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### Cross-Border Corporate Insolvency in the Era of Soft(ish) Law

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#### Publication Information & Recommended Citation

Pottow, John A. E.. "Cross-Border Corporate Insolvency in the Era of Soft(ish) Law." In *Research Handbook on Corporate Bankruptcy Law*, edited by Barry Adler, 329-63. Edward Elgar Publishing, 2020.

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**MICHIGAN LAW**  
UNIVERSITY OF MICHIGAN

PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES

PAPER NO. 569

LAW & ECONOMICS RESEARCH PAPER SERIES

PAPER NO. 17-016

OCTOBER 2017

**CROSS-BORDER CORPORATE INSOLVENCY IN THE ERA  
OF SOFT(ISH) LAW**

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## Cross-Border Corporate Insolvency in the Era of Soft(ish) Law\*

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Multinational firms follow markets more than national borders. Consequently, the financial distress of these businesses raises not just complex questions of jurisdictional doctrine but of corporate bankruptcy policy more generally. Scholars, policymakers, and judges alike all continue to struggle with how most efficiently and fairly to resolve these “cross-border” or “transnational” insolvencies. It is a fascinating area of corporate insolvency law because it is in such flux. This moving target has led to a paradoxical role for corporate bankruptcy scholars. On the one hand, because of the novelty of each new case that raises international concerns, academic work, even the deeply theoretical, has enjoyed considerably more attention than its traditional cobweb level of engagement in the domestic arena (hope you are enjoying this book!).<sup>1</sup> On the other hand, because international law involves international diplomacy and reveals the influence of other extra-legal and peri-legal considerations, what one might euphemistically call more “pragmatic” concerns frequently carry the day.<sup>2</sup> Thus, the purest academic theories are often ignored in this most unprincipled but necessary world, making scholarly relevance all the more challenging.

This chapter introduces the reader to the messy world of cross-border corporate insolvency. While it is mindful of the overarching goal many advocate (its author included) of reducing the cost of credit as a worthy foundation of corporate insolvency law,<sup>3</sup> it cautions at the outset that a pragmatic, at times atheoretical sensibility guides this field.<sup>4</sup> This messiness stems in large part from the fractured (and fractious) nature of bankruptcy. Different nations have not just different bankruptcy laws but different conceptions about the desirability of unifying cross-border law. This divide has stymied historical efforts to

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\*I appreciate the seemingly endless research assistance from James Thurman, Michigan J.D. Class of 2015, whose work on this article transcended his graduation.

<sup>1</sup> For example, the concept of “synthetic secondary proceedings,” arising from my work and that of Ted Janger, found its way into the EU’s recent amendments to its landmark Insolvency Regulation. *See* Regulation 2015/848, of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, art. 36, 2015 O.J. (L 141) (EU), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848&from=EN> [hereinafter EU Insolvency Regulation]. *See generally* John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT’L L.J. 579 (2011); Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT’L L. 401 (2010).

<sup>2</sup> *See* Bob Wessels & Ian Fletcher, Int’l Insolvency Inst., GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES 151 (2010) (noting the pitfalls of compromise by saying ‘the best should not be allowed to become the enemy of the good’).

<sup>3</sup> Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2181 (1999).

<sup>4</sup> For example, in amending its Insolvency Regulation, the E.U. championed the theory of universalism but bemoaned the necessary concessions to praxis: “This Regulation acknowledges the fact that as a result of widely differing substantive laws, it is not practical to introduce insolvency proceedings with universal scope throughout the Union.” EU INSOLVENCY REGULATION, *supra* note 1, at 22nd Recital.

craft international treaties related to bankruptcy.<sup>5</sup> Until recently, there wasn't even that much cross-border bankruptcy "law." After centuries of mistrust, however, international bankruptcy reached a conceptual breakthrough just within the last two decades. The lynchpin to this success was the abandonment of conventional international law (conventions) and the rise of "soft law" instruments, such as, principally, UNCITRAL's Model Law on Cross-Border Insolvency.<sup>6</sup> UNCITRAL's Model Law (and the cognate EU Insolvency Regulation)<sup>7</sup> not only radically altered the international bankruptcy landscape but has now set the stage for what is going to be the next wave of reform that is presently unfolding. And it is this soft law status that gets all the credit.

This chapter will proceed as follows. First, it will introduce the reader to the academic theories dominating transnational bankruptcy law in order to set the stage for the explication of the Model Law. Next, it will explore the Model Law and show how its soft status enabled its embrace by multiple jurisdictions around the globe. Third, it will examine some of the important case law that has emerged under the Model Law with an eye to gauging the success of the instrument. Finally, it will critique the new proposals emerging as the "next wave" of international insolvency reform to see how they fit within the soft law approach and underlying academic theories.

## I. CROSS-BORDER INSOLVENCY THEORY.

For better or worse, scholarship in the transnational corporate insolvency arena has shifted to "second-order" considerations (or, in some instances, "third-order" considerations).<sup>8</sup> So, too, has law-making. But because first-order consideration should anchor an analysis of second-order arguments, we should start, dear reader, by examining the dominant normative theories over the design of an optimal cross-border insolvency regime. Then we can relax the assumptions of theoretical purity for greater reality.

One of the canonical theoretical conceptions of corporate insolvency is collective-action based.<sup>9</sup> This widely accepted view imposes a "statist" solution to financial distress through reorganization or liquidation. "Statist" intends to convey the idea that a compulsory, public process is deployed as a concession to the likely impossibility of ad hoc contractual solutions that the parties would hypothetically prefer to remedy these collective action concerns but cannot achieve on their own. Hence, the U.S. Bankruptcy Code has an automatic stay and a bankruptcy judge blocking the atomistic conduct of self-interested

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<sup>5</sup> See Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 487 (1991) (discussing the Strasbourg Convention and the failed Brussels Convention); Todd Kraft & Allison Aranson, *Transnational Bankruptcies: Section 304 and Beyond*, 1993 COLUM. BUS. L. REV. 329 (1993) (discussing the challenges facing adoption of the International Bar Association's largely ignored Model International Insolvency Cooperation Act).

<sup>6</sup> See U.N. COMM. ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3, art. 25 (1999) [hereinafter MODEL LAW].

<sup>7</sup> See EU INSOLVENCY REGULATION, *supra* note 1.

<sup>8</sup> See e.g., John A. E. Pottow, *Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 BROOK. J. CORP. FIN. & COM. L. 197, 197-199 (2014).

<sup>9</sup> See Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 158-60 (1989).

creditors.<sup>10</sup> The statist solution enhances welfare by preserving value (especially going concern value), with the concomitant attribute of lowering credit costs. Higher insolvency-state distribution should translate to lower aggregate credit costs.<sup>11</sup> (“Aggregate” because an efficient individual collector knowing it could reap the fruits of its rapaciousness might not like the forced *pari passu* collectivism in the statist approach of cross-subsidizing its less efficient brethren, but including all the uncertain, risk-averse, and/or lemon-concerned creditors makes the aggregate claim plausible.) The necessary foundation of the statist approach, therefore, by literal definition, is a *state*, replete with the sovereign’s law-making and law-enforcing power.<sup>12</sup>

In the international realm there is no state and hence no possible statist solution. This demoralizes the credit-cost-minimizing theoretician, who bemoans this lack of law. Of course, binding international law can be made by sovereign consent through treaty execution. Yet corporate insolvency—all insolvency—has until recently by international law standards remained stubbornly resistant to treaty enactment. Why is this so? Wise scholars have suggested that the challenge is due both to the invasive and to the normatively contested nature of bankruptcy law.<sup>13</sup> Consider invasive. Bankruptcy law is what might be considered “trans-substantive” because it overlaps and displaces other discrete domains of substantive law. For example, one can consider the law of patents as prescribing a set of rules governing certain intellectual property rights. But bankruptcy law dangles an asterisk over that field, cautioning that all bets might be off when a corporate debtor seeks relief from creditors.<sup>14</sup> Almost no area of substantive law is immune from trumping in bankruptcy, both vertically in a federal system and horizontally in terms of pre-emption of sister regulatory regimes.<sup>15</sup> In the United States, the pages of the bankruptcy reporters are flush with enraged lawyers for the IRS, EPA, and NLRB, not to mention scores of states attorneys general, who are routinely on the losing end of a scope question of bankruptcy law.<sup>16</sup> (The automatic stay shunting those lawyers into oft-unfamiliar bankruptcy courts to make their losing claims rubs salt in

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<sup>10</sup> 11 U.S.C. § 541.

<sup>11</sup> See Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 VA. L. REV. 1199, 1201-04 (2005).

<sup>12</sup> See Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 855 (“A bankruptcy regime exists to enforce a set of priorities chosen by legislators.”); see also Barry E. Adler, *Bankruptcy Primitives* (discussing state’s role in dictating distributional endowments in bankruptcy).

<sup>13</sup> See, e.g., John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT’L L. 935, 942 (2005).

<sup>14</sup> See, e.g., *In re Telegroup, Inc.*, 237 B.R. 87 (Bankr. D. N.J. 1999) (denying patent holder relief from stay to sue debtor for alleged post-petition patent infringement).

<sup>15</sup> See, e.g., *40235 Washington St. Corp. v. Lusardi*, 329 F.3d 1076, 1084 (9th Cir. 2003) (holding that conflict preemption precluded application of California statute governing validity of tax deeds because the statute conflicted with the automatic stay provision of the Bankruptcy Code); *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510-511 (9th Cir. 2002) (holding that remedies for violation of discharge injunction under 11 U.S.C. §524 precluded claims under the federal Fair Debt Collection Practices Act). Criminal law probably fares best against bankruptcy. See 11 U.S.C. § 362(b)(1).

<sup>16</sup> See, e.g., *In re Bristol Convalescent Home, Inc.*, 12 B.R. 448, 450 (Bankr. D. Conn. 1981) (holding that, contrary to the IRS’s insistence, money owed to the debtor which the IRS had levied upon was in fact property of the debtor’s estate and therefore subject to turnover under § 542).

the wound.) Thus, one reason treaties are difficult—with their inherent cession of sovereignty—is that bankruptcy law can have wide-sweeping and deep-reaching effect.<sup>17</sup>

The second reason is that bankruptcy laws have thick normative content. For example, consider the priority provisions.<sup>18</sup> Yes, priority rules can be dismissed as the spoils of domestic rent-seeking contests (and they often are), but they also do represent deeply held policy beliefs on the sensitive distributional choices that arise in financial failure. Take, for example, the security-trumping labor claim priorities of many domestic insolvency regimes.<sup>19</sup> Having to yield on those matters by treaty to a foreign country's laws is not an easy sell. It is no surprise that bankruptcy for a long time eluded international lawmaking.

Cognizant of these constraints, international bankruptcy scholars divided into opposing camps for two theoretical models of the optimal cross-border insolvency law. The first, *universalists*, took a “one law” approach and argued that both the principles of cost minimization and the fairness-animated justification for *pari passu* distribution militated in favor of one substantive bankruptcy law to govern a multinational's financial assets, regardless of their jurisdictional location.<sup>20</sup> Cost minimization would obtain, they argued, via at least three avenues: (a) reduction in monitoring costs, where creditors would not have to follow a debtor's assets as they crossed national borders to see which new substantive bankruptcy consequences would result, (b) reduction in fragmentation costs, as creditors would not have to open duplicative and wasteful proceedings in each jurisdiction that contained assets of the debtor, and (c) going-concern preservation, with one binding law able to prevent the destructive, territoriality-based liquidation of an enterprise whose going-concern value required coordinated utilization of assets in multiple countries (mimicking the statist approach).<sup>21</sup> Undergirding the universalists' cost-minimization arguments were also robust fairness concerns: that the recovery of a creditor should not depend upon the random happenstance of asset location on the day of bankruptcy. If a debtor happened to have a bounty of assets in Country X and a paucity in Countries Y and Z, then the X creditors should not have a windfall when the going-concern value is spread evenly over the three jurisdictions.<sup>22</sup>

Universalists (perhaps ironically) do not command universal support. *Territorialists*, as their name implies, oppose what they see as universalist pipe-dreaming on both cost-minimization arguments and

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<sup>17</sup> See Frederick Tung, *Is International Bankruptcy Possible*, 23 MICH. J. INT'L L. 31, 45-48 (2001).

<sup>18</sup> See, e.g., 11 U.S.C. § 507.

<sup>19</sup> See Andrew Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177, 2196-98 (2000) (noting that although all regimes surveyed gave priority status to employee claimants, the status and amount of those claims varied country to country).

