to craft (perhaps unnecessarily for some) a model law on insolvency-related judgments. It set to work in 2014, turning around a product in only four years—respectable timing by international standards. Consider, by contrast, that the Hague Conference started futzing with its “new” choice of law convention in the 1990s with completion still nowhere in sight.⁴¹

tion of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]”).

39. Delving into this issue is beyond the scope of this Article. Briefly, some states are resistant to the bifurcation of “main” and “non-main” proceedings and hence loathe the concept of COMI, which serves as the doctrinal foundation of such bifurcation.

40. Pottow, *supra* note 17.

41. See Permanent Bureau, Hague Conference on Private Int’l Law, *Conclusions of the Special Commission of June 1992 on General Affairs and Policy of the Conference* (1993), <https://assets.hcch.net/docs/8c4a5159-9847-4bcc-85c4-58b9df9a847b.pdf> (Special Commission on General Affairs and Policy referring the proposal to a Working Group for further con-

What predictions would soft law theory offer for the IRJ model law? Several. First, the IRJ model law, as soft law, would be easy to enact—or, more precisely, easier to enact than a hard law treaty. Second, because continuing dialogues is always easier than initiating new ones, it would predict that the IRJ model law would be easier to complete than the MLCBI. The former could build upon the preexisting doctrinal scaffolding of the latter, which had to start a bold new project afresh. Third, the IRJ model law would be relatively uncontroversial given that the potentially most opposed state, the United Kingdom, supported the endeavor.⁴² This still further augurs ease of enactment. All these characteristics would presumably lead to high degrees of precision, commitment, and delegation in a low-stakes technocratic context, portending quick passage of an instrument that could be well toward the hard end (zone?) of a multi-dimensional space.

To some extent, those predictions were borne out. As alluded, the instrument was put together relatively quickly by international law standards. But even so, and surprisingly in light of this *ex ante* theoretical prediction, some striking lack of consensus on several key components of the IRJ model law emerged. One was so intractable that it threatened to derail the entire project, and another proved so divisive that it required a “fudge” to get past the finish line. These two developments cast into doubt the supposed benefits of soft law’s discursive feature in facilitating international law reform. But there is also a third provision that is noteworthy in the opposite respect, which tends to confirm the standard account of how soft law can indeed advance an ongoing international dialogue, so the glass is at least partially full. Each of these articles shall be discussed in turn.

A. *Discourse Denouement: Overview of the IRJ Model Law*

To understand the import of the three articles of the IRJ model law that will be discussed in some detail, a quick overview is required. As succinctly put in its first article, the short and sweet IRJ model law is intended for domestic enactment as a unilateral offer to recognize foreign bankruptcy judgments:⁴³ “This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in

sideration); Permanent Bureau, Hague Conference on Private Int’l Law, *Ongoing Work in the Area of Judgments* (Jan. 2016), <https://assets.hcch.net/docs/10f2d584-0f51-424b-8140-3dab5bb3d2c9.pdf> (outlining ongoing work in the area of judgments).

42. Abbott & Snidal, *supra* note 11, at 440–44.

43. “Unilateral” because no reciprocity requirement is imposed. See generally Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT’L L. 563, 571–72 (2016) (“Reciprocity . . . systematically discourages persistent objection to emerging customs that involve reciprocal rights and obligations. Thus, in practice, the doctrine of persistent objectors poses little if any impediment to custom’s applicability to all nations.”).

which recognition and enforcement are sought.”⁴⁴ The procedural requirements for recognition and enforcement are straightforward and minimal. They anticipate the use of a foreign judgment as a defense, not just as an affirmative cause of action.⁴⁵ The obligation to recognize the foreign judgment shows a high degree of commitment; it is mandatory. It also shows a *contingently* high degree of delegation, as the anticipation is that the initially soft law instrument will be enacted as fully enforceable municipal law. The critical Article 13 provides this precise commitment, subject to various important exceptions, instructing that “an insolvency-related judgment *shall* be recognized and enforced”⁴⁶ Scaling back that mandatory, precise obligation, however, is a long article that spells out multiple grounds upon which recognition and enforcement may be discretionarily refused,⁴⁷ wholly in addition to the standard public policy escape clause found in myriad international law instruments.⁴⁸ Despite all these caveats, the clear intent of the IRJ model law is to reject the approach of *Rubin*, as the GTE makes clear right up front in its second paragraph, noting:

The work on this topic has its origin, in part, in certain judicial decisions that led to uncertainty concerning the ability of some courts, in the context of recognition proceedings under MLCBI, to recognize and enforce judgments given in the course of foreign insolvency proceedings.⁴⁹

B. Discourse Discord: Article 2

While the IRJ model law looks short and sweet, it is now time to probe the experience in drafting three of its provisions in more depth in order to sharpen our understanding of the dialogic role of soft law in international insolvency. As discussed above, one of the virtues (or at least intentions) of soft law is the promotion of discursive dialogue both to justify the ultimate content of the law and to further develop and crystallize norms of consensus. But not all dialogue yields consensus, and sometimes impasse develops. The unique deliberative procedures of UNCITRAL (praised by some,⁵⁰

44. UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS WITH GUIDE TO ENACTMENT, art. 1, U.N. Sales No. E.19.V.8 (2019) [hereinafter IRJ MODEL LAW AND GUIDE]. Article 5 is an “outbound” provision that confers explicit authority on a *domestic* insolvency representative to seek recognition of a local judgment in a *foreign* state. *Id.* art. 5.

45. *Id.* art. 10.

46. *Id.* art. 13 (emphasis added).

47. *Id.*

48. *See id.* art. 7 (providing for public policy exceptions).

49. *Id.* ¶ 2 (citing *Rubin*, tactfully, with a “for example” modifier).

