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A FRESH VIEW ON THE HARD/SOFT LAW DIVIDE: IMPLICATIONS FOR INTERNATIONAL INSOLVENCY OF ENTERPRISE GROUPS

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INTRODUCTION

Policy and law makers, in both regional and international fora, have struggled for quite some time to agree on efficient solutions for the cross-border insolvency of enterprise groups. While the enterprise group is a prevalent business structure, it comes about in different arrangements, each which may require different solutions.² Furthermore, the economic reality of business integration of many group enterprises may require some form of group solution during their insolvency, including through high level concentration of the proceedings in order to maximize value for stakeholders. Such an approach, however, may raise concerns about interfering with the “corporate form”³ and with state control over local entities.⁴

In recent years, much focus and deliberation concentrated on this problem, largely driven by lessons from the 2007–09 global financial crisis.⁵ New international instruments have (finally) emerged as a result. On the EU level, a new revised regulation governing cross-border insolvency came into force in June 2017—the EU Regulation on Insolvency Proceedings (hereinafter “EIR”).⁶ The new EIR contains a chapter dedicated to enterprise

1. Professor of International Commercial Law and Co-Director of University of Nottingham Commercial Law Centre, School of Law, Faculty of Social Sciences, University of Nottingham. The author would like to thank Janis Sarra, Stephan Madaus, and Susan Block-Lieb for providing feedback and commenting on drafts of this Article. This Article also benefited from comments and discussions with participants at the University of Michigan Conference on ‘The Role of “Soft Law” in International Insolvency and Commercial Law’ (Sept. 21–22, 2018). The usual disclaimers apply.

2. Group enterprises may range from closely controlled vertical structures to more decentralized, horizontal forms and may operate with different levels of integration. *See* IRIT MEVORACH, *INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS* ch. 1 (2009).

3. The notions of corporate separate legal personality and limited liability.

4. IRIT MEVORACH, *THE FUTURE OF CROSS-BORDER INSOLVENCY: OVERCOMING BIASES AND CLOSING GAPS* at ch. 2 (2018).

5. Where it was evident that the cross-border insolvency system had insufficient tools to deal effectively with the collapse of group enterprises, the most notable example being the insolvency of the Lehman Brothers group. *See* James M. Peck, *Cross-Border Observations Derived from My Lehman Judicial Experience*, 30 *Butterworths J. Int’l Banking & Fin. L.* 131 (2015).

6. Regulation 2015/848, of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19 [hereinafter EIR].

groups.⁷ Internationally, since 2013, UNCITRAL Working Group V⁸ has been deliberating on an instrument (a model law) for the cross-border insolvency of enterprise groups (the “MLG”).⁹ This initiative builds on the general UNCITRAL Model Law on Cross-Border Insolvency (the “MLCBI”)¹⁰ and previous work on the UNCITRAL Legislative Guide.¹¹

Would these new instruments oblige countries and their implementing institutions to adopt and follow provisions that support efficient solutions for groups? The assumption is that the EIR, which is regarded as a hard, binding international law, will provide stronger commitments compared to the MLG, which, as a model law, is considered “soft law” and thus weaker.¹² This Article argues, however, that on a closer look, and against the backdrop of a more in-depth analysis of what is hard or soft law, the MLG is as hard or even harder than the EIR (chapter on groups) where it is more

7. EIR, *supra* note 6, at ch. V. The original EIR (Council Regulation 1346/2000, of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC)), following the approach adopted in its previous form as a convention, did not contain specific rules regarding groups: “[T]he Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity. Naturally, the drawing of a European norm on associated companies may affect this answer.” Council of the European Union, *Report on the Convention of Insolvency Proceedings*, at 52, Council Doc. 6500/96 (May 3, 1996).

8. See generally *Working Group V: 2001 to Present: Insolvency Law*, U.N. COMMISSION ON INT’L TRADE L., http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited Mar. 9, 2019).

9. The model law for the cross-border insolvency of enterprise groups (“MLG”) and the Guide to Enactment of the MLG are still in draft form but deliberations are in final stages. See U.N. Comm’n on Int’l Trade Law, Rep. of Working Group V (Insolvency Law) on the Work of Its Fifty-Fourth Session, U.N. Doc. A/CN.9/966 (2018) [hereinafter draft MLG]; Comm’n on Int’l Trade Law, Enterprise Group Insolvency: Guide to Enactment of the Draft Model Law, U.N. Doc. A/CN.9/WG.V/WP.162 (2018) [hereinafter Draft Guide to Enactment of the draft MLG]. The references in this Article to articles in the MLG are to the draft MLG. It is expected that the draft MLG and the draft Guide to Enactment will be finalized in the next Working Group session in May 2019 and that they will be submitted to UNCITRAL for adoption in July 2019.

10. The Model Law on Cross-Border Insolvency (“MLCBI”), published by the United Nations Commission on International Trade Law (“UNCITRAL”), provides the general framework for cross-border insolvency and includes provisions on access, recognition, relief, and cooperation concerning single debtors. It does not provide explicit rules concerning groups.

11. U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART THREE: TREATMENT OF ENTERPRISE GROUPS IN INSOLVENCY, U.N. Sales No. E.12.V.16 (2012).

12. It has been noted for example regarding the MLCBI that, “a soft law solution was pursued at the time as the most expedient alternative, especially in view of the state of law and practice at the time, but that a convention was never ruled out and was considered by some as a desirable long-term solution.” Gregor Baer, *Towards an International Insolvency Convention: Issues, Options and Feasibility Considerations*, 17 BUS. L. INT’L 5, 8 n.12 (2016); see also REINHARD BORK, *PRINCIPLES OF CROSS-BORDER INSOLVENCY LAW* 10 (2017).

complete and where it provides a wider set of tools and remedies. By contrasting the EIR and the MLG, it is possible to draw more nuanced conclusions regarding what requires hardening and where the challenges are going forward.

This Article proceeds as follows. Part I provides a discussion of the relevant background concerning the nature of hard and soft law. It notes the growing importance and advantages of so-called soft law, which can in fact exhibit characteristics of hard law and can be more effective in resolving complex international law problems. Part II unearths the challenges in reaching international agreements on hard instruments concerning the cross-border insolvency of groups. Against this backdrop, Part III evaluates and contrasts the EIR and the MLG. It highlights the strength of the MLG (a soft law instrument), especially when compared with the regime agreed to in the EIR (a hard law instrument). The Conclusion provides concrete suggestions regarding the way both the regional and global regimes may be hardened in the future to meet the challenges of enterprise groups' insolvencies.

I. WHAT IS HARD OR SOFT INTERNATIONAL LAW?

Several specific legal sources are considered “hard,” binding international law. Importantly, the international treaty¹³ is a primary source of international hard law.¹⁴ Within the EU, regulations are also key sources of hard international law.¹⁵ Regional regulations—as means to foster interstate coordination and promote a “proper functioning” of an internal market¹⁶—are even harder than treaties in terms of their binding force. Such regulations do not require ratification or transformation into domestic law. They can, therefore, create a uniform legal regime further supported by an institutional framework that promotes uniform implementation of the rules.¹⁷

Other instruments such as guides, recommendations, and model laws are understood as forms of non-binding “soft” law.¹⁸ Soft law is a general

13. The Article refers to “treaty” and “convention” interchangeably.

14. The binding force of treaties is recognized by the 1969 Vienna Convention on the Law of Treaties, which states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The treaty is considered one of the three primary sources of international law, the other two being customary international law and general principles recognized as law. HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 7–8 (2014).