<sup>20</sup> Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2284-85 (2000).

<sup>21</sup> See Guzman, *supra* note 19, at 2199-04.

<sup>22</sup> See Westbrook, *supra* note 20, at 2309. Indeed, *pari passu* distribution (tempered by voluntary contractual priority rearrangement) is likely the outcome of an approach focused on capital cost minimization, because, unless the parties have an affirmative reason to deviate from a ratable return, the avoidance of priority conflict and its attendant cost is a savings.

their own fairness grounds.<sup>23</sup> On the cost front, they complain that whatever monitoring costs universalism saves might well be offset by non-diversification and forum-shopping costs. That is, because universalism puts all the distributional eggs in one nation's basket by global application of that one nation's bankruptcy laws, favored creditors will jockey to have their nation be the selected hegemon, just as jilted creditors will litigate vociferous opposition to bowing to that nation's rules. Forum shopping will follow as a matter of course, racing to the bottom or top (depending on one's views) as fast as the much-analyzed corporate charters are drafted at U.S. state law. As such, no stable rule will ever evolve to select the "winning" jurisdiction, as perceived losers will either not acquiesce *ex ante* or will undermine *ex post*.<sup>24</sup> As for fragmentation costs, absent a pan-global adjudication system of cross-border bankruptcy tribunals, enforcement would fall to local courts, in which case multiple proceedings would have to be opened anyway, just with different substantive laws.<sup>25</sup> Finally, regarding the destruction of going-concern value, territorialists retort that nothing prevents creditors in diverse jurisdictions from cooperating *ad hoc* when to do so would be in the collective benefit.<sup>26</sup>

But even more than the cost arguments, deeply held beliefs of sovereignty and vested rights exercise the territorialists. Territorialists complain that creditors (more specifically, local creditors) lend to a debtor on the expectation that they have certain rights under local insolvency law. To pull the rug out from under them and apply a foreign bankruptcy law—because their debtor is a multinational—runs roughshod over these expectations.<sup>27</sup> Worse, because of the normative content of bankruptcy law discussed above, application of this foreign law requires subjugation of the careful domestic policy balance of insolvency priorities in favor of some foreign jurisdiction's tastes. No country would—or should—accept this emasculation.<sup>28</sup> As such, territorialists contend, good borders make good neighbors, and allowing each nation to govern the adjudication of assets within its jurisdiction in the event of a multinational's bankruptcy is the best way to address general financial default.

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<sup>23</sup> Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2239-42 (2000).

<sup>24</sup> See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 217-21 (2006); Lynn M. LoPucki, *Universalism Unravels*, 79 AM. BANKR. L.J. 143, 143-44 (2005).

<sup>25</sup> See Janger, *supra* note 1, at 409.

<sup>26</sup> See LoPucki, *Universalism Unravels*, *supra* note 24, at 143-44. This argument ignores the collective action concerns animating the creditor's bargain theory of a statist solution, but such critique is beyond the scope of this discussion.

<sup>27</sup> See, e.g., Council Regulation 1346/2000, arts. 27-28. Here, the Council of the European Union empowered local creditors to initiate secondary proceedings in their home countries to enjoy the benefit of local bankruptcy law. The Council also cited "the protection of local interests" as a justification for secondary proceedings. *Id.* at 19th Recital.

<sup>28</sup> Professor Rasmussen has offered a third approach, "contractualism," which leaves the choice of law decision to the debtor, allowing corporate entities to select the regime to govern their insolvency proceeding in their corporate charters, but this contribution is beyond the scope of our present focus. See Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2254 (2000).

It is fair to say that as an academic matter, the universalists have won the upper hand in terms of followers.<sup>29</sup> But the burden is on them, so to speak, because the dictates of sovereignty are that absent international agreement, territorialism is the status quo. The universalism-territorialism debate has been well ventilated academically, and so the reader of this chapter will have to join its author's theoretical stipulation that universalists have the better theoretical argument, especially when viewed through the lens of corporate insolvency law's interest in minimizing the ex ante cost of credit.

## II. THE RISE OF SOFT LAW (AND, CONSEQUENTLY, UNIVERSALISM).

As alluded to above, recurrent attempts to execute an international convention on insolvency law have failed, which is not surprising given the hotly contested differences of universalists and territorialists. (Different countries map to different proclivities; the United States is a leading universalist jurisdiction, whereas Japan, although now improving, was widely known for its territorialism.)<sup>30</sup> A couple historical developments—perhaps aided by the backdrop of ever-increasing globalization of business—broke the historical logjam on international bankruptcy cooperation. Likely inspired by the landmark restructuring of Maxwell Communications,<sup>31</sup> a global publishing conglomerate, and certainly facilitated by the unfolding institutional apparatus of the European Union, the 1990s saw the drafting of a European Insolvency Regulation and concomitant Model Law on Cross-Border Insolvency promulgated by UNCITRAL. It is not overstatement to say these were watershed innovations in cross-border insolvency that brought the first real semblance of coherence to the international bankruptcy scene. Because the EU has sovereign authority to bind member states directly to Directives and Regulations, its task (as a positive law matter, not necessarily as a political matter) was somewhat easier than UNCITRAL's.<sup>32</sup> Relatedly, the binding consequence of the EU Regulation is stronger than the UNCITRAL Model Law. Both regimes, however, advanced the agenda of universalism.

### A. Introduction to the UNCITRAL Model Law.

Although these two instruments developed in tandem, for ease of exposition we will focus on the Model Law championed by UNCITRAL. This document's success was principally due to its soft status and departure from the traditional international document of the multi-state convention (treaty).<sup>33</sup> Here, "soft" is used as a term of art, and the reader is spared the voluminous literature on the constitution of soft

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<sup>29</sup> Pottow, *supra* note 8, at 947; *see generally* Frederick Tung, *Is International Bankruptcy Possible*, 23 MICH. J. INT'L L. 31 (2001); Guzman, *supra* note 19; Westbrook, *supra* note 20.

<sup>30</sup> Samuel L. Bufford & Kazuhiro Yanagida, *Japan's Revised Laws on Business Reorganization: An Analysis*, 39 CORNELL INT'L L.J. 1, 55 (2006).

<sup>31</sup> *In re Maxwell Comm'n. Corp.*, 93 F.3d 1036 (2d Cir. 1996).

<sup>32</sup> The EU is not, strictly speaking, a sovereign entity because EU member states retain the power to opt out of EU regulations. Still, the Insolvency Regulation was adopted by all member states other than Denmark. *See* Westbrook, *supra* note 20, at 2280. Though beyond the scope of this chapter, it is notable that the Insolvency Regulation began as a convention but later took the form of a regulation due to the United Kingdom's sensitivity over mad cow disease. *See* E. Bruce Leonard, *The International Scene, The International Year in Review*, 2001 AM. BANKR. INST. J. 34, 34 (2001).

<sup>33</sup> Pottow, *supra* note 13, at 985-88.



law.<sup>34</sup> Relevant for purposes of this chapter is a working definition of soft law that means not only non-binding compulsion (the absence of legislation), an essential attribute of soft law, but a further, substantive dimension. Perhaps more accurately characterized as “incomplete” or “unspecified” law, the content of the Model Law, wholly apart from (actually, intrinsically related to) its non-binding nature, is notable for its careful failure to engage the most contentious substantive legal bankruptcy issues. It is thus both “positively” and “substantively” soft, which will be how “soft” law is used in this discussion.

Thus, UNCITRAL’s Model Law sought to blunt the opposition of the two fervent camps of universalists and territorialists by carving a non-committal fine line down the middle to secure maximal buy-in. That is, the Model Law nominally purports to address matters of bankruptcy procedure (opening and recognition of proceedings, etc.) *without* comprehensively resolving the difficult distributional questions attendant with choice of bankruptcy law raised by the universalist-territorialist divide.<sup>35</sup> This might be considered its substantive softness, as opposed to its positivist softness, mentioned above. Some if not most commentators assessed this aspect of the Model Law (perhaps decried it) as milquetoast reform at best that did not advance the field significantly.<sup>36</sup> Others have taken a more nuanced view. For them, the Model Law was not pussyfooting but intentionally reticent.<sup>37</sup> And in being so, the Model Law exploited its soft law nature to advance the cause of universalism considerably and should thus be celebrated, not bemoaned, by bankruptcy scholars seeking to minimize the cost of credit.

How does a self-described (and other-described) middle-ground instrument that eschews the universalism-territorialism theoretical minefield manage to advance the cause of universalism? This chapter will

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<sup>34</sup> See, e.g., Andrew Guzman & Timothy Meyer, *Soft Law*, in *THE RESEARCH HANDBOOK ON THE ECONOMICS OF PUBLIC INTERNATIONAL LAW* (Eugene . Kontorovich & Francesco Parisi eds. 2016).

<sup>35</sup> The Enactment Guide states that the Model Law’s “scope [is] limited to some procedural aspects of cross-border insolvency cases.” *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, ¶. 8, reprinted in 6 TUL. J. INT’L & COMP. L. 415 (1998). Additionally, commentators have noted that the Model Law does not even use the words “territorialism” or “universalism.” See Pottow, *supra* note 13, at 961 n. 106.

<sup>36</sup> See, e.g., Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT’L L. 23, 35-36 (2000) (“Thus, in explicitly recognizing and deferring to a court’s ability to implement a territorial approach, the [Model Law] not only falls short of its promise of universality but also gives new vitality to territoriality.”); Liza Perkins, Note, *A Defense of Pure Universalism in Cross-Border Corporate Insolvencies*, 32 N.Y.U. J. INT’L L. & POL. 787, 828 (2000) (“[The Model Law] do[es] not go far enough. In fact, the UNCITRAL Model Law, even if widely enacted, may do little to change the dreadful state of affairs in international bankruptcy law.”); see also Ian F. Fletcher, *The European Convention on Insolvency Proceedings: Choice-of-Law Provisions*, 33 TEX. INT’L L.J. 119, 124 (1998) (acknowledging that compromise approaches “draw the wrathful ire of purists”).

<sup>37</sup> See Susan Block-Lieb & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT’L L. 851, 853-854 (2007) (citing the Model Law as an instance of incremental lawmaking where “beneath the surface, the Model Law actually advanced universalism, and in a way that caused minimal affront to territorialism”) (quoting Pottow, *supra* note 13, at 939).

not summarize the Model Law in all its glory and leaves interested readers referred elsewhere.<sup>38</sup> But it will highlight two broad ways in which the Model Law advances the universalism cause notwithstanding its middle-road substantive softness. First, the instrument does so mechanically. Specifically, the Model Law contains important procedurally focused grants of authority that allow enacting jurisdictions to cooperate, coordinate, and communicate with sister jurisdictions jointly seized with the administration of a cross-border corporate bankruptcy. For example, many countries have constraints on the abilities of their courts to contact foreign tribunals (think letters rogatory and other such barnacles), and so the Model Law makes clear that to the extent not incompatible with their local domestic due process norms, these courts can and even should reach out and to a certain extent “co-adjudicate” with foreign peers bankruptcy questions.<sup>39</sup> In a similar vein, Article 8 of the Model Law (codified as section 1508 in the U.S. Bankruptcy Code) instructs domestic courts to consider foreign law in rendering their decisions under the instrument, commanding that “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.”<sup>40</sup>

#### B. The Model Law’s Universalism: Doctrinal Anchors but “Substantive” Softness.

Second, and perhaps even more importantly, beyond these cooperation-facilitating mechanical rules, the Model Law helps erect the doctrinal foundations for a universalist system. That is, for a pluralist universalist system to function, two conceptual pillars must be established. First, a jurisdiction-selecting rule must be propounded to designate the substantive bankruptcy law that will control the one, “universal” rules of priority, distribution, and the like that will transcend national borders.<sup>41</sup> Second, there must be what universalism’s chief proponent calls “an acceptance of outcome differences,” meaning deferring or ancillary states must be willing to subordinate their own (normatively rich) distributional rules for the greater good of system efficiency.<sup>42</sup> The Model Law (just as the EU Insolvency Regulation) advances both of these constructs.

As broad overview, the general structure of the Model Law envisions a domestic court considering a request for assistance from a foreign bankruptcy proceeding representative. For example, a British bankruptcy administrator may open a proceeding in Australian court to seek turnover of Australian-situated assets for purposes of transferring them to the U.K. proceeding for liquidation there. Or a Canadian order confirming a corporate reorganization proceeding under the Companies’ Creditors Arrangement Act may be brought down to U.S. court for enforcement to enjoin American creditors to comport with the plan. Thus, the Model Law is generally directed at “receiving” courts: it delineates the scope of coopera-

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<sup>38</sup> See Andre J. Berends, *the UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. INT’L & COMP. L. 309 (1998).