50. Block-Lieb & Halliday, *supra* note 2.

pooh-pooed by others⁵¹) take consensus seriously. The formal power to vote is rarely exercised.⁵² As such, impasse does not typically lead to majoritarian cram-down at UNCITRAL; elision, redirection, or capitulation carry the day. Thus, the outputs really do reflect a wide degree of consensus.⁵³

This consensus focus can have the paradoxical effect of sometimes front-loading friction points. Because the actors want consensus, they figure out—early—where they actually disagree and then try to hash out a workable solution that will be enacted (and not resisted) at the second stage of domestic incorporation. The paradox arises because a primary feature of soft law is the ability to *avoid* friction points by allowing the deferral of resolution of contested matters through watering-down commitments, restriction of scope, etc., as occurred with the MLCBI. Seen this way, the impulse to smoke out dissent is paradoxical because it underscores rather than downplays friction. Resolution may well require de-emphasizing the friction through, as mentioned, elision and/or watering down the precision of the apposite obligation, that is, by exploiting soft law’s softness.

Here, the most foundational disagreement was unexpected. In fact, any substantial disagreement was unexpected given the widespread support for the overall goal of providing for a quasi-mandatory recognition and enforcement scheme. Nonetheless, when it came time to start filling in the details, dissension arose over the initial definitional question of just what is an “insolvency-related judgment.” Specifically, discord developed over what actions could and could not be properly deemed “insolvency-related.” The source of this disagreement was perhaps a classic lack of “shared understandings,”⁵⁴ but it more likely arose from a combination of jurisprudential path dependence and procedural-institutional disparity.

51. Gabriel, *supra* note 4, at 664. “While the atmosphere in UNCITRAL was political (because delegates represented governments, which were grouped in regional blocs), that in UNIDROIT was apolitical (because participants appeared in their private capacity).” *Id.* (quoting E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 TUL. L. REV. 1985, 1989 (1998)) (internal quotation marks omitted).

52. Block-Lieb & Halliday, *supra* note 2. One such vote (the second in over a half-century) occurred in 2018 during the selection of a chair for a new working group on investment treaties, which was remarkable in its rarity. Comm’n on Int’l Trade L., Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fifth Session, at 3, U.N. Doc. A/CN.9/935 (May 14, 2018).

53. My personal observation as a delegate is that the chair will sometimes declare that there seems to be a “prevailing view” when there is near-but-not-full consensus, which shifts the burden onto objectors to marshal allies or go quietly into the night. This is not to suggest bullying; the chair in such cases will even invite other delegations to speak up if they do not feel there is a prevailing view/consensus emerging, so it has more the air of a “speak now or forever hold your peace” than a “stop bothering us” message. Sometimes, further discussion emerges, and it is clear no consensus will obtain; other times, the potential dissent withers on the vine. Naturally, differing chairs are of course quicker or slower to detect consensus.

54. See Jaye Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law*, 25 LEIDEN J. INT’L L., 313, 317 (2012).

To understand this discord, the baseline exclusion of insolvency matters from prior choice of law conventions is the starting point. Insolvency law is carved out from many international hard law instruments concerning the recognition and enforcement of civil judgments.⁵⁵ This is true going back to the original Brussels Convention, its updated Brussels I EU Regulation, its recent Recast, and the quasi-parallel Lugano Convention.⁵⁶ So is it also true for the 1971 Hague Convention⁵⁷ and the Hague's most recent *oeuvre*, the Principles on Choice of Law in Contracts.⁵⁸ (The policy behind this exclusion in part stems from the deep normativity inherent in bankruptcy law.)⁵⁹ An extant regime of international law—in this case, hard law on the recognition and enforcement of judgments in civil and commercial matters—has thus already had to grapple with the definition of an “insolvency-related judgment” for purposes of classifying proceedings that fall under an exclusion.

Noting this partially invented wheel, the Secretariat of UNCITRAL—as a form of soft law cross-dialogue with other international regimes—drew the Working Group's attention to these other international instruments as a source for a possible definition of “insolvency-related” for purposes of the IRJ model law, just as the observer from the EU was vocal in doing so at the meetings of Working Group V (and some delegates from European member states, too).⁶⁰ Indeed, the European Court of Justice (“ECJ”) developed its

55. See, e.g., Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 249 [hereinafter 1971 Hague Convention].

56. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), art. 2, 2012 O.J. (L 351) 6 (“This Regulation shall not apply to . . . (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;”); Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I]; Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 6, 1988, 1988 O.J. (L 319) 2; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, <https://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>.

57. 1971 Hague Convention, *supra* note 55, art. 1 (“This Convention shall apply to decisions rendered in civil or commercial matters by the courts of Contracting States. It shall not apply to decisions the main object of which is to determine . . . (5) questions of bankruptcy, compositions or analogous proceedings, including decisions which may result therefrom, and which relate to the validity of the acts of the debtor[.]”).

58. HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS 17 (2015) (“These Principles do not address the law governing . . . (d) insolvency;”).

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

60. U.N. Comm'n on Int'l Trade Law, Recognition and Enforcement of Insolvency-Related Judgments: Draft Guide to Enactment of the Model Law: Note by the Secretariat, U.N. Doc. A/CN.9/WG.V/WP.151 (Sept. 20, 2017).

own jurisprudence defining the contours of “insolvency-related.” Actually, because the opening of the insolvency proceedings themselves is straightforward to classify, the real definitional question hones in on what might be considered “connected matters” that arise within and are litigated in conjunction with an insolvency case, such as an avoidance action (to pick the least controversial example that most would concede is insolvency-related). The ECJ case law settled upon a formulation of jointly requiring those related proceedings to “derive directly from the insolvency proceedings” and be “closely linked with them.”⁶¹ This seemingly flexible standard actually has some hard and fast rules, such as the cause of action cannot have accrued until after the filing of the petition. For example, a breach of contract dispute settling a prior claim a creditor asserted against the debtor would not qualify under EU law as being “insolvency-related.”