15. See Udo Bux, *Sources and Scope of European Union Law*, EUR. PARLIAMENT (Oct. 2018), http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf.

16. See EIR, *supra* note 6, at recital 3.

17. See *infra* Section III(B).

18. MEVORACH, *supra* note 4, at 141 (citing A.E. Boyle, *Soft Law in International Law Making*, in *INTERNATIONAL LAW* 118, 120 (Malcolm Evans ed., 4th ed. 2014); CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST*

term that may refer to a variety of quasi-legal, non-binding rules, instruments, and processes used in international relations by countries and international organizations. As such, soft law is contrasted with hard law, which is always binding.¹⁹ Conventionally, soft law is considered a weakened version of hard law, with diminished levels of bindingness, obligation, and precision. In contrast, hard law presumably gives parties enforceable rights, which can be invoked by application to a court or tribunal, and provides complete and comprehensive rules with detailed terms that all participants can uniformly follow.²⁰ The reciprocity enshrined in treaties is also recognized as a “force” that induces compliance.²¹

The general perception in international insolvency contexts follows this traditional divide. A treaty for cross-border insolvency is believed to be the ultimate ideal solution, even if it cannot be currently achieved. A treaty regime has been equated in this respect with the concept of “pure universalism”—the presumably ideal way to address cross-border insolvency through a single forum applying a single insolvency law.²² In contrast, a model law is perceived as a form of soft law and is thought to be an interim alternative for governing cross-border insolvency.²³ However, in a previous publication,²⁴ I pointed to the prominence of so-called soft law in various international law sub-systems²⁵ and to international law scholarship highlighting how soft law may be harder than treaty law—or other forms of binding international law—in important ways.²⁶ Instruments that are formally considered hard international law, or provisions within them, can be characterized,

CENTURY 120–23 (2d ed. 2015) (discussing soft law in the context of international financial regulation).

19. MEVORACH, *supra* note 4, at 141 (citing A.E. Boyle, *supra* note 18, at 199–220).

20. MEVORACH, *supra* note 4, at 141 (citing A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L.Q. 901, 902–904 (1999)).

21. MEVORACH, *supra* note 4, at 130–40 (citing ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 42–45 (2008)).

22. See, e.g., Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. 58, 60–61 (1944); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2287, 2292 (2000).

23. A note by the International Bar Association (“IBA”) delegation to UNCITRAL Working Group V from January 2016, stated: “Some who were present when the Model Law CBI was first pursued explained that a soft law solution was pursued at the time as the most expedient alternative, especially in view of the state of the law and practice at the time, but that a convention was never ruled out and was considered by some as a desirable long-term solution.” Baer, *supra* note 12 (emphasis added).

24. MEVORACH, *supra* note 4, at ch. 4.

25. Including international financial law. See BRUMMER, *supra* note 18; Christopher M. Bruner, *States, Markets and Gatekeepers: Private-Public Regulatory Regimes in an Era of Economic Globalization*, 30 MICH. J. INT’L L. 125, 172 (2009).

26. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000); Boyle, *supra* note 18, at 121; C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850 (1989).

de facto, as soft (even though formally binding) because of their vagueness, indeterminacy, or generality.²⁷ Further, the binding nature of hard international law is sometimes merely theoretical, whereas, in practice, hard law instruments are often ignored by countries.²⁸ Vagueness in treaty or regulation provisions may also undermine their enforceability.²⁹

The rigid divide between hard and soft law and between treaties/regulations and other less formal instruments ignores the variety of so-called hard law instruments, on the one hand, and the relevance of soft law to lawmaking, on the other. Soft law enables the development of international norms through more relaxed processes. Although assumed to be non-binding, such laws can be concluded with a high degree of precision and can generate a strong compliance pull where they are negotiated by representatives of many countries and where various economic forces, including concerns about reputation, induce participants to comply.³⁰

The cost of hard law instruments like treaties may be high especially where the international agreement aims at resolving complex problems between multiple participants.³¹ Treaties typically entail a long and cumbersome negotiation and ratification process that may ultimately undermine the project.³² The binding character of hard law may involve sovereignty costs, and countries may be reluctant to relinquish certain powers.³³ Agreement on hard law to resolve international problems can also present significant hurdles in view of extant biases and bounds on decisionmaking, an issue highlighted by behavioural international law scholars.³⁴ In reality, perceived losses loom larger than perceived gains, and departing from existing en-

27. MEVORACH, *supra* note 4, at 141 (citing Chinkin, *supra* note 26, at 851 (noting that a treaty with vague or weak requirements may be characterized as “legal soft law.”)).

28. MEVORACH, *supra* note 4, at 142 (citing Andrew T. Guzman, *Against Consent*, 52 VA. J. INT’L L. 747, 752–53 (2012); BRUMMER, *supra* note 18, at 141 n.81).

29. MEVORACH, *supra* note 4, at 142 (citing Chinkin, *supra* note 26, at 863–64).

30. In certain circumstances, soft law may be even more effective than traditional hard law. MEVORACH, *supra* note 4, at 142 (citing BRUMMER, *supra* note 18, at 145–47, 180–81).

31. MEVORACH, *supra* note 4, at 144 (citing Guzman, *supra* note 28, at 764–65; Barbara C. Matthews, *Prospects for Coordination and Competition in Global Finance*, 104 AM. SOC’Y INT’L L. PROC. ANN. MEETING 289, 292 (2010)).

32. Indeed, there have been various attempts to conclude treaties on cross-border insolvency, which have failed. *See* MEVORACH, *supra* note 4, at 130.

33. MEVORACH, *supra* note 4, at 144 (citing Abbott & Snidal, *supra* note 26, at 436).

34. Drawing on “prospect theory,” Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 ECONOMETRICA 263 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*]; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974), the field of “behavioral international law” reveals the potential influence of cognitive biases in international law contexts, including regarding negotiating treaties. *See, e.g.*, Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT’L L.J. 421 (2014); Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015); Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT’L L. 309 (2013).

dowments is disliked.³⁵ Therefore, the sovereignty costs (that is, the perceived loss of sovereignty) associated with treaties or other hard laws may have a larger effect than might be expected. Relatedly, even if a treaty framework provides important benefits, a status quo bias³⁶ may slow or impede initiatives to agree to or ratify such an instrument where any change from the status quo may be unattractive.³⁷

Within the EU, which operates as a semi-federal system with pooled sovereignty, the institutional setting allows regional institutions to formulate rules. Those rules are directly applicable in the domestic systems, thus overcoming at least some restraints on decisionmaking. Direct applicability removes the requirement that domestic policy and lawmakers adopt the rules.³⁸ Yet, even directly applicable regulations require a negotiation process that may entail substantial compromises. The negotiators themselves might not be able to escape their own status quo biases, especially when negotiating a hard harmonization instrument that more rigidly constrains states than soft instruments. An example of the difficulty of negotiating hard law instruments is the long and cumbersome process to agree on a European form of company (the *Societas Europaea*) that resulted in scaling down the project from full harmonization to an agreement on limited uniform rules.³⁹

The perception of instruments as hard law can therefore be misleading because they can be quite permissive in application. Parties are more likely to be suspicious of hard law instruments given their traditional binding nature. The hard aspects of regulations (or, indeed, treaties) can make them sites of more contestation, which can result in less precise agreements and laxer commitments. Thus, international instruments that are perceived as soft can function in hard ways, while international instruments that are perceived traditionally as hard can function in soft ways. The implication is that we must look beyond the traditional labels of hard and soft instruments and instead look at the character of the instruments in substance and in practice. Specifically, and contrary to traditional thinking, the soft law approach

35. The “prospect theory” has revealed the robust effect of “loss aversion” where perceived utility is increased less by gains than by averted losses. Kahneman & Tversky, *Prospect Theory*, *supra* note 34, at 265–69.