<sup>39</sup> See MODEL LAW, *supra* note 6, art. 25. The U.S. Bankruptcy Code mirrors the language of the Model Law. 11 U.S.C. § 1525.

<sup>40</sup> MODEL LAW, art. 8; *accord* 11 U.S.C. § 1508.

<sup>41</sup> Pottow, *supra* note 13, at 952.

<sup>42</sup> Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 458 (1991).

tion and deference they should accord “requesting” courts in a multi-jurisdiction insolvency.<sup>43</sup> Against this backdrop, the Model Law reveals two universalist-leaning attributes.

First, the Model Law doctrinally deploys a jurisdiction-selecting rule. That rule is the Centre of Main Interests (“COMI,” as it is now called around the world, itself a worthy sidebar discussion of legal nomenclature).<sup>44</sup> Several legal concepts coalesce (“principal place of business” in U.S. parlance, “real seat” from the French, etc.) to confirm that the jurisdiction with the greatest connection to the corporate debtor will be accorded the most control under the Model Law system in receiving assistance.<sup>45</sup> More specifically, the Model Law designates an insolvency proceeding afoot in the corporate debtor’s COMI as a “foreign main proceeding,” and contrasts it with other proceedings not so situated (and for the most part designated “foreign non-main proceedings”).<sup>46</sup> While the Model Law requires enacting jurisdictions to recognize requests for assistance from foreign bankruptcy representatives coming from abroad to lay claim to domestic assets, the assistance granted to those shepherding foreign main proceedings is greater. Specifically, the domestic courts enter an automatic stay upon such a request from a foreign main proceeding.<sup>47</sup> While they can also stay domestic collection actions at the request of a foreign non-main proceeding’s insolvency representative, that relief is purely at the discretion of the local court.<sup>48</sup> Thus, in according (at least some) automatic relief to a foreign main proceeding, the Model Law seeks to enshrine one court—the COMI—with greater legal authority over all others. This essence of “jurisdictional hierarchy” thereby erects this first pillar of universalism: selection of a dominant forum worthy of legal deference.<sup>49</sup>

The second universalism-fomenting feature is somewhat touchier. For a completely universalist system to get off the ground, the deferring or ancillary states have to be willing to suppress their home-state

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<sup>43</sup> See generally MODEL LAW, *supra* note 6, arts. 25-27; 11 U.S.C. §§ 1525-15.

<sup>44</sup> See Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713, 719-20 (2005); MODEL LAW, *supra* note 6, art. 17(2)(a); 11 U.S.C. § 1502(4).

<sup>45</sup> See Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, Art. 16-148, 6500/96 (1996) (“Since the main proceedings can be opened only if the debtor has his centre of main interests in the State of the opening . . . the decision of the law of that state . . . should be respected by the other Member States, whose connection with the debtor is restricted to the existence of an establishment or assets.”).

<sup>46</sup> See MODEL LAW, *supra* note 6, art. 2(b)-2(c); 11 U.S.C. § 1502(4)-(5). “Main” and “non-main” do not exhaust the universe of cross-border insolvency proceedings. There is a third class of proceedings for debtors that do not meet the “establishment” requirement for a non-main proceeding. These oddities are beyond the scope of this enquiry. See Pottow, *supra* note 1, at 581.

<sup>47</sup> See MODEL LAW, *supra* note 6, art. 20 § 1(a)-(b); 11 U.S.C. § 1520(a)(1).

<sup>48</sup> See MODEL LAW, art. 21(1)(a), (b), and (c); 11 U.S.C. § 1521 (a), (b) and (c).

<sup>49</sup> See Pottow, *supra* note 1, at 583 (defining “jurisdictional hierarchies” as systems “designed to subordinate the secondary proceeding and make them, aptly, secondary”). The selection of forum is not set in stone; the presumption of COMI is rebutted when the incorporation location is merely a sham, which serves as a proxy for forum shopping. See John A. E. Pottow, *Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT’L L. 785, 793 (2007).

insolvency rules in favor of the COMI court's, a tough sell to the sovereignty-conscious.<sup>50</sup> This the Model Law (by design) does not do. A full analysis of the Model Law's capacity nonetheless to acclimate ancillary states to the imposition of COMI bankruptcy law is beyond the scope of this discussion. (The mechanisms are subtle and the subject of other work to which the interested reader is referred.)<sup>51</sup> A broad generalization can be made that suffices for purposes of this discussion: the Model Law facilitates that application of COMI state law by offering its potential application in a non-threatening (i.e., "soft") manner. What the Model Law does is suggest a framework, perhaps even a presumption, of that deference to COMI bankruptcy law, but then claw back that seemingly universalist proclivity with unambiguous territorialist retrenchments.<sup>52</sup> This is where we see pragmatism creeping its way into the theoretical purity of cross-border insolvency law. Specifically, the Model Law approach does not force wholesale "export" of the COMI state's bankruptcy laws to the ancillary jurisdictions as universalism would counsel. Rather, it permits, but for the most part does not require, its exportation. That is, while true the Model Law contains a jurisdictional hierarchy favoring the COMI state, it still leaves cooperation up to the cooperating states.<sup>53</sup> Some have called this "modified universalism," because the injection of discretion diminishes the universalist application of one substantive bankruptcy law.<sup>54</sup> It "modifies" (better, "softens") universalism's unitary aspect by allowing some territorial concessions. This modification was likely necessary to get the law past territorialist states who would otherwise have balked at the cession of sovereignty from more full-throated universalism.<sup>55</sup>

The Model Law's balancing act is careful and delicate. That is, on the one hand it offers modified universalism and the ability of a foreign representative to take assets away from a local jurisdiction and deploy them under foreign distributional rules.<sup>56</sup> On the other hand, it qualifies those seemingly universalist powers by three important concessions to territorialists (wholly apart from the baseline discretionary power to cooperate with the request for assistance). Namely, the Model Law contains three principal "claw-backs" toward territorialism from its universalist inroads. First, although the recognition provisions accord relatively automated and mandated cooperation to the foreign insolvency representative (the local courts are commanded to "recognize" the foreign representative if a check list of factors is satisfied, and moreover to specify whether they are recognizing a foreign main or non-main proceed-

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<sup>50</sup> See Tung, *supra* note 17, at 55 ("[A] state's preference for its own bankruptcy law and reluctance to recognize foreign bankruptcy proceedings may arise from the desire of domestic actors to defend the policies implicit in their domestic laws.").

<sup>51</sup> See Pottow, *supra* note 13, at 980-96 (discussing, among other things, notice provisions and the presumption of insolvency).

<sup>52</sup> See *id.* at 969 ("[T]he Model Law, on the surface, appears to be a hybrid of sorts: partially universalist in outreach, but partially territorialist in retrenchment.").

<sup>53</sup> See MODEL LAW, *supra* note 6, arts. 25-26; 15 U.S.C. §§ 1525-1527.

<sup>54</sup> Jay Lawrence Westbrook, *Bankruptcy Tourism*, 3 Int'l J. of Proc. L. 159, 161-62 (2013).

<sup>55</sup> See Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and the EU Insolvency Regulation*, 76 Am. Bankr. L. J. 1, 17 (2002) (noting that Articles 28 and 29, which allow local proceedings to trump foreign proceedings under certain circumstances, were *sine qua non* of passing the Model Law).

<sup>56</sup> See, e.g., MODEL LAW, *supra* note 6, art. 21(1)(e); 11 U.S.C. § 1521(a)-(b).

ing),<sup>57</sup> the relief provisions are separated out for different treatment. Bluntly, recognition does not mean relief. Once recognized, the foreign insolvency representative must still ask the local court for specific bankruptcy-related relief. While some relief is awarded automatically (e.g., the stay to a foreign main proceeding), most relief is discretionary.<sup>58</sup> The Model Law grafts three constraints onto the exercise of that discretion.

Consider the most poignant of all relief requests: expatriation of local assets to the foreign main proceeding, which the Model Law explicitly countenances.<sup>59</sup> This is the essence of universalism. The Model Law envisions a domestic court ordering turnover of locally situated assets to the COMI court to share with COMI creditors and distribute under the substantive rules of COMI bankruptcy law. Local creditors are unlikely to welcome the departure of such assets that would otherwise be available to satisfy local claims. This is especially so for local creditors who are protected by local priority rules, such as, e.g., U.S. fishermen under the U.S. Code.<sup>60</sup>

Recognizing this territorialist tension working against its quintessentially universalist provision for discretionary relief, the Model Law spells out safeguard considerations that must be undertaken by a local court before assets can be turned over to the COMI tribunal.<sup>61</sup> One of those expressly states that the interests of local creditors must be “adequately protected.”<sup>62</sup> To be sure, the Model Law intentionally and delphically leaves this standard undefined, but the idea is surely to offer the aggrieved local creditor ammunition to deny turnover and loss of domestic bankruptcy favoritism. Indeed, an overly robust form of interpreting “adequate protection” would deny any turnover unless the local creditors would receive at a minimum their precise entitlement under local law (a standard auguring poorly for the acceptance of outcome differences necessary to buttress universalism),<sup>63</sup> but courts have for the most part not fallen into this trap.<sup>64</sup> Rather, the idea has been interpreted to allow something of a “margin of

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<sup>57</sup> See *id.*, *supra* note 6, art. 17(1)-(2); 11 U.S.C. § 1517.

<sup>58</sup> The automatic stay for foreign main proceedings arises from Article 20(1)(a), while discretionary interim relief, post-recognition relief, and relief under laws of the enacting state arise from articles 19, 21, and 7, respectively.

<sup>59</sup> See MODEL LAW, *supra* note 6, art. 21.1(e)-21.2.

<sup>60</sup> 11 U.S.C. § 507(a)(6) (2012).

<sup>61</sup> MODEL LAW, *supra* note 6, art. 22(1)-(2). The discretionary nature of the relief is not on its own enough to assuage territorially inclined states. This is because of agency costs and the possibility of renegade judges. The mere possibility that the Model Law could allow a judge to “go wild” would terrify policymakers from these states, and so the specific provisions built into the Model Law were necessary for their assuagement wholly apart from the discretionary nature of many of the relief provisions.

<sup>62</sup> See MODEL LAW, *supra* note 6, art. 21, ¶2; 15 U.S.C. § 1522(a). Note, this “adequate protection” is not coextensive with the safeguard for secured creditors under U.S. bankruptcy law. Congress used the term “sufficiently protected” here to avoid confusion. H.R. REP. NO. 109-31(I), 115 (2005).

<sup>63</sup> See LoPucki, *supra* note 23, at 2221 (2000) (arguing that modified universalism is virtually indistinguishable from territorialism if cooperation with foreign courts hinges on the rights of the parties under local law not being altered).

<sup>64</sup> Some have. The recent U.K. case of *Cosco Bulk Carrier Co Ltd v. Armada Shipping SA*, [2011] EWHC 216 (Ch), 2011 WL 398130, casts some worry that even respected courts may fall victim to ex-

appreciation,”<sup>65</sup> and thus a loose recognition of “adequate protection” has been seen that requires only general respect of entitlements or assets without assuring perfect concordance.<sup>66</sup> A survey of the case law is beyond the scope of this analysis (although a flavor can be divined from the public policy cases discussed below). Still, however “strictly” or “loosely” the standard is interpreted, the point remains that the local creditor safeguard of adequate protection is a significant retrenchment toward territorialism contained within the universalist-inclined Model Law.

The second significant territorialist concession of the Model Law—whose inclusion was likely a *sine qua non* for hesitant states to join—was the supremacy of local bankruptcy proceedings. Recall that the archetypal Model Law application is to an ancillary proceeding lending assistance to a foreign main proceeding. But nothing in the Model Law precludes (indeed, specific provisions explicitly affirm) the ability of uncooperatively inclined local creditors to open a full “plenary” proceeding (for example, in the United States, a chapter 11 reorganization)<sup>67</sup> under local law to govern local assets.<sup>68</sup> There, the world shifts back to the pre-Model-Law, comity-dependent State of Insolvency Nature, with courts negotiating ad hoc for cooperation, complete with the prospect of dueling and conflicting court orders.<sup>69</sup> Although there are provisions that blunt the territorialist consequences of such a local creditor veto,<sup>70</sup> the fact remains that a territorially inclined creditor can drop the opt-out bomb at any time and have local law reign supreme.