The EU’s jurisprudence did not arise in a vacuum. It built upon a desire to foster judgment recognition, presumably as a way to strengthen the Union, by having maximal reach of the judgment recognition instruments. It thus took a deliberately restrictive approach to *exclusions* from the Brussels Regulation, meaning that its definitional approach to “insolvency-related” was intentionally crabbed and sought to interpret that term as narrowly as possible so as to permit concomitantly the widest application of Brussels.⁶² The presumable motivation was laudable: to recognize and enforce as many judgments as possible and foster regional international juridical cooperation.⁶³

The problem was this: some important commercial jurisdictions outside the EU balked at this definition. Indeed, in the context of negotiating an international instrument specifically on the recognition and enforcement of insolvency-related judgments, the exact opposite approach would develop from the very same laudable impulse of maximizing international enforcement and recognition of judgments that drove the EU’s jurisprudence.

61. See, e.g., Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast), recital 35, 2015 O.J. (L 141) 19, 22 [hereinafter EIR Recast]; see also *id.* art. 6 (“Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them[.]”).

62. Francisco Garcimartín, *The EU Insolvency Regulation Recast: Scope and Rules on Jurisdiction*, SSRN (Mar. 21, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752412; see also EIR Recast, *supra* note 61, recital 7 (explaining that proceedings excluded from the Brussels I Regulation Recast should be covered by the EIR Recast, and vice versa, so as to “avoid regulatory loopholes between the two instruments”).

63. An interconnected motivation was that of what I call “gap-phobia,” by which I mean that the EU, for example, works hard to mind the gap by making sure the definition in the Brussels I insolvency *exclusion* conforms to the definition of its Insolvency Regulation’s scope of *inclusion* so there is no “gap” (or, its corollary, an “overlap”) in regime coverage. “Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.” Brussels I, *supra* note 56, recital 2.

Whereas the EU court read “insolvency-related” as narrowly as possible to *minimize an exclusion*, an insolvency-specific project would arguably want to read the definition as broadly as possible to *maximize an inclusion*, which these jurisdictions took to heart.

This disinclination toward European law was compounded by the list of examples the Secretariat provided of actions deemed insolvency-related under judicial precedents (culled largely from the EU).⁶⁴ Some jurisdictions’ delegations found these decisions incomprehensible to synthesize and so did not even like the EU case law, wholly apart from its restrictiveness. Further exacerbating matters was the procedural-institutional experience of the United States, which has specialized bankruptcy courts that are designed under its domestic insolvency law to exert maximal jurisdictional reach to centralize dispute resolution of bankruptcy-related matters before judicial experts.⁶⁵ Immanent in such an institutional set-up is a belief that “bankruptcy-related” should be given expansive reach. (That is indeed the approach to jurisdictional disputes under U.S. law.)⁶⁶ For these various reasons, the United States was primed against cementing into the IRJ model law European jurisprudence that was expressly designed to define “insolvency-related” as narrowly as possible.

A divergence seemed inevitable. The EU directly—dependently following its path of regulation-exception jurisprudence—and the Secretariat indirectly—by obliquely aiding and abetting this path dependency—were through the best of intentions heading off on a narrow definition road, while the United States, steeped in its own jurisdictional peculiarities, was setting quite a different, more expansive course. Also within this debate were third-party states who, when it came time to define “insolvency-related judgments,” tried to reason from first principles what a normatively preferable definition would be, coming to the question with neither “expansive” nor “restrictive” baggage.⁶⁷

64. U.N. Comm’n on Int’l Trade Law, Recognition and enforcement of Foreign Insolvency-Derived Judgments, at 7 nn. 10–12, U.N. Doc. A/CN.9/WG.V/WP.126 (Oct. 6, 2014) (citing Case C-111/08, SCT Industri AB v. Alpenblume AB, 2009 E.C.R. I-05655; Case C-292/08, German Graphics v. van der Schee, 2009 E.C.R. I-08421).

65. H.R. REP. NO. 95-595, at 43–48 (1997), as reprinted in 1978 U.S.C.C.A.N. 5963, 6004–08.

66. Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir.1984) (“Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.”) A normative defense of this approach (were one inclined to search for one) could be to facilitate marshalling assets into the bankruptcy estate.

67. International law struggles with how best to define insolvency. *E.g.*, Convention on Choice of Court Agreements art. 2, ¶ 2(e), June 30, 2005, 44 I.L.M. 1294 (“This Convention shall not apply to the following matters - e) insolvency, composition and analogous matters;”). In the context of the Hague Conference texts, the term “insolvency” is intended to cover both the bankruptcy of individual persons and the winding up or liquidation of corporate entities which are insolvent. It does not cover the winding up or liquidation of corporations for reasons other than insolvency, which is addressed in *id.* art. 2, ¶ 2(m). The term “composition”

Interestingly, this clash was not resolved by a force of lobbying power—that is, a skirmish of the EU “vs.” the United States, each trying to rally supporters to their respective positions. Rather, it was through use of a thesaurus. The challenge was to escape the baggage of EU jurisprudence that would likely follow were identical language taken from the EU Insolvency Regulation Recast and at the same time find language that was close enough that the EU-favoring states would not find it “too different.” Recall the risk of identical language is that the compelled international interpretation clause in the IRJ model law (and the MLCBI) fueled *Rubin* fear in the first place, so the language, for many states, had to be different from the EU’s.⁶⁸ Thus, it was not adherence to its broad approach to jurisdiction that the United States insisted upon (although likely preferred) but rather the need to be free from the EU’s jurisprudence on the scope of insolvency-related judgments.⁶⁹ So there was no objection to concept, just language. For its part, however, the EU was unlikely to want to junk its own test, not just for robust ego purposes, but also for possible fear that doing so could be seen as a concession that its own internal test is non-compliant with UN standards, which implicitly carry a best practices imprimatur.