36. The tendency to prefer to stick to the current position and avoid change. See Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

37. MEVORACH, *supra* note 4, at 147.

38. Guzman notes that “[t]he EU represents perhaps the single greatest example of international cooperation on political, social, and economic issues the world has ever seen. It is also an exception to the normal requirement of consent for state-to-state collaboration. The modern EU was made possible only because political processes were created that allow for non-consensual decisions.” Guzman, *supra* note 28, at 751 n.6.

39. For a comprehensive description of the process of negotiating the *Societas Europaea* legislation, see M. Cristina di Luigi, *An Invasive Top-down Harmonisation or a Respectful Framework Model of National Laws? A Critique of the Societas Europaea Model*, 19 INT’L COMPANY & COM. L. REV. 58 (2008).

to solving complex international problems may be more effective. It may produce more complete and strong commitments than may be agreed via conventional hard law instruments.

II. THE PROBLEM WITH INTERNATIONAL GROUPS

International group insolvency poses a complex problem of an international character. Devising and agreeing upon an effective legal international instrument to address this problem is unsurprisingly a challenge. Enterprise groups are comprised of separate entities that are nonetheless connected through ownership, control, or coordination.⁴⁰ Although legally split into separate entities, groups are often economically, administratively, or financially integrated and therefore require some form of global group approach. A coordinated response to international insolvency of enterprise groups is critical for ensuring value maximisation for the benefit of the enterprise stakeholders. Generally, in the private international law of insolvency, harmonization and uniformity across jurisdictions is necessary to avoid the “chaos” generated by conflicting private international law rules and to allow for a fair and efficient global collective process.⁴¹

Agreeing on optimal levels of “universalism,” that is, a global approach to multinational default, is difficult. Often, the best solution in cross-border insolvency, including in cases involving groups, is concentrating proceedings in one country to foster “procedural consolidation.”⁴² Many groups that face financial difficulties have been, at least to some extent, integrated in the ordinary course. Due to the economic integration of the group, the insolvency of one entity affects the rest of the group, or the entire integrated enterprise faces financial or operational distress simultaneously. Therefore, a “group solution” is required: a liquidation, reorganization, sale, or a form of restructuring that encompasses the group as a whole, or relevant parts thereof. In special circumstances, it is also necessary to allow forms of “substantive consolidation”⁴³ if the group was heavily integrated in terms of its as-

40. UNCITRAL defines an enterprise group as “two or more enterprises that are interconnected by control or significant ownership” U.N. COMM’N ON INT’L TRADE LAW, *supra* note 11, ¶ 4(a).

41. “Collective” in a broad sense: “A proceeding should not be considered to fail the test of collectivity purely because a class of creditors’ rights is unaffected by it.” U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, at 40, U.N. Sales No. E.14.V.2 (2014).

42. Namely, administration of the process under the same court and supervisor and contemplation of a group solution. See Irit Mevorach, *The ‘Home Country’ of a Multinational Enterprise Group Facing Insolvency*, 57 INT’L & COMP. L.Q. 427, 433–34 (2008); Janis Sara, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, 44 TEX. INT’L L.J. 547, 558 (2009).

43. Namely, mixing of assets and/or debts together.

sets and/or liabilities.⁴⁴ Generally, a global collective cross-border insolvency process can ensure non-discrimination between foreign and local creditors, better control of costs, and the ability to consider solutions that can increase value. In the absence of an international agreement on a global collective approach, countries and their implementing institutions may avoid cooperation and may allow “races to collect.”⁴⁵

Negotiators of international instruments may be concerned, however, about the prospective loss of control to foreign bodies, limiting sovereignty, and disempowering local courts.⁴⁶ Even when countries are inclined to accept universalism, they may be caught in a prisoner’s dilemma—the fear that other countries will not commit to the same approach. As a result, they may be unwilling to enter into an agreement.⁴⁷

A paradox exists. Countries may recognize the need for an international approach buttressed by widespread commitment, yet they have reason to be suspicious and avoid entering into such commitments.⁴⁸ Notwithstanding these difficulties, “modified universalism” provides a proper solution. Modified universalism refers to norms concerning jurisdiction, choice of law, recognition, relief, and cooperation that enable efficient levels of centralization or coordination.⁴⁹ Through experience and peer effect,⁵⁰ modified uni-

44. IRIT MEVORACH, *INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS* 215–36 (2009); see also Stephan Madaus, *Insolvency Proceedings for Corporate Groups Under the New Insolvency Regulation*, *INT’L INSOLVENCY L. REV.* 235 (2015); Sarra, *supra* note 42, at 566; Janis Sarra, *Maidum’s Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies* 17 *INT’L INSOLVENCY REV.* 73 (2008); Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 *BUS. LAW.* 109 (2004).

45. See Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 *AM. BANKR. L.J.* 457, 465–66 (1991) (arguing that universalism can resolve the insolvency collective action on the global level). But of course, on the global level it may be more difficult to restrict a “race to collect” and the ring fencing of assets in the absence of effective enforcement mechanisms.

46. See Fredrick Tung, *Fear of Commitment in International Bankruptcy*, 33 *GEO. WASH. INT’L L. REV.* 555, 573 (2001).

47. Fredrick Tung, *Is International Bankruptcy Possible?* 23 *MICH. J. INT’L L.* 31, 60–64 (2002).

48. As Guzman has noted, it is not very challenging to reach consensus and create optimal international arrangements on simple matters where countries’ interests are aligned (Guzman observes that such matters may not amount to international “problems” at all). On other matters, for example when participants are faced with a “prisoner’s dilemma[.]” or with regard to “global commons” problems, cooperation, even if beneficial, can be frustrated and it may be difficult to resolve serious international issues especially if insisting on hard laws based on consent and strict processes. Guzman, *supra* note 28, at 764–67, 775.