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pansive insistence of foreign concordance with local law and even evince hostility to foreign procedures. The *Cosco* court held that a London arbitration between a Swiss debtor in a recognized foreign main proceeding from Switzerland and a British shipping company should continue over the foreign representative’s objection and request for a stay. Referring to his discretion under the Model Law, the judge relied on the fact that the dispute would be governed by English shipping law and that London arbitrators would be more qualified. The court discounted the expense and delay of the arbitration, complaining that “the only reason why that has not occurred is because of the [foreign representative’s] preference for some other, probably Swiss, method of dispute resolution.” *Id.* at ¶¶ 52-60.

<sup>65</sup> While there is no canonical definition of “margin of appreciation,” the term generally refers to the latitude given to member states in observing conventions, initially applied to the European Convention on Human Rights. The term did not appear in the text of the Convention, but was first used in the Cyprus Case. *See Greece v. the United Kingdom (The Cyprus Case)* (1958-59) 2 Y.B. Eur. Conv. on H.R. 172 (1958-59) (Eur. Comm’n on H.R.).

<sup>66</sup> *See, e.g., In re Schimmelpenninck*, 183 F.3d 347, 364 (5th Cir. 1999); *In re Sivec SRL*, 476 B.R. 310, 324 (Bankr. E.D. Okla. 2012); *In re Petition of Garcia Avila*, 296 B.R. 95, 112 (Bankr. S.D.N.Y. 2003).

<sup>67</sup> The lax bankruptcy jurisdictional rules in the United States make this an easy prospect, even if the debtor’s COMI is located elsewhere.

<sup>68</sup> *See* MODEL LAW, *supra* note 6, art. 28; 11 U.S.C. § 1528.

<sup>69</sup> *See, e.g., Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod. N.V.*, 310 F.3d 118, 122 (3d Cir. 2002).

<sup>70</sup> For example, the parallel domestic plenary proceeding is restricted to assets within that country’s territorial jurisdiction. *See* MODEL LAW, *supra* note 6, art. 28; 11 U.S.C. § 1528. The Model Law thus cabins worldwide bankruptcy jurisdictional pretensions, such as found in the U.S. Code. *See* 11 U.S.C. § 541 (incorporating definition of “property of the estate” to include all property “wherever located and by whomever held”).

The third concession to territorial sovereignty is the least surprising because it replicates the “escape clause” found in many international instruments involving recognition of foreign judgments and choice of foreign law.<sup>71</sup> It provides that the cooperating court may always refuse to grant relief—even purportedly automatic relief—if to do so would violate “fundamental public policy” of the recognizing jurisdiction.<sup>72</sup> This assuages the “little states” that they will not be hegemonically commandeered by the possibly offensive bankruptcy laws of the COMI jurisdiction. With these three carveouts/clawbacks toward territorialism, the Model Law was able to advance a “proto-universalist” policy of a COMI-centered regime that defers, in some limited respects, to COMI-state bankruptcy laws but that backtracks in important ways from that promise. This middle-ground stance of the Model Law—at best a soft nudge toward universalism—was instrumental to its passage. A more brazen attempt toward universalism would likely have faltered given the sovereignty-consciousness of many states.<sup>73</sup>

### C. The Model Law’s “Traditional” Softness (It’s Not Law!)

Equally important to the passage of the Model Law as substantive softness, namely, its delicate middle-ground posture between universalism and territorialism (although leaning clearly universalist), was as a positivist matter its mode of implementation, namely, as a model law. While prior attempts at international agreement through the treaty mechanism tried and failed—repeatedly and spectacularly—the model law document allowed ultimate say on whether and how to enact the legislation up to each individual state, piecemeal and on its own timeframe.<sup>74</sup> Model laws are thus soft laws. More precisely, they might be called “softish,” because of course if and when the law becomes implemented as domestic legislation it crystallizes into hard law. As mentioned, this softness of the Model Law was another necessary condition to its acceptability by deeply hesitant and skeptical states.

But there are degrees of softness, and the Model Law, while soft, is far from the soft end of the spectrum. While soft enough to win over doubting states, it still tilts hard in several respects. For example, there are various provisions that are drafted with specific alternatives (i.e., Alternative A, Alternative B), such as the rules on foreign tax claims.<sup>75</sup> This format serves an agenda-setting function of cabining the perceived areas of legitimate differences of opinion and focuses dissent onto a few areas, rather than suggesting clause-by-clause consideration of each provision was appropriate by a state weighing enactment. And as an empirical matter, for the most part, this hard tilt of the softish law has worked. Many

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<sup>71</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(d) (Am. Law Inst. 1987) (“A court in the United States need not recognize a judgment of the court of a foreign state if . . . the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought . . .”).

<sup>72</sup> See MODEL LAW, *supra* note 6, art. 6; 11 U.S.C. § 1506.

<sup>73</sup> See Pottow *supra* note 13, at 939.

<sup>74</sup> See generally Charles W. Mooney Jr., *Extraterritorial Impact of Choice-of-Law Rules for Non-United States Debtors Under Revised UCC. Article 9 and a New Proposal for International Harmonization*, CROSS-BORDER SECURITY AND INSOLVENCY 202 (Michael Bridge & Robert Stevens eds., 2001) (praising this feature of model law).

<sup>75</sup> See, e.g., MODEL LAW, *supra* note 6, art 13, note b.

states that have enacted the Model Law have made only minor alterations at most to its text.<sup>76</sup> More importantly, the Model Law seems to be catching on. Leaving aside Europe, where its enactment rate is respectable but less urgent given the overlay of the EU Insolvency Regulation, the Model Law has been embraced by Canada, the United States, Mexico, Australia, Japan, and South Africa, to name just a few. There are some conspicuous omissions (the South American uptake has been slow), but for the large part, it is taking hold.<sup>77</sup> The uniformity (i.e., minimal deviations) of the enacting states doubtless accelerates this effect, as each successive country takes stock of how the law was deemed to be acceptable to the one before.

The model law construct is not new and shows the success of pan-governmental organizations, such as UNCITRAL, in capitalizing upon a soft law approach to international law.<sup>78</sup> While treaties are far from foreign to UNCITRAL's tool kit, it shepherded through the model law approach—radically softer than a treaty—perhaps because it sensed the fragile negotiating environment on cross-border insolvency. And this model law in particular was substantively soft, likely further respectful of this environment. For example, the conspicuous omission of choice of law rules was another likely intentional stance.<sup>79</sup> UNCITRAL is especially well situated to gauge the level of comfort with member state delegations on account of its working group format. These working groups are deeply consensus driven. Formal votes are eschewed in lieu of a sometimes-painstaking process that encourages cross-delegate engagement. (Coffee breaks are intentionally generous.)<sup>80</sup> The idea of “stretching” or trying to cram down one approach over the consternation of minority state delegations is just not how the operation works, and so its legal product hides from firm pronouncements and frequently contents itself with generalized principles or standards that leave some room for the eyes of the beholders. Here, too, the description of “soft” law is apt: not just non-binding but non-specifying.<sup>81</sup>

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<sup>76</sup> See Pottow, *supra* note 13, at 986.

<sup>77</sup> UNCITRAL maintains a list of the states that have enacted the model law, which now includes twenty-two states. See U. N. COMM'N ON INT'L TRADE LAW, STATUS: UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997) [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html) (last visited Sept. 1, 2015).

<sup>78</sup> Halliday & Block-Lieb, *supra* note 37, at 853-54.

<sup>79</sup> See U.N. Comm'm. on Int'l Trade Law, Working Group V (Insolvency Law), Rep. of the Fourth International Insolvency Law Colloquium (Vienna, 16-18 December 2013), July 7-18, 2014, U.N. Doc. A/CN.9/815 (May 2, 2014) (“[P]rocedural centralization leaves open the issue of which legal question will be determined by the choice of forum (*lex fori*) and which will be left to the ordinary choice of law principles (*lex situs*). The Model Law is silent on this question . . .”).

<sup>80</sup> I have attended many group meetings, but nothing in the text above is telling tales out of school.

<sup>81</sup> See generally Susan Block-Lieb & Terence C. Halliday, *Contracts and Private Law in the Emerging Ecology of International Lawmaking*, MAKING GLOBAL MARKETS WORK: CONTRACTS, PRICES AND INSTITUTIONS IN THE LONG TWENTIETH CENTURY (Gregoire Mallard & Jerome Sgard, eds., forthcoming 2015) (on file with authors) (showing how UNCITRAL has evolved to stay relevant in a crowded international institutional sphere, with UNIDROIT and the Hague Convention nipping at its heels and copying



#### D. More Soft(ish) Law: The EU Insolvency Regulation.

Worth a brief discussion in comparison with the UNCITRAL Model Law is the EU Insolvency Regulation. The Regulation allows bankruptcy proceedings opened in one of the member states at the COMI of the debtor to be recognized automatically in other member states, such as an “ancillary” jurisdiction where cooperation by the COMI insolvency representative is sought.<sup>82</sup> But the EU Regulation goes further than the Model Law’s tentativeness on choice of law matters such as priority, distribution, and the like. The Regulation provides a presumptive choice of law rule of COMI law (*lex fori concursus*). Under this presumption, COMI state law applies extraterritorially to all cross-border proceedings occurring within the Union.<sup>83</sup> That is, for a foreign main proceeding opened in the United Kingdom, UK bankruptcy law presumptively governs the distribution of assets of the debtor located in France (including the British rules of distribution). Needless to say, such a COMI-centered choice of law regime is deeply universalist and doesn’t seem that soft at all.

Nevertheless, territorialists persist in Europe as elsewhere, and so there are indeed territorialist retrenchments, just as with the Model Law. Thus, although the Regulation is hard as a traditional matter (binding Union-wide, although Denmark did opt out originally),<sup>84</sup> it remains “substantively soft,” following the lead of the UNCITRAL Model Law. First, the *lex fori concursus* rule is tempered by a laundry list of “carveouts” from the choice of law presumption, ranging from laws governing labor agreements to laws governing secured transactions.<sup>85</sup> So, for example, if the COMI bankruptcy law treats employee wages as general unsecured claims but an ancillary jurisdiction would give them a priority, the ancillary jurisdiction may not need to follow the *lex fori concursus*’s ranking rule but can instead apply its own *lex secundus* (actually, *lex laboris*) that elevates the labor claim’s rank.<sup>86</sup> Given the breadth of these carveouts, it is understandable that the Insolvency Regulation is rarely described as universalist but rather “modified universalist” at best.<sup>87</sup>

A second retrenchment toward territorialism is the ability to open *secondary proceedings*. Much like the veto local creditors hold under the Model Law to open parallel plenary proceedings under domestic law in the face of a COMI foreign main proceeding, so too does the EU Regulation allow local creditors (technically, any creditors) to open “secondary proceedings” under local insolvency law (per the above

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its songbook). The enthusiastic embrace of the Model Law shows that UNCITRAL may have had the exact right approach with going soft.

<sup>82</sup> EU INSOLVENCY REGULATION, *supra* note 1, arts. 3, 19.

<sup>83</sup> *Id.*, art. 7.

<sup>84</sup> *See supra*, note 32

<sup>85</sup> *See* EU INSOLVENCY REGULATION, *supra* note 1, arts. 8-18.

<sup>86</sup> *See id.*, art. 13. Because the operative section of Article 3, paragraph 2, only explicitly refers to laws “applicable to the contract of employment” and confers power on courts in ancillary proceedings to “terminate and modify” them, the example above is merely an expository illustration.

<sup>87</sup> *See* Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 8-9 (2002).

example, a French insolvency proceeding after the UK-COMI-ed debtor's main proceeding).<sup>88</sup> These secondary proceedings apply their own substantive bankruptcy laws of distribution and the like, further muting the universalist inroads of the Regulation. (The Regulation also has a standard public policy "escape clause" mirroring the Model Law.)<sup>89</sup>

### III. ASSESSING THE ROLE OF SOFT LAW IN ADVANCING UNIVERSALISM.

The state of affairs of the cross-border insolvency legal system as it now stands is thus "somewhat" universalist—certainly dramatically more so than before the roll-out of the Model Law and the EU Regulation. But there is a deliberately vague, inchoate nature to the state of the law (demonstrating the rub of soft law). The parameters of the public policy carveout, the definition and application of "adequate protection," and so forth have been left unspecified, for courts and parties to hash out in litigation (or render moot by settlement on the courthouse steps). This might be considered yet another aspect of "softness" of the law. A key theme to the acceptability of the Model Law has been leaving difficult questions unanswered to assuage passage. Leaving questions vaguely answered constitutes a friendly amendment to that approach. (As discussed below, however, it is not without risk.)