Neutral language was going to be required: de novo text for an interpretative reboot, but not *too* de novo to suggest disparagement of the EU approach—hence, the suggestion above that a thesaurus was needed. Indeed, it was. No shortage of proposals was floated.⁷⁰ The eventual finalist that made its way to Article 2(d)’s definition now requires that an insolvency-related judgment “[a]rises as consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed[, and is one that is] issued on or after the commencement of the insolvency proceeding”⁷¹

In considering the unexpected drama of Article 2(d), soft law’s ultimate role is hard to rate. At no point did the softness of the instrument assuage

refers to procedures in which the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term “analogous proceedings” covers a broad range of other methods in which insolvent persons or entities can be assisted to regain solvency while continuing to trade. See Masato Dogauchi & Trevor C. Hartley, *Preliminary Draft Convention on Exclusive Choice of Court Agreements Explanatory Report* (Dec. 2004), https://assets.hcch.net/upload/wop/jdgm_pd26e.pdf.

68. IRJ MODEL LAW AND GUIDE, *supra* note 44, art. 8 (“In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”); see also MLCBI, *supra* note 16 (same).

69. Perhaps as a bone thrown to the United States, the Guide to Enactment openly offers examples of what are, but not what are not, insolvency-related judgments. See IRJ MODEL LAW AND GUIDE, *supra* note 44, ¶ 60.

70. There was not a lack of options. One early contender that received widespread support (later tweaked into the final version) was “stems intrinsically from or is materially associated with” an insolvency proceeding. U.N. Comm’n on Int’l Trade Law, Rep. of Working Group V (Insolvency Law) on the Work of Its Fifty-First Session, ¶ 77, U.N. Doc. A/CN.9/903 (May 26, 2017).

71. IRJ MODEL LAW AND GUIDE, *supra* note 44, art. 2(d).

the divergent stakeholders that their differences of opinion mattered less because it was a “mere” model law being developed that could be tinkered with at stage two of domestic adoption. And, perhaps smarting from the *Rubin* decision’s spillover effects, the parties were focused on the nominally soft law as nascent hard law, so they were almost treating it as “hard law lite”—soft in name only, but with all the risks of hard law (itself a curious development given the repeatedly touted benefits of a model law’s softness as a legal technology). It is also too early to say whether European jurisdictions enacting the IRJ model law will (a) modify the language of Article 2(d) to translate it back into “proper” EU language, (b) keep the language and then develop through case law a position that it means basically the same thing as closely related (perhaps driven by gap-phobia that it must be so interpreted to avoid regime gaps with the EU Insolvency Regulation),⁷² or (c) keep the language and develop a separate gloss on its meaning as interpretative case law unfolds that is specific to insolvency jurisprudence. Perhaps this shows the “positive” aspect of soft law, at least in a cynical way, of assuaging states that the harmonization-defection opportunity at the domestic enactment stage remains!⁷³ While the jury, as they say, is still out, it does seem clear that the dialogic aspect of international law (here, UNCITRAL’s consideration of an already-developed EU doctrinal jurisdictional test) seemed to provide more disagreement and potential for dissent than source of harmonizing consensus.

C. Discourse Digression: Article 15

Sometimes too much dialogue is a bad thing. This perhaps suggests a theory of “diminishing dialogic returns,” the full theoretical modeling of which—and its specific application for marital conflicts—remains beyond the scope of this Article. This is what might have happened with regard to Article 15 of the IRJ model law, where the disagreement seemed at times to rival that regarding Article 2.

The reader may be justifiably puzzled by reference to Article 15, which was not discussed previously in the above overview of the IRJ model law’s key provisions. Article 15 is an ancillary provision that addresses the “equivalent effect” of an insolvency-related judgment sought to be recognized or enforced, generally providing that the judgment is to be accorded full faith and credit.⁷⁴ It also provides, perhaps more significantly, for “ad-

72. Gap-phobia is evidenced, for example, in the EU Insolvency Regulation Recast. EIR Recast, *supra* note 61, recital 7 (“The interpretation of [the Recast] should as much as possible avoid regulatory loopholes between [it and the Brussels Regulation.]”). This pronouncement reveals an almost conceit regarding the coherence of international law in a world of fragmented and overlapping regimes.

73. Conceivably, a more dramatic solution might have been to strike Article 8 and let each state “go it alone.” Article 8’s retention actually circumscribes the EU from getting too far afield in returning to its own law.

74. IRJ MODEL LAW AND GUIDE, *supra* note 44, art. 15.

aptation” of remedy. If relief ordered in the originating court is unavailable in the recognizing court (for example, injunctive relief impermissible under domestic law), the remedy “shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating state.”⁷⁵

This may cause the reader to further wonder: how on earth could such a banal provision generate dissent? The answer is once again found in the role of soft law in promoting a form of international civil discourse. If soft law instruments serve in part to provoke dialogue, then sometimes that dialogue will, and perhaps should, transcend the regime within which it is initiated. This is exactly what happened with Article 15, which transformed, or perhaps devolved, into a discussion about the proposed language used to develop the contemporaneous draft of the revised Hague Convention in a cognate international regime.⁷⁶ Underscoring the role of elite repeat players among international drafters, the Article 15 discussion was in part an offstage re-litigation of a Hague drafting dispute.⁷⁷ The specific issue was whether the concept of “equivalent effects” should bestow upon the applicable judgment the same effect as it has in the *originating* state or the same effect it would have had if it was issued by a court of the *recognizing* state. Fine pinheads upon which the angels might dance to be sure, but a divide nonetheless. The Hague draft (in its earlier iterations) leaned toward the former approach, which was noted by countries such as Switzerland in Working Group V,⁷⁸ but many countries, such as Mexico, Uganda, the United States, and China, favored the latter.⁷⁹ And Korea noted that there were problems with both formulations!⁸⁰

This cross-dialogue (or distracting chatter, depending on one’s perspective) about the Hague drafting influenced the IRJ model law drafting of Article 15 as much, if not more, than the actual normative preferences for which language provided superior content. This deep-dive exploration of preclusion law was made even all the more unusual by the United States’ preference for the second option, notwithstanding that its own domestic law on interstate recognition and enforcement of “foreign” (that is, different

75. *Id.* art. 15, ¶ 2.