49. See MEVORACH, *supra* note 4, at 13–27; Westbrook, *supra* note 22.

50. Increasingly international actors, policy makers, courts, or other authorities, have had interaction with and exposure to their peers in other jurisdiction through deliberations in international forums and cooperation in insolvency cases, acclimating countries to universalist and cooperative norms. See MEVORACH, *supra* note 4, at 74–76. It has been shown that people’s choices can be significantly influenced by the choices of peers and that there is social

versalism has become the dominant approach for addressing cross-border insolvency.⁵¹

However, modified universalism is not uniformly accepted. There have been deviations and pushback.⁵² “Territorialism” persists. Some states continue to prefer, or at least conduct, state-by-state administration of cross-border insolvency proceedings.⁵³ In these cases, concerns over loss of control, loss of other powers, and status quo biases seem to override the potential gains that cooperation would provide. These fears about the loss of sovereignty and control are likely exaggerated,⁵⁴ yet they remain a hurdle for those committed to developing an effective universalist solution. Avoiding modernization and movement toward universalism is also influenced by inequality of systems and problems of institutional capacity, which also affect trust between systems.⁵⁵

These international apprehensions are further mixed with and exacerbated by other fears when coordination involves enterprise groups. A group solution can minimize costs and maximize value, including in circumstances where assets are moved around the group without proper record-keeping. The concern, however, is that, when allowing group solutions, the integrity of the corporate form may be at risk, specifically the economic benefits of the limited liability structure.⁵⁶ When negotiating instruments on the cross-border insolvency of groups, such concerns exist in the background, even though not every group solution interferes with limited liability (that is, mixes assets or debts as part of the solution).⁵⁷ A “fear of the unknown” may also be in play as countries have limited experience in this field. It has been

and psychological benefit from meetings others’ expectations. See, e.g., S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP AND MEN* 177, 189–90 (Harold Guetzkow ed., 1951); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 639–41 (2004).

51. MEVORACH, *supra* note 4, at 32–38.

52. The notable example from recent times is the United Kingdom Supreme Court approach expressed in the case of *Rubin* where the court refused to enforce an insolvency-related judgment that emanated from the main proceedings. *Rubin v. Eurofinance SA* [2012] UKSC 46, ¶¶ 91–92, 177.

53. IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* 11 (2d ed. 2005); Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy* 98 *MICH. L. REV.* 2216, 2218–19 (2000).

54. See Kahneman & Tversky, *Prospect Theory*, *supra* note 34.

55. MEVORACH, *supra* note 4, at 29–30, 71.

56. Such benefits include the saving of transaction and monitoring costs when assets and liabilities are segregated and creditors may only monitor the financial situation of the entity with whom they are dealing, knowing that they will not compete with creditors of other group entities. See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *YALE L.J.* 387, 398 (2000).

57. As mentioned in *supra* note 43 and its accompanying text, substantive consolidation that mixes assets and/or debts is a solution for the rare cases, and, usually, what is required is just procedural consolidation and concentration of the process.

shown in experiments on decisionmaking that people are more risk averse when making choices based on described probabilities as opposed to decisions based on information learned through experience.⁵⁸ In many domestic systems, laws concerning group insolvency do not exist, and what generally prevails is an “entity law” approach, namely, the consideration of each entity in a group separately for various legal purposes.⁵⁹ It has been very taxing in the past to agree on tools for international group insolvencies. Often, the problem of the corporate form was raised in international negotiations even where it was not really at issue.⁶⁰ International insolvency of groups is therefore a problem where international coordination and agreement on strong commitments proves generally difficult.

III. EU vs. UNCITRAL: EVALUATION OF THE INSTRUMENTS FOR INTERNATIONAL GROUPS’ INSOLVENCIES

Against this backdrop, it is not surprising that the new international instruments designed for groups are generally quite soft. However, the approach in the EIR (which is regarded a hard law instrument) in particular represents a compromise with soft elements. The EIR is directly applicable and has mechanisms to ensure uniform enforcement, but its rules for groups are somewhat hollow and limited. UNCITRAL requires that its model (the MLG) be *adopted*. However, it has other means to induce participation. The MLG’s more relaxed process has allowed it to develop a more comprehensive regime for enterprise groups. Even though it is regarded a soft law instrument, it is overall stronger than the EIR regime.

58. See Ralph Hertwig & Ido Erev, *The Description–Experience Gap in Risky Choice* 13, TRENDS COGNITIVE SCI. 517 (2009); Elliot A. Ludvig & Marcia L. Spetch, *Of Black Swans and Tossed Coins: Is the Description-Experience Gap in Risky Choice Limited to Rare Events?*, PLOS ONE, June 2011, at 1–7; Christopher R. Madan et al., *The Role of Memory in Distinguishing Risky Decisions from Experience and Description*, 70 Q.J. EXPERIMENTAL PSYCHOL. 2048 (2017).

59. This is contrasted with “enterprise law” which is concerned with the economic reality of the overarching business enterprise and the possible matching of rights or responsibilities to its collective economic function. See Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947); Phillip Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283 (1990); Clive M. Schmitthoff, *The Wholly Owned and the Controlled Subsidiary*, J. BUS. L. 218 (1978). This situation of absence of rules on group insolvencies in domestic laws is gradually changing, importantly following the guidance in the UNCITRAL Legislative Guide. See U.N. COMM’N ON INT’L TRADE LAW, *supra* note 11. Legislation has been introduced for example in Germany, Argentina, and Romania. See *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, U.N. COMMISSION ON INT’L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_exts/insolvency/1997Model_status.html (last visited Mar. 9, 2019) (containing all national legislations based on MLCBI, as updated by the UNCITRAL Secretariat).

60. For example, when Working Group V has deliberated in the past on the notion of a group coordination center or group COMI. See *infra* Section III(C)(2).

A. Country Participation

The EIR is undoubtedly hard international law in terms of the obligation to adopt its provisions. As it is a regime provided in the form of an EU regulation, it is directly applicable in all member states.⁶¹ An EU regulation is binding in its entirety from the time it enters into force and does not require any process of transposition into domestic law.⁶² As such, regulations are more robust than treaties. Indeed, the EU cross-border insolvency regime was originally contemplated in a treaty⁶³ but, in that form, was ratified by only one country.⁶⁴ A later effort to conclude an EU Convention also failed because not all participating states signed it.⁶⁵ The relaunch of the EU cross-border insolvency project as a regulation overcame the complications associated with treaties as the regime could now be directly applicable in all member states. The change in the instrument's nature also ensured that adoption is of the entire framework.⁶⁶

The EU regime applies only within the EU, and the chapter on groups therefore concerns entities (members of groups) with a "centre of main interest" ("COMI")⁶⁷ in the EU only. In terms of country participation, the restriction to EU-COMI entities is a key drawback of the EIR as enterprise groups may span across several jurisdictions and not all may have their entities' COMIs present in EU member states.⁶⁸ In contrast, the MLG is not confined to a specific region and has the potential to govern any group.

However, the MLG's applicability depends on adoption of the instrument by countries. The need to adopt the instrument is its main soft characteristic. The EIR is robustly stronger than the MLG in that regard because it is directly applicable in member states. If the MLG is not adopted by a significant number of countries, it will be difficult or, in certain circumstances, impossible to cooperate and coordinate group solutions where important as-

61. See Bux, *supra* note 15. Denmark is an exception as it is in a special position regarding legislation such as the EIR. See FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW*, *supra* note 53, at 357.

62. Compare the EU Directives, which are also binding, but require a process of adoption and allow member states to choose the form and method of implementation of the directives' rules; see Bux, *Sources and Scope of European Law*, *supra* note 15.

63. European Convention on Certain International Aspects of Bankruptcy, June 5, 1990, C.E.T.S. No. 136.

64. See FLETCHER, *supra* note 53, at 315.

65. Deliberations on a European Union Convention on Insolvency Proceedings lasted more than thirty years. *Id.* at 343–46.

66. Compare The Istanbul Convention 1990 which allowed reservations from various important chapters. *Id.* at 317.

67. EIR, *supra* note 6, art. 3.

68. The EU regime is also susceptible to regional turmoil like the UK decision to leave the EU (Brexit).

pects of the group may be in countries that are not party to the regime.⁶⁹ There is also a risk that countries adopt the MLG in different ways, undermining uniformity.