#### A. Public Policy (Not) Gone Wild.

The success of this nascent regime has seen fits and starts but for the most part has been encouraging. Two questions might be asked to test this encouragement: first, have cross-border restructurings been facilitated since the completion of these instruments; and second, have those restructurings evinced a universalist bent? The first question is hard to answer empirically, but certainly on an anecdotal review of headlines and war stories, the cooperation in multinational corporate insolvencies has been widespread and highly visible.<sup>90</sup> The second question is closer, but signs nevertheless augur positively.

One useful metric for the second question whether the Model Law regime has allowed its incipient universalism to take flight is to look at the usage of the public policy exception. Territorialists might opine that in any case in which there is even a marginal difference of dividend based on substantive law (or asset concentration) a local court will try to shoehorn a foreign request for assistance into the public policy exception and deny assistance, thereby protecting the local players (and local turf).<sup>91</sup> By contrast,

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<sup>88</sup> EU INSOLVENCY REGULATION, *supra* note 1, art. 34.

<sup>89</sup> *See id.*, art. 33.

<sup>90</sup> The insolvency proceedings following the collapse of Lehman Brothers is a notable example. *See* Joseph Checkler, *Lehman Australia Files Chapter 15 Bankruptcy Petition in US*, WSJ BLOGS: DEAL JOURNAL AUSTRALIA (Jan. 10, 2012, 4:40 PM), <http://blogs.wsj.com/dealjournalaustralia/2012/01/10/lehman-australia-files-chapter-15-bankruptcy-petition-in-us/>; Michael J. Fleming & Asana Sarkar, *The Failure Resolution of Lehman Brothers*, Fed. Res. Econ. Pol'y Rev. Dec. 2014, at 175, 175 ("More than eighty jurisdictions' insolvency laws applied to the non-U.S. Lehman Brothers entities . . .").

<sup>91</sup> Professor Buxbaum notes that a classification problem arises at the outset because insolvency regimes reflect goals both public and private. *See* Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23, 55 (2000) ("[T]he question

universalists hope for restrained application of the public policy escape.<sup>92</sup> Whose predictions have been borne out?

Consider first the historical backdrop using the United States as an example. Before the Model Law, comity was king, albeit semi-codified in the U.S. Bankruptcy Code through former section 304.<sup>93</sup> There, U.S. bankruptcy courts were allowed to offer assistance to foreign proceedings on a discretionary basis and pursuant to list of factors enumerated by statute.<sup>94</sup> One of them, “distribution of assets substantially in accordance with the provisions of this title,” presented a similar question.<sup>95</sup>

Would courts find any trivial deviation in distribution from U.S. law fatal, or would they take a more permissive (perhaps “cosmopolitan”) approach? On its strictest read, any deviation from U.S. law would preclude cooperation with a foreign representative, and so a universalist approach would be impossible absent substantive convergence of bankruptcy laws, a fantasy not yet achieved but a topic for another paper.<sup>96</sup> Although there were some notable exceptions,<sup>97</sup> U.S. courts for the most part were willing to defer to foreign insolvency cases even when to do so resulted in differing creditor outcomes.<sup>98</sup>

Thus, the historical practice suggests a predisposition to take the universalist invitation of the Model Law and run with it (at least in the United States). There might have been backlash, but the initial reports indicate that the public policy clause has not been a rule-swallowing exception. Deployment has been restrained. Sticking to the U.S. experience, we can look at an important exemplar, *Mansfield*. In a

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arises whether it is possible to separate impairments of creditors’ interests that do not violate the public policy of the United States from impairments that do.”). Others have decried the *Qimonda* and *Vitro* decisions as evidencing a trend of applying the public policy exception “merely to secure the interest of U.S. creditors and interested entities.” Buckel, *infra* note 105 at 1284. For an extended discussion disaggregating the territorialist impulses of private local creditor distribution (greed) and sovereign public policy vindication (pride), see John A.E. Pottow, *Greedy and Proud in International Bankruptcy: The Problems of and Proposed Solutions to ‘Local Interests,’* 104 MICH. L. REV. 1899 (2006).

<sup>92</sup> MODEL LAW, *supra* note 6, *Guide to Enactment and Interpretation*, ¶ 21(e) (“[I]t is expected that the public policy exception will be rarely used.”).

<sup>93</sup> 11 U.S.C. § 304 (repealed 2005).

<sup>94</sup> The factors courts considered under § 304 included just treatment of all holders of claims; protection of U.S. claim holders against the prejudice and inconvenience of foreign proceedings; prevention of fraudulent transfers; substantial accordance with U.S. bankruptcy distribution; comity; and opportunity for a fresh start for the individual whom the foreign proceeding concerns. *See* § 304(c); *cf.* 11 U.S.C. 1507(b) (preserving [many of] these considerations in gauging certain discretionary relief).

<sup>95</sup> *See* 11 U.S.C. § 304(c)(4).

<sup>96</sup> *See* LoPucki, *supra* note 23, at 2217.

<sup>97</sup> *See, e.g., In re Treco*, 240 F.3d 148 (2d Cir. 2001). Guided by the startling fact that the Bahamian administrators had devoured \$8 million (USD) in fees on an estate of \$10 million, the court denied deference to a Bahamian main proceeding under § 304(c)(4), on the appeal of a secured creditor founded solely on differential payout. *See id.* at 159-61.

<sup>98</sup> *See, e.g., In re Bd. Dirs. Telecom Arg., S.A.*, 528 F.3d 162 (2d Cir. 2008). Here, the court upheld the lower court’s recognition of an Argentinian proceeding under § 304, despite the creditor’s claim that Argentina’s insolvency regime lacked protections available to creditors under U.S. law. *Id.* at 176 n. 9.

seminal case stemming from the market collapse of the commercial paper lending markets and a Canadian-COMI-ed restructuring proceeding under the CCAA, a Canadian representative tested U.S. willingness to allow departure from its own substantive bankruptcy laws in aid of enforcing a comprehensive reorganization designed in Canada.<sup>99</sup> There, the Canadian debtor secured multiple constituency buy-in for a plan, but because of the inter-connectedness of the commercial paper market participants, a global release was sought by non-debtor, third-party financiers not themselves in bankruptcy. The issue was fully litigated in the Canadian courts (up through appeals) and eventually resolved in favor of the debtor's plan and the non-debtors' releases, finding sufficient flexibility in the substantive provisions of the CCAA to permit the plan's unusual terms of discharging non-debtors from liability.<sup>100</sup>

When matters came down to New York for enforcement by injunctions of the releases against parties with U.S. connections through chapter 15, objectors implored the U.S. court to find the third-party releases violative of public policy. The court would have none of it. Expressly discussing the necessity of comity and appreciation of foreign insolvency law and its differences, the court made clear that the mere impermissibility of the non-debtor releases under U.S. domestic bankruptcy law (actually a source of some contention and circuit division)<sup>101</sup> was not an impediment to the enforcement of the Canadian orders as appropriate relief under the Model Law.<sup>102</sup> Put another way, mere deviation from substantive U.S. bankruptcy law—even with distributional consequences (profound ones—discharge, no less!)—did not equate to a transgression of fundamental public policy worthy of triggering the escape clause. In crafting its holding, the U.S. court underscored both the need for a procedural focus (remarking at how the Canadian proceedings were cognate common law ones with full and fair trial and appellate procedure) and on the need to accept substantive differences of law in the international bankruptcy context and the related need to cabin the public policy exception of section 1506 strictly.<sup>103</sup>

*Mansfield* is a representative U.S. case in terms of the strict construction of the public policy exception. Contrary examples are few, but exist. For example, in the *Toft* case, 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

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<sup>99</sup> *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

<sup>100</sup> *See id.* at 694.

<sup>101</sup> The Second Circuit holds that bankruptcy courts may approve non-debtor releases under some circumstances by exercising their broad equitable powers under 11 U.S.C. § 105. *See In re Drexel Burnham Lambert Grp. Inc.*, 960 F.2d 285 (2d Cir. 1992). In *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit distinguished *Drexel*, holding that, while temporary injunctions of third-party actions may be appropriate if the debtor and non-debtor enjoy an identity of interest or when the third-party action would have an adverse effect on the ability of the debtor to reorganize, 11 U.S.C. § 524(e) does not permit permanent discharge of non-debtor liabilities because the statute extends only to discharge of claims against the debtor, and the proscription cannot be overcome by section 105. *See In re Zale Corp.*, 62 F.3d 746.

<sup>102</sup> *See In re Metcalfe*, 421 B.R. at 694-700.

<sup>103</sup> *See id.* at 697-98; *see also In re Epherdra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006) (holding that Canadian court's order approving claims resolution procedure was entitled to recognition in part because the foreign procedure afforded claimants a fair and impartial proceeding).

have triggered criminal liability in the United States.<sup>104</sup> *Toft* was almost apologetic in its refusal to cooperate with the German representative and shows how courts are striving for limiting principles, not stretching for plausible grounds to dig in territorialist heels.<sup>105</sup> That said, the U.S. record is not unblemished. In one much-discussed U.S. opinion, *Qimonda*, the trial court held that a German insolvency representative's request to enforce an order rejecting executory intellectual property licenses (as licensor) of U.S. licensees would violate fundamental public policy because the aggrieved licensees would only have an ordinary claim for damages as opposed to the special quasi-property remedy accorded under section 365(n) of the U.S. Bankruptcy Code (which effectively allows the licensees to "reject the rejection" in part and continue exercising certain rights under the license).<sup>106</sup> The opinion delved into congressional history and divined an intent to foster entrepreneurial activity through protection of intellectual property licensees, elevating such incentivizing to fundamental U.S. policy. The opinion was ridiculed by most U.S. bankruptcy commentators as expanding the public policy exception to near-comical extent,<sup>107</sup> and its reasoning (although not its ultimate holding of non-cooperation) was abandoned on appeal.<sup>108</sup> All in all, it is fair to say the public policy exception has been interpreted narrowly in the United States, vindicating the Model Law's soft law potential to advance true deference to foreign insolvency laws by U.S. courts hosting ancillary proceedings. Harder law requiring cooperation was not necessary, and indeed could have proved destructive.

#### B. Beyond (and Avoiding) Public Policy: Adequate Protection with Restraint.

Going beyond the public policy question to other territorialist safeguards, the U.S. experience has been similarly cooperative, for the most part restricting non-relief to egregious cases and not, as territorialists may have feared (or hoped), running wild with excuses to reject requests for relief.<sup>109</sup> A good example

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<sup>104</sup> *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011).

<sup>105</sup> The court noted that the powers sought by the foreign representative "go far beyond the powers that have traditionally been afforded to a U.S. estate representative." *Id.* at 198.

<sup>106</sup> *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011), *aff'd on other grounds*, *Jaffe v. Samsung Elecs. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013).

<sup>107</sup> See, e.g., Elizabeth Buckel, *Curbing Comity: the Increasingly Expansive Public Policy Exception of Chapter 15*, 44 GEO. J. INT'L L. 1281, 1301-03 (2013).