76. *Working Group V, 52nd Session*, U.N. COMMISSION ON INT’L TRADE L. (Dec. 19, 2017), <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/767192b9-e657-4474-b2c3-30f110d182b2> [hereinafter *52nd Session Audio Recording*].

77. Susan Block-Lieb & Terence C. Halliday, *Less Is More in International Private Law*, 3 NOTTINGHAM INSOLVENCY & BUS. L E-JOURNAL 43, 55 (2015).

78. *52nd Session Audio Recording*, *supra* note 76, at 10:51:06–53:53 (Switzerland).

79. *Id.* 10:47:02–48:44 (China); *id.* 10:48:50–50:52 (United States); *id.* 10:56:34–57:52 (Uganda); *id.* 10:58:05–59:16 (Mexico).

80. *Id.* at 11:02:00–05:11 (Republic of Korea).

state) judgments requires the *first* option approach of looking to the originating state's preclusion laws.⁸¹

One possible outcome might have been for the Working Group to throw up its hands and deferentially say, "Let's just settle on whatever the Hague does," honoring the Hague Conference's arguably greater experience on matters of private international law.⁸² But even that possible outcome was unable to garner a consensus, and so the Working Group simply bracketed the matter at successive sessions until a breakthrough of sorts seemed possible in 2017. The UNCITRAL working groups only meet semi-annually, with interstitial interventions by the Secretariat, and this one expressed little interest in resolving the Article 15 issue. The issue would rear its head, be discussed, and get bracketed for further consideration a couple of times each year. What happened before Working Group V's penultimate drafting session on the IRJ model law, however, was remarkable. In the fall of 2017, during its most recent working session, the Hague Conference decided to scrap the equivalent effects clause from its draft convention altogether, citing such anesthetizing reasons as a desire not to conflate matters of issue preclusion with claim preclusion.⁸³ This left UNCITRAL with a hanging debate on how to implement—or modify—a provision from the draft Hague Convention that the Hague itself decided to withdraw.

The UNCITRAL Secretariat (one assumes excitedly) quickly drew this development to the Working Group's attention, presumably hoping that it would inspire similar deletion of Article 15 as unnecessary.⁸⁴ Indeed, early

81. See, e.g., 28 U.S.C. § 1738 (2012). While this is a federal law, much of the U.S. judgment enforcement jurisprudence is at the state level. See generally *Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("[T]hrough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . .").

82. Recall, however, that the Hague moves glacially, and UNCITRAL was moving with comparative speed.

83. FRANCISCO J. GARCIMARTÍN ALFÉREZ, JUDGMENTS CONVENTION: PRELIMINARY EXPLANATORY REPORT 59 (2017) ("Effects. Judgments concerning the merits of a dispute may have different effects, typically, substantive and procedural. The substantive or dispositive effects derive from the authoritative determination made by the court as to the substance and content of the relationship at stake. In some jurisdictions, these effects are usually referred to as substantive authority of *res judicata*. Procedurally, a judgment may, under certain conditions, prevent subsequent proceedings on the same issue (preclusion or formal *res judicata*). Furthermore, under the so-called *collateral estoppel* or issue preclusion doctrine, a judgment may also have wider effects in precluding subsequent proceedings even as regards issues that have not been specifically determined. The same holds with regard to the range of persons that are bound by the authority of the judgment. The decision may bind persons that did not take part in the proceedings but have a particular relationship with the parties.").

84. U.N. Comm'n on Int'l Trade Law, Conference Room Paper 2, ¶ 2 (Dec. 2017) (unpublished) (on file with author); *Id.*; see also U.N. Comm'n on Int'l Trade Law, Rep. of Working Group V (Insolvency Law) on the Work of Its Fifty-Second Session, ¶ 37, U.N. Doc. A/CN.9/931 (Jan. 15, 2018) ("The Working Group noted that in the most recent text emanat-

in the discussion at the next working group meeting, a proposal was made to remove draft Article 15 altogether.⁸⁵ But then, snatching discord from the jaws of easy agreement, some delegations pushed back and said, in effect, just because the Hague deleted it does not mean we have to, too. What began as deference to the Hague suddenly flipped into lofty indifference. As the delegate from Switzerland summed up, noting the irony, UNCITRAL's Working Group V was neither a specialized body for nor had the purpose of "harmonizing principles of general procedural law" (presumably contrasting the Hague's or UNIDROIT's mandates). He nonetheless proceeded, somewhat cheekily, "we are not that modest"⁸⁶ and so declined to support following the Hague's path of deletion. Others concurred.⁸⁷

The discourse digression had sewn its distracting seed. The debate over the article, animated in part by a salutary attempt to engage in cross-dialogue with the Hague Conference, took on a life of its own, persisting long after the Hague debate was over because the can of worms had already been opened. To reiterate, this was a debate—a heated one—over procedural issues of preclusion law that have nothing specifically to do with insolvency. But perhaps due to a sense of intellectual sunk costs, the Working Group persuaded itself that it was now in a position to best resolve the matter for purposes of its IRJ model law. Soft law's dialogue-promoting goal created a monster. And having expressly considered the question, the Working Group brushed aside the idea that it would follow the Hague's modesty, promptly resurrecting the ongoing debate over which option to prefer.