The MLG is, however, not so soft in terms of participation by countries. The choice of a model law rather than legislative provisions, recommendations, or principles promotes participation because a model law is generally perceived and developed as a law for adoption in its entirety, encouraging participation in the complete scheme.⁷⁰ Indeed, the Guide to Enactment of the MLG explicitly states that, “in order to achieve a satisfactory degree of harmonization and certainty, States may wish to make as few changes as possible when incorporating the Model Law into their legal systems.”⁷¹

Adoption of a model law is quite simple and certainly simpler than adopting a treaty, which is often subject to a cumbersome ratification process. A model law is enacted like any other domestic law and requires minimal legislative efforts as the law is “ready-made” and can be adopted almost as is.⁷² Indeed, the general model law on cross-border insolvency (the MLCBI) has been so far adopted—usually with limited modifications—in more than forty countries.⁷³

B. Enforcement

The EIR is also, on its face, much harder than the MLG in terms of the regime’s enforcement mechanisms. The EIR’s provisions are “strong” where they are part of the national regulation. They supersede contradicting national laws, and they take effect within the national legal order.⁷⁴ They are required to have uniform effect, which is further guarded by the delegation of interpretive powers to an international tribunal, the Court of Justice of the

69. The solutions envisaged by the MLG are described and assessed in Section III.C below.

70. Compare the use of recommendations in the UNCITRAL Legislative Guide on Insolvency Law, which are provided as guidance to legislators but do not intend to create a complete insolvency law for uniform adoption. Thus, the decision of UNCITRAL (Working Group V) in May 2018 to recharacterize the instrument on cross-border insolvency of groups (the MLG) from “model provisions” to a “model law” hardened it significantly. The report of the Working Group’s May 2018 meeting notes that “[t]he prevailing view was that the text should be prepared as a stand-alone model law, in the light of its distinct scope. That approach, it was noted, would accord more prominence to the text and facilitate its promotion, as well as highlight its importance for cross-border inter-State cooperation and coordination in insolvency-related matters.” U.N. Comm’n on Int’l Trade Law, Rep. of Working Group V (Insolvency Law) on the Work of Its Fifty-Third Session, U.N. Doc. A/CN.9/937, ¶ 48 (2018).

71. Draft Guide to Enactment of the draft MLG, *supra* note 9, ¶ 13.

72. See MEVORACH, *supra* note 4, at 157.

73. See *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, *supra* note 59.

74. See Bux, *supra* note 15; see also FLETCHER, *supra* note 53, at 355 (“all national courts and officials are required to give effect to them.”).

European Union (the “CJEU”).⁷⁵ The EIR is also premised on the notion of “mutual trust,” which facilitates the system of compulsory recognition under the regime.⁷⁶ The MLG, on the other hand, is regarded as non-binding, and it is not supported by an institutional framework with international tribunals that can ensure consistent compliance.

Once domestic legislators adopt and implement the MLG, however, the model law and its provisions become part of the domestic legal order. The provisions are then laws (hard laws, like any domestic law) and are enforceable through domestic mechanisms. Additionally, uniformity is enhanced by the requirement in the MLG that, when it is interpreted, “regard is to be had to its international origin and to the need to promote uniformity in its application”⁷⁷ A Guide to Enactment of the MLG,⁷⁸ and a system of collecting and disseminating case law on UNCITRAL texts,⁷⁹ assist as well in ensuring uniform application. UNCITRAL may also issue an interpretation guide in the future if the need arises.⁸⁰ Further, although trust among participants cannot be presumed within the global framework, it can certainly develop over time through subsequent practice and interaction.⁸¹

The risks of inconsistent enforcement and noncompliance still exist. The application of the general cross-border insolvency framework (the MLCBI) in cases of groups has not been fully consistent. Some courts took account of the group circumstances and promoted group solutions while others were more inclined to consider each entity in a group separately.⁸² However, this is precisely why it was important to design a specific model law for groups that provides explicit solutions and safeguards. It is expected that, when the MLG is enacted, such inconsistencies will be reduced.

A risk of inconsistent enforcement exists regarding the EIR as well. There are already indications that, although the EIR is directly applicable, there are “startling” differences in its adoption by member states, which

75. See FLETCHER, *supra* note 53, at 355.

76. See EIR, *supra* note 6, at recital 65; see also Christoph G. Paulus, *The ECJ's Understanding of the Universality Principle*, 27 *Insolvency Intelligence* 70 (2014).

77. See Draft MLG, *supra* note 9, art 7.

78. See *supra* note 9.

79. UNCITRAL Texts (CLOUT) is maintained by the UNCITRAL Secretariat with the purpose of “promot[ing] international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts.” *Case Law on UNCITRAL Texts (CLOUT)*, U.N. COMMISSION ON INT’L TRADE L., http://www.uncitral.org/uncitral/en/case_law.html (last visited Mar. 9, 2019).

80. Compare the Guide to Enactment and Interpretation of the MLCBI which was revised in 2013 as a result of uncertainties regarding the application of the notion of COMI. U.N. COMM’N ON INT’L TRADE LAW, *supra* note 41.

81. See Mevorach, *supra* note 4, at 180. Experience also show that domestic courts often endorse or rely on the jurisprudence of other countries that have adopted the MLCBI.

82. See Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency*, 12 *EUR. BUS. ORG. L. REV.* 517, 537–43 (2011).

may affect the way the EIR may be enforced.⁸³ Additionally, not all issues arising in the course of international insolvency may be referred to the CJEU, especially as problems of insolvency often require a resolution in real time.⁸⁴ Importantly, vagueness or laxity of the rules in the instrument can decrease enforceability, and the rules on groups in the EIR are indeed quite lax, as discussed next.

C. Hardness of the Rules

Both the EIR and the MLG provide a toolkit of solutions for cross-border insolvency of groups, attempting to promote cooperation, centralization, and/or coordination of the process. In important respects, however, the MLG provides stronger tools and a more comprehensive regime. Indeed, whilst a model law is increasingly understood as a prominent instrument for cross-border insolvency, it is at the same time still perceived as less threatening than “binding international law.” That more nuanced perception seems to have worked to limit concerns to some extent and achieve stronger commitments eventually. As explained below, both the EIR and the MLG regimes impose similar cooperation duties and avoid contemplating a compulsory centralized process in a single group center (group COMI). The MLG, however, has a stronger coordination tool with a wider range of relief and mechanisms to limit multiple proceedings.

1. Cooperation Duties

Cooperation between courts and insolvency representatives is the first tool provided in the MLG and in the EIR for resolving international group insolvencies. Only cooperation is mandatory under the instruments.⁸⁵ The EIR requires that insolvency representatives cooperate and communicate with each other to facilitate the effective administration of group members’ proceedings to the extent that cooperation is not incompatible with the rules applicable to the proceedings and that there is no conflict of interest.⁸⁶ The courts must also cooperate and communicate where such cooperation is

83. See *Realisation of the EU Insolvency Regulation (EIR 2015) in National (Procedural) Law of the Member States*, CERIL (June 4, 2018), <http://www.ceril.eu/uploads/files/20180604-ceril-report-2018-1-final-version.pdf>.