<sup>108</sup> See *Jaffe*, 737 F.3d 14 at 32. The Court of Appeals actually affirmed the lower court's decision on its finding of inadequate protection under § 1522 and thus declined to rule on the issue of the public policy exception. The Court of Appeals did concede that its decision indirectly furthered the public policy underlying 365(n). *See id.*

<sup>109</sup> The general trend of cooperation between jurisdictions is borne out by the data and reflected in the literature. See, e.g., JAY LAWRENCE WESTBROOK, UNIVERSITY OF WESTERN ONTARIO, AN EMPIRICAL LOOK AT CHAPTER 15, 3 (2011). ("The data show that the United States courts are very strongly inclined to defer to foreign main proceedings within the intent of the Model Law and Chapter 15. Of the 253 cases that we found had reached a clear result, 237 resulted in recognition and only 12 in a denial of recognition."); Leah Barteld, *Cross-Border Bankruptcy and the Cooperative Solution*, 9 BYU INT'L LAW & MGMT. REV., at 38 (2012) ("In addition to the regional arrangements now in existence in Southeast Asia, Latin America, Northern Europe, and Central Africa have structures in place for some form of coopera-

of the facts warranting non-cooperation involves the Mexican reorganization (“concurso”) of Vitro, S.A.B. de C.V.<sup>110</sup> In *Vitro*, a Mexican-COMI-ed glass company sought to restructure its debt through a Mexican consensual, super-majoritarian voting regime analogous but far from identical to U.S. chapter 11. A group of dissident bondholders based in the United States voted no and launched numerous objections in Mexico, screaming bloody murder. Faring poorly in Mexico, they waged a more successful home court campaign in the United States, striving to convince the U.S. bankruptcy court in chapter 15 neither to recognize nor offer relief to the Mexican insolvency representative from the foreign main proceeding. They lost on the first front—it was, after all a foreign main proceeding afoot in the debtor’s COMI under the Model Law—and so the U.S. court recognized the proceeding and opened up a chapter 15 case.<sup>111</sup> But when it came time to enforce the *concurso* (through injunctive relief to bind the U.S. creditors and administer the U.S.-based property), the U.S. bankruptcy court balked, siding with the bondholders.<sup>112</sup>

Among the grounds argued to deny cooperation was, first, violation of fundamental policy. The section 1506 argument was launched on two general grounds: fundamental bankruptcy policy and fundamental due process. The gist of the latter assault was that the Mexican system, at least in this specific case, was crooked. Colorful facts about the questionable process used in the appointment of the insolvency representative and judicial ex parte procedures were all trotted out to disparage the result of the vote.<sup>113</sup> The gist of the first attack was directed to the voting rules that enabled the *concurso* to pass the Mexican thresholds for acceptance in the first place. Specifically, the company had (allegedly) manufactured inter-corporate debt owing from the debtor to affiliates sufficient to make those affiliates dominate the creditor vote and pass the plan. Worse, the corporate affiliates had guaranteed bondholder debt, and the *concurso* sought to dissolve those guarantees (a development the affiliates enthusiastically supported in casting their dominating votes to approve the plan). All these attributes were on the heels of a distribution proposal that offered equity around 50% of its stake while bypassing the creditors.

The *Vitro* U.S. bankruptcy court denied cooperation in light of these facts in finding a violation of bankruptcy policy.<sup>114</sup> But, again, the pains the court underwent to constrain the scope of its grounds for non-cooperation were striking—they come off as genuine, not feigned. For example, it assiduously avoided even engaging the corruption-based challenges (doubtless in the service of international diplomacy) and instead anchored its refusal to cooperate on the perversion of bankruptcy policy resulting from equity holders stripping off guarantees on the premise of a “consensual” waiver of the absolute priority rule by

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tion.”). I have not done my own recent study, but my intuition is that this cooperative trend is accelerating.

<sup>110</sup> *In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012).

<sup>111</sup> *See In re Vitro S.A.B. de C.V.*, 470 B.R. 408, 409 (Bankr. N.D. Tex. 2012), *aff’d* 701 F.3d 1031 (5th Cir. 2012).

<sup>112</sup> *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117, 133 (Bankr. N.D. Tex. 2012), *aff’d* 701 F.3d 1031 (5th Cir. 2012).

<sup>113</sup> *See id.* at 132.

<sup>114</sup> *See id.* at 133.

affiliated insider-creditors who were the obligors on the guarantees.<sup>115</sup> Thus, while *Vitro* nominally stands as an American example of non-cooperation under the Model Law regime, its opinion is intentionally narrow and draws attention to the case's specific and egregious facts (and even throws in some platitudes about Mexican insolvency law generally).<sup>116</sup> Indeed, on direct affirmance, the Court of Appeals downgraded the case even more, noting that the public policy clause did not even need to be reached because whatever the definition of "adequate protection" of creditors requires, this surely was not it.<sup>117</sup>

*Vitro* is an important U.S. precedent under chapter 15, not just in its holding but its analysis, because it shows how rarely courts want to deny cooperation, and when they do, how they want to avoid suggesting another country's bankruptcy laws violate public policy.<sup>118</sup> The opinion is sensitive to distributional differences and sensitive to cabining (or avoiding) the public policy out. Its facts were truly striking, and for the most part it does not seem to have set the international community on edge about a U.S. backslide toward parochial territorialism.<sup>119</sup> Accordingly, *Vitro* is generally accepted and drew little of the scorn reserved for *Qimonda*. And taking *Vitro* and the public policy cases collectively, the soft law gamble of the Model Law (at least in the United States) seems to have paid off. By leaving wide latitude for courts to cooperate, or not, it took a risk that the virtues of the universalist system would attract states not to unravel the regime through territorialist interpretations and exploitations of the slack in the system. That has happened, with universalist cooperation increasing.<sup>120</sup>

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<sup>115</sup> Responding to the bondholders' charges of corruption, the court made clear, "[T]his court has not seen evidence that the Mexican Proceeding is the product of corruption or that the LCM[*concurso*] is a corrupt process." *Id.* at 131. Instead, the court grounded its refusal on the fact that the plan provided for "drastically different treatment [from that given in a Chapter 11 proceeding] in that the bondholders receive a fraction of the amounts owed under the indentures from Vitro SAB and their rights against the other obligors were cut off." *Id.* at 132.

<sup>116</sup> *See id.* at 133. ("Generally, reorganization pursuant to the LCM is found to be a fair process, worthy of respect.")

<sup>117</sup> *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069-70 (5th Cir. 2012).

<sup>118</sup> *See In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex.) (finding cause to dismiss chapter 11 case filed by Russian company under 11 U.S.C. § 1112 due to the company's minimal contacts with the United States).

<sup>119</sup> *See, e.g.* Ramona Ortega, *A Cross-Border Insolvency Showdown: Vitro's Mexican Restructuring Plan Denied Comity in U.S. Bankruptcy Court*, FORDHAM J. CORP. L. FIN. BLOG (July 13, 2012), <http://news.law.fordham.edu/jcfl/2012/07/13/a-cross-border-insolvency-showdown-vitros-mexican-restructuring-plan-denied-comity-in-u-s-bankruptcy-court/> ("Despite the Bankruptcy Court's refusal to extend comity, its decision seems to be influenced more by the specific terms of the reorganization plan rather than a revival of territorialism . . .").

<sup>120</sup> *See 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."). The scorecard is not perfect, of course. *See Rubin v. Eurofinance SA*, [2012] UKSC 46, ¶ 130 (refusing to enforce a foreign avoidance action because such action "would be only to the detriment of United Kingdom businesses without any corresponding benefit."). *Id.*

### C. Universalism Doctrine Strengthening: COMI Construction.

Developing alongside these heady delineations of the public policy exceptions to cooperation and the giving of content to the adequate protection of creditors standard has been seemingly more workaday but equally important precedent-building on the doctrinal constructs that operationalize the Model Law's soft law regime. The easiest example of this is the COMI concept. Cases both under the EU Regulation and the Model Law have had occasion to weigh in on what "COMI" means, such as how and when its presumption of registered office should be rebutted. The *Bear Stearns* case, for instance, established that the Model Law's presumption of registered office being the COMI is not a burden of persuasion that if unchallenged by the litigants will ripen into a finding of fact. The opinion holds, on the contrary, that a recognizing judge has an independent obligation (or at least prerogative) to assess the bona fides of COMI and allow the court to deflate the presumption sua sponte in the instance of a true "letter box" corporation that is officially registered in one jurisdiction but has no operational or other significance there.<sup>121</sup> *Bear Stearns* and its progeny put meat on the bones of COMI. EU Regulation cases have done so too, such as the famous *Parmalat* case,<sup>122</sup> which cross-fertilize the Model Law jurisprudence due to the same COMI standard and the injunction under 11 U.S.C. § 1508 to consider the foreign origins of chapter 15. Ancillary doctrines are also being worked out in the case law, such as timing rules for determining COMI when there is COMI migration.<sup>123</sup>

### D. Toward (But Not Yet) Distributional Universalism: *Nortel*.

The most dramatic recent deployment of the Model Law's soft law regime has been with the sprawling *Nortel* bankruptcy.<sup>124</sup> *Nortel Networks* was a Canadian-COMI-ed telecommunications behemoth with arms spread all around the globe, including a good chunk of assets and operations in the United States. When the company collapsed, it had viable business lines and attractive IP portfolios. Under a strictly territorialist system, it is deeply implausible this value could have been preserved as assets would be carved up jurisdiction by jurisdiction at the behest of local creditors. Recognizing this, and using the procedural tools offered by the Model Law in the various relevant jurisdictions, the stakeholders en-

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<sup>121</sup> See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 125-26 (Bankr. S.D.N.Y. 2007).

<sup>122</sup> See Case C-341/04, *In re Eurofood IFSC Ltd.*, 2006 E.C.R. I-3813, 3868, ¶¶ 34-35 (May 2, 2006) (citing a shell company's not carrying out business in the territory of the state of the registered office as a circumstance that would rebut the COMI presumption).

<sup>123</sup> See *In re Fairfield Sentry Ltd.*, 714 F. 3d 127, 137 (2d Cir. 2013) (holding that a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed . . . [but] a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith). *But see In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (holding that a foreign debtor's COMI at chapter 15 filing was the Cayman Islands, despite the debtor's not having conducted any business there before filing).

<sup>124</sup> *In re Nortel Networks, Inc.* 532 B.R. 494 (Bankr. Del. 2015); *In re Nortel Networks. Corp.*, 2015 CANLII 2987,(Can. O.N.S.C.) <http://canlii.ca/t/ghtd6>.



tered into a comprehensive protocol to coordinate treatment of the debtor's assets.<sup>125</sup> To be clear, this was not the archetypal universalist response. That is, they did not open a foreign main proceeding in Canada and ancillary proceedings (e.g., chapter 15) in other jurisdictions to seek cooperation with that Canadian COMI proceeding. This decision was likely for a couple reasons. First, the corporate group network of Nortel contained individual corporate affiliates—and not just shells, but real, thickly capitalized subsidiaries—that were COMI-ed outside Canada.<sup>126</sup> Thus, for example, Nortel's U.S. subsidiary was very likely COMI-ed in the United States. Because the Model Law at present does not have rich tools for dealing with corporate groups, it is not clear there was anything much better that could be done than different proceedings in the different COMIs.<sup>127</sup> The second reason is that there was likely too much money at stake for non-Canadian creditors to sign on up front to ancillary treatment when the COMI issue was up for grabs.<sup>128</sup> That said, the *Nortel* bankruptcy did deploy the procedural framework of the Model Law to implement a worldwide approach to maximizing value of the assets: essentially an agreement to permit a worldwide sale of the assets irrespective of national borders. This was effected through the execution of "protocols" signed by the insolvency representatives and debtors of the respective jurisdictions and ratified by courts conducting proceedings where necessary.<sup>129</sup> The non-Canadian proceedings were thus "parallel" plenary proceedings.<sup>130</sup>

Critical to the success of the *Nortel* protocols was taking a page from the incrementalist, soft law handbook of the Model Law. Specifically, the multinational agreement deferred resolving questions of allocation of the sale proceeds (i.e., the ever-vexing distributional question), and instead focused on the value-maximization question, garnering consensus that the assets should be sold as going-concerns whenever possible. This plan worked with remarkable success: complete business lines were sold from the *Nortel* estates, and a syndicate of suitors ended up buying the residual IP portfolio that remained after the business line sales.<sup>131</sup> Had the stakeholders insisted on hammering out an allocation rule of which creditors would get which share of the proceeds up front, the contentiousness of that issue would likely have doomed the cooperative impulses necessary to get the worldwide sale approach off the ground.

Act II of the *Nortel* proceedings, however, was less glamorous. Under the terms of the protocols, the stakeholders after sale were to mediate a mutually acceptable allocation of the sale proceeds to the local bankruptcy estates around the world. That mediation failed spectacularly. Legions of lawyers and

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<sup>125</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 531; *In re Nortel Networks, Corp.*, at ¶¶ 4-5.

<sup>126</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 500, 506; *In re Nortel Networks, Corp.*, at ¶1.

<sup>127</sup> See UNCITRAL Legislative Guide on Insolvency Law, Part III, 38th Sess., U.N. Doc. A/CN.9/WG.V/WP.92 (2010), ¶¶ 1-162 [hereinafter Legislative Guide].

<sup>128</sup> The patent sale alone generated \$4.5 billion, and the sale of Nortel's business lines netted another \$3.285 billion. *In re Nortel Networks, Inc.*, 532 B.R. at 512-14; *In re Nortel Networks, Corp.*, at ¶ 3.

<sup>129</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 531-44; *In re Nortel Networks, Corp.*, at ¶¶ 4-5.

<sup>130</sup> Cf. 11 U.S.C. § 1528 (anticipating such proceedings).