With no resolution to the impasse in sight, it was also clear that an ancillary provision was not going to derail the IRJ model law project. Accordingly, the consensus of the Working Group then became to "agree to disagree" and leave the equivalent effects issue *unresolved*. The drafting solution, which found its way into the final product, was to settle for an either/or option, requiring enacting states to pick option one or option two. The IRJ model law contains an asterisk on Article 15, instructing states: "The enacting State may wish to note that it should choose between the two alternatives provided in square brackets."⁸⁸ It would appear that some uniform model laws are not so uniform after all.

ing from the November 2017 Special Commission on Recognition and Enforcement of Foreign Judgments of the Hague Conference on Private International Law, the provision equivalent to article 14 had been deleted. Having deleted the article, the Special Commission decided that the Explanatory Report to the draft convention should: (a) note that it was inherent in the concept of recognition of a judgment that the same claim (or cause of action) could not be relitigated in another Contracting State (*res judicata*); and (b) refer to the material in paragraph 89 of the Hartley-Dogauchi Report.").

85. 52nd Session Audio Recording, *supra* note 76, 10:48:50–50:52 (United States).

86. *Id.* 11:07:36–11:09:38 (Switzerland).

87. The Canadian delegation noted that a similar provision existed in other widely adopted international instruments, such as the ICSID treaty, and so some non-Hague institutions "go it alone" and have equivalent effects clauses. *Id.* 10:54:00–10:56:21.

88. IRJ MODEL LAW AND GUIDE, *supra* note 44, art. 15 n.1.

Three observations flow from the unusual experience in the drafting of Article 15 and yield ambiguous conclusions about the efficacy of soft law. First, whether the disuniformity proves to be devastating or trivial remains to be seen. Certainly, an option A/B approach is not unheard of in model law texts,⁸⁹ but it is not ideal. This failure-to-harmonize aspect of the IRJ model law may serve as a wedge—that is, it may embolden states to start departing from the proposed text in other provisions at the domestic enactment stage.

Second, as suggested above, sometimes too much dialogue is a bad thing. If soft law allows for the further percolation (and fermentation) of ideas and norms in the international sphere, then sometimes it might cause distraction and digression. Here, an enormous amount of insolvency working group intellectual effort was spent on an issue of preclusion law that another, arguably more expert, body ultimately abandoned as unworkable. It is possible this could have been avoided if “Hague fetishism” had not beset the Working Group in the first place.⁹⁰

Finally, it could be that the “or” solution of the IRJ model law is a blessing in disguise. That is, by allowing experimentation with regard to cross-border preclusion law principles, the IRJ model law may actually facilitate the development of a jurisprudential data set upon which future international reforms (hard or soft) may draw. For example, if, as the United States feared, an option one approach will lead to difficulties in ascertaining the content of foreign law that will impede the recognition of insolvency-related judgments,⁹¹ then a corpus of subsequent case law showing easy ascertainment may diminish that concern—just as a case law replete with difficulty will confirm it. Indeed, when the Hague Conference gets back to drafting its convention revisions, it can look upon that body of case law, whatever it shows, with great interest. On this view, then, while sometimes digressions are digressions, sometimes they lead to serendipitous discovery.

89. For example, the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment art. 11, Nov. 16, 2001, <https://www.unidroit.org/instruments/security-interests/aircraft-protocol>, offers Contracting States three options on insolvency: (1) to adopt, by declaration, Alternative A of Article XI of the Protocol (“Alternative A”); or (2) to adopt, by declaration, Alternative B of that Article (“Alternative B”); or (3) to retain national insolvency law, by making no declaration (“Existing Insolvency Law Retention”).

90. It is not robust Hague fetishism, of course, because that deference vanished at the final cut. Rather, it was Hague fetishism coupled with the intellectual sunk cost fallacy of having a need to resolve an issue that devoted so much drafting attention. This could be another aspect of soft law relevant to contrasting UNCITRAL’s experience to the Hague’s. In working on a hard law convention, the Hague group may have been more concerned with ironing out each tiny nuance than UNCITRAL would have been in quickly crafting a soft law with a “let’s just try it” mindset.

91. *52nd Session Audio Recording*, *supra* note 76, 10:48:50–10:50:52 (United States). This concern is reflected in the Guide to Enactment’s paragraph 121, which deftly plays no favorites in presenting the respective benefits of the two alternatives. MLCBI *supra* note 16, ¶ 121.

Again, while it is too early to tell what the legacy of this particular “disuniform” soft law provision will be, the experimental potential lies there waiting.

D. Discourse Development: Article 14

A final article in the IRJ model law implicating its soft law capacity for dialogue is Article 14. It is not just its most intriguing provision but, from the lens of incremental development of cross-border insolvency law, its most promising. Moreover, it once again invites comparison to the Hague Conference’s efforts and roadblocks in revising its hard law convention. Article 14 has a paragraph dealing with indirect jurisdiction. The rules of indirect jurisdiction bedevil international efforts in the field of private international law.⁹² There are two opposed concerns: the excessive reach of states with exorbitant exercises of jurisdiction on the one hand, and the need to bind recalcitrant defendants who seek to evade legitimate exercises of jurisdiction on the other.⁹³ So dysfunctional is the law in this domain that apparently even concession of reciprocal recognition of jurisdiction (country x has to recognize a judgment from country y where the basis of jurisdiction in y was the same as one that exists under the laws of x) is a hard sell.⁹⁴ This came sharply into relief in the early days of drafting the IRJ model law because, of course, the *Rubin* decision was based on a refusal to recognize a judgment whose jurisdiction was not exercised in a manner concordant with British law. But the defendant in *Rubin* was, in the eyes of some, a scofflaw who hid from the U.S. court in an attempt (ultimately successful) to escape jurisdiction. In the eyes of these detractors, he would certainly have been accorded full due process rights and would have been able to mount an effective defense.