84. The classic example was the Daisytek group saga (for the judgment of the English High Court, see *Re Daisytek-ISA Ltd.*, [2003] BCC 562), which was not referred to the CJEU, but where at least initially the English, French and German courts reached different decisions concerning the ability of the group members incorporated in France and Germany to be subject to main proceedings in the UK. See FLETCHER, *supra* note 53, at 388.

85. Unless group members have their COMI in the same place in which case centralization may be mandated, see Section III.C(2) below.

86. See also Madaus, *supra* note 44, at 238 (noting that this language should “not be interpreted as an excuse not to engage in any kind of cooperation across borders at all.”).

conducive to effective administration of the process.⁸⁷ The MLG requires that courts cooperate to the maximum extent possible with other courts, foreign representatives, and any group representative appointed.⁸⁸ It requires that insolvency representatives supervising group members proceedings cooperate, too, including with other courts.⁸⁹

The instruments do not demand that cooperation culminate in any prescribed result though. They only require considering group-wide solutions against the backdrop of the general objective to promote “[f]air and efficient administration of cross-border insolvencies concerning enterprise group members . . .”⁹⁰ or “ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies.”⁹¹ Under the EIR, for example, cooperation may lead to the conferral of additional powers to one of the insolvency representatives resulting in greater concentration of the process. Representatives are obliged to cooperate, but they “may” (or may not) agree on such deference and grant of powers.⁹²

As in single entity cross-border insolvencies, cooperation in group cases is crucial. The instruments emphasize that it is a duty. Both instruments are, however, quite light regarding the results of cooperation, and, here, they lean toward what is called “cooperative territorialism.” In such a system, each jurisdiction may administer the assets or the insolvency of a subsidiary located within its own borders separately but may still cooperate, including by entering into agreements.⁹³ The lack of required outcomes weakens the utility of a duty to cooperate, and what is required from courts and representatives in this respect is rather vague and limited. The result of applying the cooperation tool might therefore be suboptimal.⁹⁴ Both instruments,

87. EIR, *supra* note 6, art. 57. The cooperation duty is also extended to the interaction between insolvency representatives and courts, *id.* art. 58, and between insolvency representatives and a coordinator where appointed. EIR, *supra* note 6, art. 74. On the notion of the “coordinator,” see Section III.C(3) below.

88. Draft MLG, *supra* note 9, art. 9. On the concept of “group representative,” see *infra* Section III.C(3).

89. Draft MLG, *supra* note 9, arts 13–14.

90. *Id.* at pmb1. (d).

91. EIR, *supra* note 6, at recital 51.

92. *Id.* art. 56, ¶ 2.

93. Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 742–43 (1999).

94. See, for example, the opening and conduct of the process concerning the Air Berlin/NIKI group (which took place after the entry into force of the new EIR), where some excessive litigation took place, and parallel proceedings opened both in Germany and Austria, notwithstanding the initial effort of the German representative to concentrate the process in Germany. While a German district court decided to open main proceedings regarding both the German parent and the Austrian subsidiary, following objections the German regional court repealed the decision of the first instance court, Amtsgericht Charlottenburg [Charlottenburg Local Court] Jan 4, 2018, 36n IN 6433/17, <https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2018/pressemitteilung.662862.php>, and

however, provide additional mechanisms which may lead to greater centralization and coordination of group solutions.

2. Centralization Through Grouping of COMIs

Neither the EIR nor the MLG envision a notion of “group COMI” (the center of main interests of a group) or “group forum” where all the proceedings against group members (or members of certain groups exhibiting a centralized/integrated structure) must be opened. UNCITRAL Working Group V did consider the notion of group COMI in the past.⁹⁵ It acknowledged that centralization and avoidance of parallel proceedings can reduce costs, assist in coordination of sales, and promote the maximization of value, including through global reorganization of the group. This is particularly true where there is high integration between group members.⁹⁶ It was difficult, however, to reach a consensus on the meaning and location of the group COMI. The concern was also that such a concept will not be adopted and recognized widely.⁹⁷ A report of the EU Parliament, produced during the EIR revision process,⁹⁸ recommended identifying a group center where proceedings will be centralized (consolidated procedurally) in circumstances of groups that have a centralized structure.⁹⁹ In the more exceptional cases of heavily integrated (intermingled) groups, the report recommended to allow a

as a result, main proceedings were opened in Austria regarding the subsidiary and additional secondary proceedings in Germany. *See also* Marvin Knapp & Daniel Arends, *NIKI's COMI – There can be only one!*, *INSOL WORLD* 30, 30–32 (2018).

95. It was considered during deliberations that commenced in 2006 on the expansion of the Legislative Guide to address the treatment of enterprise groups. U.N. COMM’N ON INT’L TRADE LAW, *supra* note 11, at 83.

96. U.N. Comm’n on Int’l Trade Law, Working Group V (Insolvency Law), Treatment of Corporate Groups in Insolvency, U.N. Doc. A/CN.9/WG.V/WP.76/Add.2, at 11 (Mar. 6, 2007); U.N. COMM’N ON INT’L TRADE LAW, *supra* note 11, at 11.

97. *See* Treatment of Corporate Groups in Insolvency, *supra* note 96, at 3–4.

98. European Parliament, Comm. on Legal Affairs, *Report with Recommendations to the Commission on Insolvency Proceedings in the Context of EU Company Law (2011/2006(INI))*, Doc. A7-0355/2011 (Oct. 17, 2011).

99. *Id.* Specifically, the report recommended that “whenever the functional/ownership structure allows it . . . [p]roceedings should be opened in the Member State where the operational headquarters of the group are located. Recognition of the opening of the proceedings should be automatic.” *Id.* at 12. The recommendations further provided that these main proceedings “should result in a stay of the proceedings opened in another Member State against other group members.” *Id.* And that “[a] single insolvency practitioner should be appointed.” *Id.* The centralized approach in EU insolvency proceedings would have been the mandatory solution whenever the group has been centralized in terms of its structure, namely the group business was integrated and was centrally controlled. The recommendations did not preclude the possibility that additional secondary proceedings may be opened, in which case it suggested that “a committee should be set up to defend and represent the interests of local creditors and employees.” *Id.*

form of substantive consolidation.¹⁰⁰ These recommendations were not adopted in the revised (recast) EIR.

Still, it is possible under the EU and UNCITRAL regimes to centralize group proceedings where entities' COMIs are in the same forum, namely, when there is a "grouping of COMIs." This solution is quite "hidden" though. In the EIR, it is noted in the recitals and not in the body of the text.¹⁰¹ The MLG impliedly acknowledges that several group members may be subject to insolvency proceedings in the same place,¹⁰² but it does not pronounce the concept explicitly.¹⁰³ Surely, such centralizations can be attempted pursuant to the existing MLCBI if proceedings are opened and recognized based on the presence of COMI of separate entities belonging to the same group.¹⁰⁴ However, the MLCBI lacks explicit rules on groups, and the application of its provisions in this way is not straightforward and encountered objections.¹⁰⁵

The absence of explicit provisions concerning the centralization of group proceedings can result in uncertainty regarding the possibility of opening such proceedings in the same place or granting them recognition and relief. This may lead to inefficient solutions.¹⁰⁶ The result under both

100. Specifically, the report recommended that "[i]f it is impossible to determine which assets belong to which debtor, or to assess inter-company claims, recourse should exceptionally be had to the aggregation of estates." *Id.*

101. Also using "negative" language where it is provided that the rules in the new chapter on groups "should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. . . ." EIR, *supra* note 6, at recital 53.