<sup>131</sup> The gargantuan asset portfolio was purchased by a consortium of tech giants Apple, Microsoft, Ericsson, Blackberry, Sony, and EMC. See *In re Nortel Networks, Inc.*, 532 B.R. at 502; *In re Nortel Networks, Corp.*, at ¶. 41.

experts tore through hundreds of millions of debtor assets in a mad squabble over who should get what.<sup>132</sup> Because the protocol planned for the worst, it instructed that if the stakeholders could not agree in mediation, the matter would be litigated in all relevant courts, which is what came to pass, with full-blown trials. The soft law of the Model Law had nothing to say on distribution, and so *Nortel* appeared to demonstrate the best potential of the Model Law at the outset of the case but then the limitations of its softness as the mediation unraveled in Act II.

But that recast is too negative. In fact, even though the mediation failed and the Model Law had no fast rule for allocating proceeds (universalist or otherwise), its procedural mechanisms helped coordinate the disputed parallel proceedings, with the Canadian CCAA judge and U.S. chapter 11 judge conducting, effectively, a “joint trial,” with simultaneous broadcasts and inter-judge conferences. Indeed, the two courts coordinated their decisions to be handed down at the same time.<sup>133</sup> While the Model Law did not force the issue of choice of law, it at least facilitated a mechanism by which two judges who had no obligation to defer to one another could think and work together on judicial questions commended to their own sovereign courtrooms. Lo and behold, they arrived “independently” at the same decision on the merits of allocation (each venting with some chiding at the necessity for a litigated resolution).<sup>134</sup> And moreover, that decision was to share the assets internationally, regardless of territorial location.<sup>135</sup>

The quasi-paradoxical outcome of the *Nortel* case is thus fairly seen as yet another (partial) triumph for universalism. For although the ability to launch parallel plenary proceedings was earlier described as a territorialist concession to local creditors necessary to pass the Model Law,<sup>136</sup> the outcome of the *Nortel* “distribution” dispute lurched unabashedly universalist.<sup>137</sup> What both the Canadian and American judges concluded, after hearing an onslaught of experts and parties testify on the appropriate way to carve up the spoils, was that the assets should be presumptively shared on a worldwide pro rata basis—the crux of universalism—albeit on an “estate by estate” basis.<sup>138</sup> This solution can perhaps be seen as 2/3 universalist (evincing more incremental universalism). The foundation of the judges’ reasoning was that

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<sup>132</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 550-51 (“The variance of the positions are of such magnitude that highly capable and responsible attorneys were unable, or in the heat of the fight were unwilling, to find a middle ground despite three extensive and costly mediations.”).

<sup>133</sup> See *id.* at 500.

<sup>134</sup> See *id.* at 500 (“The Court can only speculate why the parties, all represented by the ablest of lawyers and sparing no expense, were unable to reach a settlement on allocation.”).

<sup>135</sup> See *id.* at 532; *In re Nortel Networks, Corp.*, ¶258.

<sup>136</sup> See Westbrook, *supra* note 55.

<sup>137</sup> Quotation marks are used because technically ultimate distribution is left for each judge in his or her own jurisdiction to administer, presumably, but not necessarily, under local bankruptcy priority rules. This distinction might matter in instances of divergent priority rules. See *In re Nortel Networks, Inc.*, 532 B.R. at 534 (“[T]he Court is not ordering a consolidated or coordinated global distribution . . . . Each Estate will distribute as appropriate, through a plan process within the bounds of the applicable law.”). For detailed discussion of the universalist consequences of this seemingly territorial aspect of the *Nortel* case, see John A. E. Pottow, *Two Cheers for Universalism: Nortel’s Nifty Novelty*, in ANNUAL REVIEW OF INSOLVENCY LAW 333 (JANIS P. SARRA & BARBARA ROMAINE EDS., . 2015).

<sup>138</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 532-50.

substance should dominate over form and that Nortel's intellectual property assets were the result of an interconnected worldwide research web of corporate affiliates. Therefore, although, for example, many of the patents were held in a Canadian parent, that consolidation of title holding served purely logistical purposes and it would be a neither fair nor sensible way to divide the gain to suggest the Canadian estate should get 100% of the IP sale proceeds. The courts emphasized, for example, that the intellectual property accrued from research labs around the world.<sup>139</sup> (The Canadians were not alone in their self-serving allocation proposal. So too did U.S. creditors argue that the proceeds should be allocated on the basis of national proportionate revenue to the Nortel network, a metric that to nobody's surprise skewed strongly American.)<sup>140</sup>

Recall that universalism's insistence on the application of one substantive corporate bankruptcy law worldwide is premised on reducing credit costs. Its principal cost concern—that creditors should not squander resources monitoring asset movement across borders (or hamstringing debtors with covenants)—translates into a distributional proposition that creditors' payouts from a multinational debtor should not depend on the possibly random situation of assets in one country over another. *Nortel's* repudiation of strict territorial location—rejecting nearly out of hand the formal situation of the IP assets in Canada—is a telling embrace of universalism by judges forced to examine the pragmatics and function of an actual modern cross-border conglomerate. The U.S. court's focus on actual creditor reliance as opposed to presumed reliance based on formalism was revealed in comments noting that while creditors who had relied on distinct corporate entities could be protected, most likely knew they were dealing with one big beast.<sup>141</sup> Those familiar with the American doctrine of substantive consolidation might find this vector of analysis familiar.<sup>142</sup> Interestingly, however, the U.S. court, mindful of governing appellate precedent, tripped over itself to insist it was *not* effecting substantive consolidation. (This is why the case was only 2/3 universalist.) Rather, the court said it was pooling the assets globally but then dividing those assets pro rata (by claims allowed) into the respective national (territorial) bankruptcy estates.<sup>143</sup> So, as a simplified example assuming only two countries, if there were \$X in claims lodged in the U.S. proceeding and \$2X in Canada, 2/3 of the proceeds would go to the Canadian creditors and 1/3 to the U.S. ones. In a world where creditors are sophisticated enough to file in either jurisdiction, however, this essentially *is* universalism for purposes of asset allocation. But where there is a difference in distributional rules, then the allocation does have contra-universalist tension. For example, if a favored class of creditors has priority under Canadian law, but not U.S. law, then they do better by having their priority attach to 2/3 of the debtor's assets. This is worse for the Canadian creditors than pure universalism, in which their Canadian priority would be exported to all the debtor's assets worldwide, but bet-

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<sup>139</sup> See *id.* at 500; *In re Nortel Networks, Corp.* at ¶ 16.

<sup>140</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 547-49.

<sup>141</sup> See *id.* at 522, 531, 559.

<sup>142</sup> See *In re Cont'l Vending Mach. Corp.*, 517 F.2d 997, 1000 (2d Cir. 1975) (“The power to consolidate is one arising out of equity, enabling a bankruptcy court to disregard separate corporate entities, to pierce their corporate veils in the usual metaphor, in order to reach assets for the satisfaction of debts of a related corporation.”).

<sup>143</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 534.

ter than a situation in which assets physically within Canada constituted less than 2/3 of the worldwide pot. Thus, the *Nortel* case can only be described as “mostly” universalist but not completely so. (Accordingly, 2/3 seems like a helpful if arbitrary characterization.)

The “estate by estate” qualifier on the global sharing of assets was not the only holdback from full universalism in *Nortel*. For example, the courts also carved out cash on hand from the global consolidation and said each jurisdiction’s cash on hand would stay within its estate, a clearly territorialist outcome—and somewhat odd given the findings of fact regarding interrelated cash management practices that treated the conglomerate as one giant entity.<sup>144</sup> Moreover, to defuse any concerns of substantive consolidation, the courts held that inter-corporate debt would be recognized as claims (and join the pro rata distribution) as would cross-corporate guarantees, outcomes that might not obtain under substantive consolidation.<sup>145</sup> On balance, however, the joint judicial opinions tilt unambiguously universalist, albeit tentatively and incrementally so: worldwide sharing of assets and pro rata distribution of spoils, but still ultimate allocation to territorial estates for distribution.

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Taking all these case law data points together, culminating in *Nortel*, we can conclude that the Model Law has been developing a rich precedent book to flesh out some of its (deliberately) unspecified areas in a polycentric and non-binding incrementalist fashion. This success has vindicated its soft law approach. By allowing the content of the law to be worked out over time in a “jurisprudentially market-tested” manner rather than hammered out ex ante, the Model Law elided likely disagreements that were surmountable over time. This approach capitalizes upon what learned experts have elsewhere described as the “dynamic” nature of cross-border insolvency law.<sup>146</sup> The dynamic prediction is that the resistance of territorially inclined states is not static but likely to erode over time. This is not just because territorialist states are mistaken not to embrace the normative superiority of a universalist system (some commentators have gone so far to cast territorialist states as “troglodytes”),<sup>147</sup> and the passage of time will allow them to see the errors of their ways, but because part of their resistance to universalism is an unfounded risk aversion to the consequences of ceding some jurisdictional autonomy to foreign

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<sup>144</sup> Compare *In re Nortel Networks, Inc.* at 532, 506 n. 38 (presenting documents detailing debtor’s “Global Cash Pooling” but nonetheless refusing to substantively consolidate so court could “respect the corporate separateness of the [subsidiaries] by recognizing cash in hand”), with *In re Nortel Networks, Corp.*, at ¶¶218, 258(4) (noting also “the existence and operation of a centralized cash-management system” but equally holding each estate should “continue to hold that cash and deal with it in accordance with its administration”).

<sup>145</sup> See *In re Nortel Networks, Inc.*, 532 B.R. at 534; *In re Nortel Networks, Corp.*, at ¶214.

<sup>146</sup> See Pottow, *supra* note 13, at 1011-13. The argument is that reform will not be static because the incrementalism of the Model Law gives resistant states time to get their feet wet, to become acclimated to the extraterritorial reach of foreign laws, and to experience the benefits of participating in a quasi-universalist insolvency regime and update their preferences accordingly.

<sup>147</sup> See Pottow, *supra* note 13 at 992.

insolvency law.<sup>148</sup> One Japanese commentator noting Japan's historically territorial mood has evocatively described this territorialist characteristic as "fear."<sup>149</sup> Acclimation and repetition are both means by which the reflexive fear of foreign law will dissipate. Thus, by skipping over some of the tough bits and deferring to follow-on explication through a developing casebook, the Model Law wisely allowed the confrontations to be put off to a time when the fear index of universalism would be lowered.<sup>150</sup> This gambit paid off as seen by the increasing accommodation of foreign cooperation.<sup>151</sup> The soft law approach seems to have thus been a success for universalism.

#### IV. THE RISK OF SOFTNESS AND UNIVERSALISM'S FUTURE: WHITHER THE NEW REFORMS?

The *Nortel* case is important in showing the ascent of universalism under the present regime. But it also reveals what might be considered both the rosy and dark narratives that can flow therefrom. The happy story is one of directional incrementalism: that through case-by-case development of the contours of the Model Law regime, the system will be fleshed out to be increasingly universalist as time progresses. The mechanisms of that advancement will be case law at first but ultimately amendments and revisions to the underlying documents. (Indeed, the EU has just concluded its self-mandated review of the Regulation and enacted amendments.)<sup>152</sup> "Modified" universalism will relax its need to modify the universal application of one substantive bankruptcy law and eventually give way to the enlightened world of full universalism. That is the happy story.<sup>153</sup>

There is, however, another version of the future. The sadder version is that the reason the Model Law was a compromise between universalism and territorialism is that there are certain bridges that sovereignty-conscious territorialist states will never cross, and full universalism is just untenable absent radical changes in legal cultures and domestic insolvency laws. If that is so, there is no incrementalist path at all—or at best, universalism will incrementally ascend the asymptote of Zeno but never arrive at its

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<sup>148</sup> See *id.* at 1004.

<sup>149</sup> Sohsuke Takahashi, *The Reality of the Japanese Legal System for Cross-Border Insolvency—Driven by Fear of Universalism*~ 67-72 (Mar. 14, 2011) (unpublished manuscript) (on file with the International Insolvency Institute).

<sup>150</sup> See Pottow, *supra* note 13, at 1006-10 (discussing emerging evidence of the Model Law's having allayed friction between competing insolvency regimes through its Legislative Guide, which advised member states to reduce reliance on priority rules with the hope of diminishing outcome differences and territorialist battles arising therefrom).

<sup>151</sup> See, e.g., *In re Cozumel Caribe, S.A. de C.V.*, 508 BR. 330 (Bankr. S.D.N.Y. 2014) (rejecting a creditor's motion to terminate a recognition order as violative of public policy despite serious doubts as to the propriety of the actions of the foreign representative); *In re Irish Bank Resolution Corporation Ltd.*, 538 B.R. 692(D. Del. 2015) (holding Irish proceeding qualified for recognition as foreign main proceeding and that creditor's unsubstantiated claims regarding deprivation of due process and aggrandizement of debtor, a bank nationalized by the Irish government, was insufficient to satisfy the narrow publicpolicy exception).