Recall that Article 14 lists grounds for discretionary refusal to recognize an insolvency-related judgment. Paragraph (g) is phrased in the negative by saying recognition may be refused if jurisdiction was not exercised in the originating court in one of the following manners.⁹⁵ This has the functional

92. Ronald A. Brand, *Understanding Judgments Recognition*, 40 N.C. J. INT’L L. & COM. REG. 877, 889–92 (2015). “[A] problem has resulted in the failure to understand the gap that exists in some other legal systems between the bases of jurisdiction on which courts are allowed to hear a case in the first instance (bases of direct jurisdiction) and the bases of jurisdiction courts will accept as appropriate in the originating court of another state for purposes of the recognition of the resulting judgment (bases of indirect jurisdiction).” *Id.* at 880.

93. Compare, e.g., CODE CIVIL [C. CIV.] [CIVIL CODE] art. 4 (Fr.) (basing jurisdiction on *plaintiff’s* nationality), with, e.g., *Rubin v. Eurofinance SA* [2012] UKSC 46 (allowing sophisticated defendant to evade jurisdiction through non-submission notwithstanding his access to full due process rights).

94. The most recent version of the Hague Convention’s redraft does not permit reciprocity as a legitimate exercise of indirect jurisdiction under Article 5 (that is, jurisdiction was exercised in a manner permitted under the law of this state). Convention on Choice of Court Agreements art. 22, June 30, 2005, 44 I.L.M. 1294.

95.

effect of providing a list of legitimate jurisdictional bases. It starts with low-hanging fruit: “The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued”⁹⁶ It then proceeds to an idea of submission (attornment) that has been bouncing around the Hague Conference for some time.⁹⁷ Increasing the touchiness, it even adds a reciprocity basis that the Hague has thus far been unwilling to stomach, approving of jurisdiction when the “court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction”⁹⁸

So far, so good. In fact, so far, so excellent, as prescribing bases of indirect jurisdiction is an overdue project for private international law. But none of these provisions “fixes *Rubin*.” Recall that the *Rubin* defendant neither consented nor attorned to U.S. jurisdiction, and the whole ratio of the decision was that U.S. jurisdiction was not based on a ground reciprocally found under U.K. law. Accordingly, a fourth, catch-all category was needed to mean something like *jurisdiction was exercised in a non-exorbitant manner, even if that ground is unavailable under domestic law*. Early efforts talking of “reasonable” grounds were quickly dismissed by jurisdictions whose judges would find such ambiguity anathema (presumably where those judges are not versed in exercising wide swaths of discretionary power, especially with concepts such as jurisdiction).

Singapore came up with the final ground that made its way into the text: “The court exercised jurisdiction on a basis that was not incompatible with the law of this State”⁹⁹ This ground is listed directly after the reciprocity ground, textually indicating that it requires different and hence necessarily broader reach.¹⁰⁰ For the avoidance of doubt, the GTE clarifies that the

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if: . . . (g) The originating court did not satisfy one of the following conditions: (i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued; (ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law; (iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or (iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State

IRJ MODEL LAW AND GUIDE, *supra* note 44, art. 14(g).

96. *Id.* art. 14(g)(i).

97. *Id.* art. 14(g)(ii).

98. *Id.* art. 14(g)(iii).

99. IRJ MODEL LAW AND GUIDE, *supra* note 44, art. 14(g)(iv). Singapore’s initial version was slightly different linguistically, but the concept was the same.

100. Specifically, “not incompatible” cannot be conflated with “compatible,” the textually distinct prior ground for permissible indirect jurisdiction.

purpose of this provision is to allow for some “margin of appreciation,” “acceptance of outcome differences,” or whatever legal term of art one may wish to use to mean that it’s OK to be un-British:

Subparagraph (g)(iv) is similar to subparagraph (g)(iii), but broader. While subparagraph (g)(iii) is limited to jurisdictional grounds explicitly permitted under the law of the receiving State, subparagraph (g)(iv) applies to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the law of the receiving State. The purpose of subparagraph (g)(iv) is to discourage courts from refusing recognition and enforcement of a judgment in cases in which the originating court’s exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided that exercise was not incompatible with the central tenets of procedural fairness in the receiving State.¹⁰¹

This language from the GTE is a thinly veiled (if veiled at all) rebuke of *Rubin*. It also shows that Article 14(g)(iv) could be the start of a new significant strand of private international law that provides a doctrinal anchor for meaningful expansion (and a coherent foundation) for indirect jurisdiction.¹⁰² Consider the success of the MLCBI’s public policy clause (which follows from public order exceptions from treaties).¹⁰³ This potentially cooperation-unravelling provision has happily been interpreted quite restrictively—silencing alarmists who saw it as a backdoor—and constrained the jingoistic impulses of states.¹⁰⁴ So, too, could Article 14(g)(iv) similarly constrain those same impulses of states predisposed to consider their way or the highway in jurisdictional matters. For that potential to take off, however, a “reverse” Hague deference will need to unfold: rather than UNCITRAL bending over backward to accommodate language used by the EU’s or the Hague’s drafting, those institutions will need to look at the case law that develops interpreting UNCITRAL’s IRJ model law.¹⁰⁵ Indeed, the cross-dialogue of international law might work well in this regard as the EU con-

101. IRJ MODEL LAW AND GUIDE, *supra* note 44, ¶ 115.

102. In fact, Article 14(g)(iii) might itself be a breakthrough, but it is a breakthrough in a longstanding debate. Article 14(g)(iv) blazes an even more novel path.