102. For example, the relief available to the group planning proceeding (discussed in Section III(C)(3)) refers both to entities participating (i.e., who have their COMI in other countries but who participate in a group process) and entities subject to the proceeding.) *See* Draft MLG, *supra* note 9, art. 20.

103. The revised Guide to Enactment of the MLCBI contributes, however, to a COMI analysis that supports group centralizations in such manner where it emphasises that the primary factor for determining COMI is the location of central administration (actual head of office) ascertainable by third parties. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 41, at 70–71. Often, when groups were centralized, the central administration of the entities coincides with the central administration of the group, thus focusing on the central administration factor can result in a grouping of COMIs.

104. It is also possible to centralize proceedings under the MLCBI by opening proceedings against group members in the same place where some of them may have their COMI and some an establishment, defined in the MLCBI as "any place of operations where the debtor carries out a nontransitory economic activity with human means and goods or services" (MLCBI, article 2) (*see, e.g., In the Matter of Videology Ltd* [2018] EWHC 2186 (Ch)).

105. *See* Mevorach, *supra* note 82, at 537.

106. *See, for example, the dispute regarding the recognition of foreign main proceedings in the UK concerning a group member that was part of group proceedings in Croatia, in the case of Agrokor. Re Agrokor DD* [2017] EWHC 2791 (Ch). The English court referred in its judgment to the possible absence of an option to grant recognition in such circumstances a "significant hole" but considered that there is nothing in the MLCBI that precludes it. *Id.* at

regimes might be that, with the advance of the new instruments, there may be a reduction in centralizations based on grouping of COMIs as the emphasis is on cooperation and coordination rather than full centralization.¹⁰⁷ Still, as explained in the next section, the coordination tool under the MLG is stronger and more “centralization-driven.”

3. Development of a Solution in a Coordinating (Planning) Forum

In both the EIR and the MLG, the main innovation—and, indeed, an important international coordination tool—is the idea of developing a group coordinated solution in a single forum (or in a limited number of locations) and participation in the solution by relevant group members. This concept allows developing group solutions not only when all the entities’ COMIs are in the same place but also in circumstances of more decentralized enterprise structures. A group solution may be an optimal approach even if the group is largely decentralized but nonetheless integrated. Stakeholders can then benefit from the value of the group business or a combined value in realization of assets. They can also profit from the minimization of costs where parallel processes are avoided.

The EIR allows the opening of “coordination proceedings”¹⁰⁸ in any court having jurisdiction over the insolvency proceeding of a member of the group pursuant to a request of an insolvency representative appointed in insolvency proceedings opened in relation to a group member.¹⁰⁹ The court first seized has jurisdiction over the coordination process (except where there is an agreement of two-thirds of the insolvency practitioners on the location of the coordination proceeding).¹¹⁰ The opening request should present the outline of the proposed group coordination and propose the person to be nominated as the group coordinator.¹¹¹ The court should then be satisfied that the opening of the proceedings is appropriate to facilitate the effective administration of the proceedings and that no creditor of any of the

[53]. See also the circumstances concerning *Air Berlin/Niki* group decided under the new EIR, where the attempt of the German representative to concentrate the proceedings against the German parent and Austrian subsidiary in Germany eventually failed. Amtsgericht Charlottenburg [Charlottenburg Local Court] Jan 4, 2018, 36n IN 6433/17, <https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2018/pressemitteilung.662862.php>.

107. Compare the pragmatic approach which was developed whereby proceedings against group members have been opened in the same jurisdiction, under the EIR 2000 and the MLCBI. See Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 Brook. J. Int’l L. 1005 (2007); Mevorach, *supra* note 82, at 537.

108. EIR, *supra* note 6, arts. 61–77.

109. *Id.* art. 61.

110. *Id.* arts. 62, 66.

111. It should also list the representatives appointed in relation to the members of the group and courts involved in those proceedings and outline the estimated costs of the proposed coordination. *Id.* art. 61, ¶ 3.

group members is likely to be financially disadvantaged by the inclusion of the group member in the proceeding.¹¹² Any of the other appointed representatives may object to the inclusion of the entity they represent in the coordination proceedings and shall, in that regard, obtain any approval that may be required under the local law of the state where they were appointed.¹¹³ In case of objection, the group member is not included in the group coordination proceedings unless the insolvency representative decides to opt in and be included at a later stage.¹¹⁴ The coordinator appointed in the coordination proceedings may recommend a group coordination plan,¹¹⁵ which shall be considered by the other insolvency representatives “[w]hen conducting their insolvency proceedings.”¹¹⁶ The plan proposal is just a recommendation, and it is not binding¹¹⁷—the representatives are not “obliged to follow in whole or in part the coordinator’s recommendations or the group coordination plan;” they are only required to “give reasons” for not following the recommendations.¹¹⁸

Coordination under the EIR is therefore possible, but it is not mandatory or binding as might have been expected from a hard law instrument. The coordinating court has limited control over the process. If there is an objection to the inclusion of a group member by its appointed insolvency practitioner, the member is excluded, provided that the exclusion is approved by the local court of the group member’s COMI forum. The exclusion of an objecting entity is allowed and cannot be overridden by the coordinating forum. This is true even if the objection is a “hold-out” strategy aimed at extracting more value than may have been realized separately (before, perhaps, opting back into the process) or where the objection is a result of fear of loss of control supported by local authorities. The excluded entity can be brought back to the process only voluntarily where the local representative decides to opt in. Adherence to a group coordinated plan is optional and discretionary. To compare, the EU Parliament previously recommended that “[f]or insolvency proceedings in respect of decentralised groups there should be [r]ules for *mandatory* coordination and cooperation”¹¹⁹ As mentioned above, for centralized structures, the EU Parliament recommended mandatory centralization.

In terms of the content of the coordinating plan, the EIR provides that it should identify, describe, and recommend “a comprehensive set of measures appropriate to an integrated approach to the resolution of the group mem-

112. *Id.* art. 63.

113. *Id.* art. 64.

114. *Id.* arts 65, 69.

115. *Id.* art. 72.

116. *Id.* art. 70, ¶ 1.

117. It is not “an enforceable ‘European rescue plan’ voted on and confirmed on a European level.” Madaus, *supra* note 44, at 242.

118. EIR, *supra* note 6, art. 70, ¶¶ 2–3.

119. European Parliament, Comm. On Legal Affairs, *supra* note 98 (emphasis added).

bers' insolvencies." The plan may contemplate how to "re-establish the economic performance and the financial soundness of the group . . ." It may address "the settlement of intra-group disputes" and may contain proposed agreements between the representatives.¹²⁰ The focus is on group reorganizations and restructurings. In addition, the coordinator may mediate disputes, be heard, and participate in members' proceedings. He or she may explain the plan to their domestic court, request information from other representatives, and request a temporary stay of up to six months of group members' proceedings if "such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested . . ."¹²¹

The prescribed powers of the coordinator are overall quite limited. They may be compared with the general powers of insolvency representatives appointed in single company main proceedings, which include all the powers conferred on the office holder by the law of the opening state.¹²² Additionally, the EIR explicitly prohibits any form of consolidation of the proceedings (procedural consolidation) or of the estates (substantive consolidation).¹²³ This prohibition has no clear base rationale that accounts for the economic reality of the group in question. The prohibition is absolute.¹²⁴ As such, it shows that it was difficult to reach an international agreement on optimal tools that adequately respond to different group circumstances¹²⁵ within the

120. EIR, *supra* note 6, art. 72, ¶ 1.

121. *Id.* art. 72, ¶ 2(e).