<sup>152</sup> See EU INSOLVENCY REGULATION, *supra* note 1.

<sup>153</sup> See Pottow, *supra* note 13, at 969 ("Likely due to the feel-good administrative provisions about facilitating international communication and cooperation, the overall consensus has trended toward happiness.").

quixotic goal. On this view, future reform efforts will sputter if pushed toward further universalism, much to the dismay of those seeking to reduce the costs of corporate credit. Even the past success of the soft law approach—as mutual fund prospectuses counsel—is no assurance of future results.<sup>154</sup>

How are we to know which narrative is more likely? We might be able to gather some evidence on which path is unfolding because we are in the midst of a new wave of reform on the first-round regime of the Model Law and EU Insolvency Regulation. That is, UNCITRAL is considering new model laws on further insolvency-related matters, some of which may be implemented by way of amendments to the Model Law itself.<sup>155</sup> And the EU Insolvency Regulation has undertaken a round of just-enacted amendments (in the middle of 2015).<sup>156</sup> Complementing these are other soft law efforts, most notably the Global Principles joint project of the ALI and ILLI,<sup>157</sup> which includes a path-breaking choice-of-law annex that tackles some of the thorniest issues in cross-border insolvency.<sup>158</sup> Thus, to see the new directions of cross-border insolvency law—and whether the universalist promise of the soft law regime is being realized—we must look at these reform efforts to see whether they are trending universalist or have hit a territorialist stalling point.

The starting point with gauging the vector of these current reforms is to understand what is at play, i.e., what has been attracting clamor for change. Several clusters of insolvency law come to the fore. First, widespread consensus, even by the most enthusiastic defenders of the Model Law, is that it provides no clear guidance on what to do with corporate groups.<sup>159</sup> How to deal with the insolvency of a multinational corporation's often-integrated web of corporate subsidiaries and affiliates, especially when those affiliates if taken on standalone bases are COMI-ed in different jurisdictions, remains a difficult puzzle. Second, there is the oft-avoided question of choice of law and its distributional consequences that proved so intractable in *Nortel*.<sup>160</sup> Third, there are the more mechanical issues, such as the previously

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<sup>154</sup> See *id.* at 1012 (discussing danger of reforms stalling as encroachments on sovereignty increase (“[I]n a worst-case scenario, a Frankenstein interim regime might entrench a new status quo that is less efficient and desirable than might have otherwise been obtained under naked territorialism.”)).

<sup>155</sup> See generally U.N. Comm. On Int’l Trade Law, Rep. of Working Group V (Insolvency Law) on its Forty-seventh session (New York, 26-29 (May 2015), June 29 – July 16, 2015 U.N. Doc. A/CN.9/835 (Jun. 9, 2015) (summarizing developments).

<sup>156</sup> See EU INSOLVENCY REGULATION, *supra* note 1. A list of amended provisions and the amendments thereto can be found at Annex C.

<sup>157</sup> A.L.I. & INTERNATIONAL INSOLVENCY INSTITUTE, TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES (2012) [hereinafter Global Principles].

<sup>158</sup> See *id.* at 200-56.

<sup>159</sup> See, e.g., Irit Mevorach, *Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge*, 9 BROOK. J. CORP. FIN. & COM. L. 107, 128 (2014) (noting that “The Model Law does not provide rules for groups.”); U.N. COMM. ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Sales No. E. 12, V, 16, 84 ¶ 3 (2012) (“In the international context, the models that have been created to address cross-border insolvency issues have always stopped short of dealing satisfactorily with enterprise groups.”).

<sup>160</sup> *In re Nortel Networks, Inc.* 532 B.R. 494, 500, 550-51 (Bankr. Del. 2015).

discussed contours of the definition of COMI, that hunger for elaboration.<sup>161</sup> Finally, there are the general communication and cooperation provisions that are purely procedural. Here, too, stakeholders have pressed for more.<sup>162</sup> Each of these “reform clusters” can be assessed in turn.

Taking the simplest first, the procedural provisions continue the march toward greater communication between courts, which surely is consistent with the advance of universalism. (Greater communication yields greater acclimation.) The EU Insolvency Regulation further encourages communications and in some instances lands affirmative obligations on courts or insolvency representatives to communicate.<sup>163</sup>

Second, the mechanical definitions are being similarly refined to flesh out the COMI construct. For example, the Insolvency Regulation amendments take a stance on the timing issue for COMI migration and formalize what had been the dominant test in case law (itself taken from a form of quasi-official preamble text)<sup>164</sup> that turns on creditor reliance and objective expectations of corporate seat.<sup>165</sup> All this augurs well for universalism and vindicates the incrementalist approach.

But this is the lowest hanging fruit. What of the distributional rub, namely, choice of law? UNCITRAL has yet to touch it with a ten-foot pole in its Model Law.<sup>166</sup> The revisions to the EU Insolvency Regulation have also for the most part been underwhelming, although there has been some movement. The revised instrument still recognizes the carveout-based system but has now focused carveouts on the “major” areas, such as labor law, secured credit rights, set-off, and the like.<sup>167</sup> Most tantalizing and candid is a concession and aspiration in the amendments’ preamble stating that substantive bankruptcy law remains too divergent and sensitive to roll out universalism at present and so the carveouts must remain.<sup>168</sup> It is paired with an expressed hope that the next time around when reconsideration is mandated the carveouts might be ready for retirement.<sup>169</sup>

Other universalist inroads have been made in this current round of reform. For example, although too technical for the scope of this chapter, there have been modifications to secondary proceedings, the

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<sup>161</sup> See Westbrook, *supra* note 44, at 719-20.

<sup>162</sup> See U.N. Comm’n. On Int’l Trade Law, Working Group V (Insolvency Law), Draft Notes on Cooperation, Communication, and Coordination in Cross-border Insolvency Proceedings, May 18-22, 2009, U.N. Doc. A/CN.9/WG.V/WP.86/Add. 1 (Mar. 6, 2009).

<sup>163</sup> EU INSOLVENCY REGULATION, *supra* note 1, art. 42.

<sup>164</sup> See Virgos & Schmit, *supra* note 45, ¶¶ 73-75.

<sup>165</sup> EU INSOLVENCY REGULATION, *supra* note 1, art. 3(1).

<sup>166</sup> MODEL LAW, *supra* note 6, *Guide to Enactment and Interpretation*, 3d Recital (“The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law.”).

<sup>167</sup> EU INSOLVENCY REGULATION, *supra* note 1, arts. 8-18.

<sup>168</sup> *Id.* at Recital 22. “[A]s a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope . . . . The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties . . . .”

<sup>169</sup> *Id.* (“At the next review of this Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at European level.”).

territorialist veto entitlements under the Regulation.<sup>170</sup> In brief terms, there are some universalist steps forward and backward but mostly forward on secondary proceedings. Secondary proceedings can now be used to support a corporate reorganization (not just liquidation),<sup>171</sup> and a sort of jurisdictional hierarchy is emerging whereby the insolvency representative of the secondary proceeding is partially beholden to COMI court insolvency representative.<sup>172</sup> Finally, the COMI court is now allowed to defer to the substantive bankruptcy law (e.g., priority) of the secondary proceedings in crafting a plan in the main proceeding.<sup>173</sup> This final addition might sound like a step backward toward territorialism by elevating the non-COMI (*lex secundus*) bankruptcy law to receive even greater effect in the multi-jurisdictional proceeding than it currently receives, but that is misleading. The concession is made with the overarching goal of *reducing* the incidence of secondary proceedings with their disruptive transaction costs and parochial expressive costs.<sup>174</sup> These secondary proceedings revisions, while not earth-shattering, do seem consonant with (and indeed incrementally advance) the universalist agenda. Moreover, as alluded to briefly above, the even-softer ALI/III Global Principles (softer because they are just academic recommendations and do not even have the governmental imprimatur of UNCITRAL) go further and suggest reducing the number of carveout areas from *lex fori concursus*.<sup>175</sup> They may well have an effect on future reforms.<sup>176</sup>

Finally, the corporate groups issue is being advanced more in the UNCITRAL domain than in the EU amendments. There, UNCITRAL is presently wrestling with an addendum to the Model Law that would

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<sup>170</sup> *Id.* at arts 34-51.

<sup>171</sup> *See id.* at arts. 41 & 47.

<sup>172</sup> *See id.* Article 41 mandates cooperation between representatives in the main and secondary proceedings, and Article 47 empowers the main proceeding representative to propose a restructuring plan if restructuring is allowed by the laws of the member state housing the secondary proceeding.

<sup>173</sup> *See id.* art. 36(1)-(2).

<sup>174</sup> *See generally* Pottow, *supra* note 1, at 582, n. 23 and accompanying text (describing traditional, if overblown, antipathy towards secondary proceedings being grounded in differences in priority rules: “those pesky normative distributional differences that the cynical cast as rent-seeking outputs of domestic lobbying efforts and the naïve see as the culmination of a thousand flowers of important socio-cultural differences blooming”).

<sup>175</sup> *See* Global Principles, *supra* note 157, at 253-55 (“[T]he question is whether it is currently appropriate, or acceptable, to eradicate virtually all exceptions to the application of the *lex fori concursus*, or whether a number of specific exceptions should be introduced, and if so, which ones . . . . In these Global Rules, we have limited ourselves to those exceptions for which, both in the global domain of the relevant literature and also in the opinion of a large portion of the Advisers to the project, general consent is expressed.”).

<sup>176</sup> Legal professionals have taken note of the connection between the Global Principles and the recent amendments to the EU Insolvency Regulation. *See, e.g.,* Peter J.M. Declercq & Sonya Van de Graaff, Schulte Roth & Zabel, *The Impending First Revision to the EU Insolvency Regulation: An Update*, (Dec. 16, 2014) (discussing proposed amendments pertaining to group insolvencies: “In each respect, the Proposed Amendments clearly draw inspiration from the principles included in the *Report Containing Global Principles for Cooperation in International Insolvency Cases* published in 2013 by Professors Fletcher and Wessels.”).



deal with “group solutions” to cross-border defaults.<sup>177</sup> While the project is still in formation, proposals have been put forward by the UNCITRAL Secretariat to enable a “group representative” to design a “group solution” for a corporate bankruptcy, and, importantly, to allow corporate subsidiaries to participate in the group solution without necessarily having to open individual insolvencies in their own COMI jurisdictions.<sup>178</sup> As mentioned, it is early days, so nobody knows yet where this might go. The relevant point for this analysis of the soft law approach’s success is that where law is softest—UNCITRAL and model laws—it seems to be tackling the most urgent and difficult subjects in cross-border insolvency reform. (On “the merits,” the proposals are universalist in ceding more jurisdictional autonomy to other jurisdictions, here, the “group solution” court.) Incrementalism thus seems to have taken a foothold and blazed a path which may well now prove dependency-attracting. Specifically, crafting an international treaty on the treatment of corporate groups in cross-border insolvency now appears to be a methodological non-starter. Rather, due to the success of the Model Law, the logical starting point is building upon the soft law scaffolding already laid down by UNCITRAL.

In sum, the direction of current reforms seems to continue toward universalism, an important development for those who believe corporate insolvency law should strive to reduce credit costs. Those reforms themselves have been incremental, and their vitality builds upon the success of prior efforts. Transformative among these has been the UNCITRAL Model Law, with its deliberately soft(ish) law approach, both methodologically of avoiding a comprehensive treaty, and substantively in terms of its incomplete resolution of all possible bankruptcy law issues. By recognizing the likely dynamic nature of amenability toward cross-border cooperation in insolvency law, the UNCITRAL approach has used discretion as the better part of valor and led, perhaps somewhat serendipitously, to an ultimately more universalist system than we might otherwise have ever dreamed were possible. And the current round of reforms seems to be taking this potential and running with it (or at least walking with it). While universalism remains modified, and its ultimate realization a long way off, the soft law approach continues to reap success and move the ball further up the normatively desired field.

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<sup>177</sup> See U.N. Comm. On Int’l Trade Law, Working Group V (Insolvency Law), Facilitating the Cross-border Insolvency of Multinational Enterprise Groups, May 26-29, 2015, U.N. Doc. A/CN.9/WG.V/WP128 (Mar. 13 2015).

<sup>178</sup> See *id.* at ¶¶ 19-23.