103. MLCBI, *supra* note 16, art. 6.

104. For example, in *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011), the court found a violation of public policy by a German insolvency representative’s request to get access to the debtor’s email, which may have triggered criminal liability in the United States.

105. The Guide to Enactment’s caveat regarding “central tenets of procedural fairness” makes clear that exorbitant bases of jurisdiction need not be appreciated under the margin. It is possible, of course, that similar work could have been done through the public policy clause of Article 7, but that might have required more resort to Article 7 than desired under a restrictive approach to its usage. It is also at least arguable that central tenets of procedural fairness need not necessarily rise to the level of manifest public policy.

cept of a “margin of appreciation” could even be deployed in interpreting the scope of Article 14(g)(iv).¹⁰⁶

III. RECONSIDERING THE ROLE OF SOFT LAW IN THE IRJ MODEL LAW DISCOURSE

Analysis of the IRJ model law reveals a process demonstrating soft law’s potential for experimentalism and for catalyzing dialogue, both within and across “regimes.”¹⁰⁷ But that experimental potential also has a dark side: too much dialogue can lead to distraction, with participants careering madly off in all directions. Taking the three specific articles discussed in some detail above, we can tentatively conclude the following, starting with the negative and ending with the positive. First, the definition of “insolvency-related” in Article 2 showed the challenges of consideration of cognate regimes in international law. Many EU delegates wanted to use the doctrinal scaffolding from their own case law, as subsequently embodied in hard law instruments such as the Insolvency Regulation Recast. Other delegates did not want to be locked into that path, seeing it as having developed unhelpful jurisprudence. The compelled international interpretation provision from the MLCBI (and ultimately the IRJ model law), far from fostering international cooperation in this case, seemed to have induced anxiety. Exploiting soft law’s capacity for experimentation, consensus-builders suggested a different definition employing a different phraseology, although a similar conceptual idea, to avoid the precedential risk of renegade jurisdictions. Whether this other path proves durable when the IRJ model law makes the transformation from soft to hard law in Europe, however, remains to be seen; but the glass starts half full.

Second, the unexpected impasse on Article 15’s “equivalent effects” clause shows that deference and consideration of other international organizations (here, the Hague Conference) is alive and well in the insolvency regime. No turf warfare was evinced here. But Article 15’s drafting also shows that such deference has limits. Maybe the digression on preclusion law was a fluke, ill-suited for generalization. And it arguably started with good intentions (cross-regime consideration of a cognate endeavor). Here, however, it seems too much consideration of the revised Hague Convention’s inchoate drafting just ended up creating confusion—confusion that the Hague Conference ultimately eschewed. The end result, an ugly spot of

106. The irony that this sunny view of Article 14(g)(iv)’s potential requires overcoming the anxiety revealed in the drafting of Article 2 does not escape me. The difference is hindsight: Article 2 was drafted after some states knew there was (in their minds) a bad outcome. It is noteworthy that Article 8 on compelled international interpretation persists in the IRJ model law, suggesting that anxiety is surmountable.

107. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185, 185 (1982) (“International regimes [are institutional factors effecting cooperation] defined as principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area.”).

disuniformity in an otherwise uniform model law, may not be that big a deal. Or it may have a spillover effect to invite textual deviation at the domestic enactment stage. Again, the half-full aspect of experimentation is that this may generate a natural experiment with the two approaches that may trickle back to the Hague Conference should it revisit the issue.

Finally, the advancement of a new basis of indirect jurisdiction under Article 14 is potentially the most significant aspect of the IRJ model law. The reason for its inclusion was a concerted effort to “fix *Rubin*.”¹⁰⁸ And *Rubin*’s need for fixing, in turn, stemmed from the soft law framework approach of the MLCBI: the United Kingdom exploited a position the soft law’s imprecision allowed. It generated backlash, and the international community responded when it became time to take the precision to the next level of specificity.¹⁰⁹ Soft law’s dialogue begat a soft law response. This is the area where the potential for soft law’s dialogic effect on international law could be most promising if for no other reason than the promulgation of a doctrinal anchor.¹¹⁰ The IRJ model law may thus ultimately offer a transformative development in cross-border matters of indirect jurisdiction.

The lingering question, then, is what role did the *softness* of the IRJ model law play? That is, could experimentation and dialogue have occurred just as easily with negotiation of a hard law convention? Possibly. But the softness of the instrument made it easier to negotiate and finalize, with the cognate Hague Conference’s languid pace serving as a marked contrast. Moreover, this softness of the instrument made more tolerable the “option A/B” pseudo-resolution of the Article 14 impasse, a punt that is not unprecedented but can be awkward.¹¹¹ Future disputes will test the long-term durability of Article 14’s pseudo-resolution, but at least at this early stage, the “option A/B” provisions garnered widespread support—indeed, no parties suggested alterations to Working Group V’s product at the Commission.¹¹² Thus, although too early to pronounce with certainty, the IRJ model law seems to be another example of successful incremental reform in international insolvency through the use of soft law.

108. Probably too detailed for this article is the IRJ Model Law’s “infamous” Article X, which purports to amend the MLCBI by simply clarifying judgment recognition is an available remedy. This innovation of a cross-reference to another model law that enacting states may or may not have enacted is cumbersome but rational.

109. So-called “framework conventions” are broadly inclusive, non-threatening agreements that do not contain deep substantive commitments or perform strong enforcement procedures. See Abbott & Snidal, *supra* note 14.

110. Of course, skeptical states can try to strangle that development and cabin the IRJ model law to being restricted to insolvency only.

111. See, e.g., Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, *supra* note 89.

112. *Working Group V, 54th Session*, U.N. COMMISSION ON INT’L TRADE L., 11:55:47–58:35 (Chair) (Dec. 10, 2018), <https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/9c566f0f-bd64-4855-bb62-c942d6c70120>.