122. *Id.* art. 2.

123. *Id.* art. 72, ¶ 3.

124. Except where some form of consolidation may be achieved by finding a grouping of COMIs, *see supra* Section III.C(2), or through cooperation, and where the domestic law allows for such consolidation, *see* EIR, *supra* note 6, art. 61 (noting that member states may develop supplementary rules concerning the insolvency of enterprise groups).

125. See, for example, the circumstances of the insolvency of the Nortel group, where a pro rata, partial consolidation solution was required and indeed eventually prescribed by both the American and Canadian courts. *In re Nortel Networks, Inc.*, 532 B.R. 494 (Bankr. D. Del. 2015); *Re Nortel Networks Corp.*, 2015 ONSC 2987 (Can.); John A.E. Pottow, *Two Cheers for Universalism: Nortel's Nifty Novelty*, in ANNUAL REVIEW OF INSOLVENCY LAW 333 (Janis P. Sarra & Justice Barbara Romaine eds., 2015). See also the agreement on the concepts of procedural and substantive consolidation in the UNCITRAL Legislative Guide. U.N. COMM'N ON INT'L TRADE LAW, *supra* note 11, at 32–34, 71–74 (listing recommendations 202–10 and 220–28).

EIR instrument.¹²⁶ Instead, the negotiators of this so-called hard law instrument compromised on more limited, soft tools.¹²⁷

With the MLG, the international community managed to develop and agree on a more comprehensive and wider range of measures. The equivalent innovation in the MLG to the coordination proceedings in the EIR is the concept of “group insolvency solution” contemplated in a “planning proceeding.”¹²⁸ A group insolvency solution is defined broadly as “a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members”¹²⁹ The proposal (or proposals) should aim at “protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members.”¹³⁰ The planning proceeding takes place at the main (COMI) forum of an enterprise group member,¹³¹ which “is likely to be a necessary and integral participant in that group insolvency solution” and in which other group members participate and a group representative is appointed.¹³² Like in the EIR, participation in the planning proceeding is voluntary, and group members may opt in or out.¹³³ Pursuant to the MLG, the planning proceeding may be recognized in host countries where group members have a presence. Recognition of the planning proceedings is not automatic, but it should be granted “at the earliest possible

126. See Madaus, *supra* note 44, at 247 (noting as “bad news” the fact that the Regulation’s new rules for groups are only “a very modest first step[.]” where it “does not yet seem to allow for solutions that make a considerable difference in the practice of administration insolvent corporate groups. Legal scholars have made a good case for means of procedural concentration or consolidation”). “U.S. bankruptcy practice keeps handling group insolvencies of every magnitude with considerable success along the lines of procedural and, if adequate, substantive consolidation. In Europe, we have just begun to take the first steps.” *Id.*

127. See Madaus, *supra* note 44, at 241 (noting that the coordination tool in the EIR “can be considered a rather soft approach intended to incentivise stakeholders more than making them bound to perform specific duties.”); see also Irit Mevorach, *Insolvency of Corporate Groups Under the New Insolvency Regulation: Progress or Reason for Concern?*, in THE IMPLEMENTATION OF THE NEW INSOLVENCY REGULATION: IMPROVING COOPERATION AND MUTUAL TRUST 290–94 (Burkhard Hess et. al. eds., 2017); Gerard McCormack, *Something Old, Something New: Recasting the European Insolvency Regulation*, 79(1) MODERN L. REV. 121, 144 (2016); Chrisoph Thole & Manuel Dueñas, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, 24 INT’L INSOLV. REV. 214, 220 (2015).

128. Draft MLG, *supra* note 9, art. 2(f), (g).

129. *Id.* art. 2(f).

130. *Id.*

131. “‘Planning proceeding’ means a main proceeding commenced in respect of an enterprise group member” *Id.* art. 2(g). Subject to the requirements in the definition, “the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution. . . .” *Id.*

132. *Id.*

133. *Id.* art. 18(3).

time”¹³⁴ based on objective criteria and the provision of certain pieces of evidence.¹³⁵ It is, therefore, assumed that recognition will be swift (“quasi automatic”) as it has been under the MLCBI.¹³⁶

Under both the EIR and the MLG, a coordinated solution depends on group member initiative and agreement. Coordination through any degree of deference to a central forum is not mandatory, and authorities in host jurisdictions are not obliged to go along with a group plan or postpone a local opening or a local solution in order to consider a group solution. The risk is that certain group members and their stakeholders will hold out, ring fence assets, and refuse to cooperate or participate. Local courts may also over-protect local stakeholders and refrain from surrendering control to the home jurisdiction of the planning proceedings.¹³⁷

The MLG is, however, quite far-reaching and comprehensive. It does not limit the type of solution for the group. As mentioned, a group solution can be any solution. Furthermore, the MLG grants the group representative the authority to seek a wide range of relief,¹³⁸ which can support the development of an effective group approach. Whilst the instrument does not require participation by group members, the group members may be subject to various types of relief in the course of the group-wide insolvency process once they decide to participate and local courts do not prohibit such participation. The group representative may request relief in the planning proceeding as well as in host countries where group members have their COMI or other forms of presence. Relief may include a stay of execution and of insolvency proceedings, entrustment of the realization of assets, and entrustment of the distribution of such assets with the group representative where a local insolvency representative is not able to perform the task.¹³⁹

Relief also includes “any additional relief that may be available” under the local law.¹⁴⁰ Like the MLCBI, the MLG does not limit the relief and “the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting state and needed in the circumstances of the case.”¹⁴¹ There is also no prohibition on a solution that is based on some form of consolidation. Procedural consolidation may result from participation in the planning proceedings and refraining from conducting local proceedings in multiple jurisdictions.¹⁴² The range of relief contemplated in the instrument can facilitate procedural consolidation, such as

134. *Id.* art. 23(2).

135. *Id.* arts. 21, 23.

136. *See* Mevorach, *supra* note 82, at 533.

137. *See also* MEVORACH, *supra* note 4, at 234.

138. Draft MLG, *supra* note 9, arts. 20, 22, 24.

139. *Id.* arts. 20, 24.

140. *Id.* arts. 20(h), 24(i).

141. U.N. COMM’N ON INT’L TRADE LAW, *supra* note 41, at ¶ 189.

142. *See infra* Section III(C)(4).

the stay of executions and of proceedings, recognition of intra-group funding arrangement, and any other additional relief that may be granted in the planning proceeding.¹⁴³ Stronger forms of consolidation may be required in specific circumstances.¹⁴⁴ Such solution and relief, although not mentioned explicitly, may be proposed by a group representative and accepted by host jurisdictions if safeguards are met and creditors of each participating enterprise group member are adequately protected.¹⁴⁵

4. Avoidance of Multiple Proceedings

The MLG provides tools that aim to avoid the commencement of multiple proceedings, specifically in a group context. It allows treating claims that may be brought in “non-main proceedings”¹⁴⁶ in other states where group members have “establishments”¹⁴⁷ centrally in the main proceedings (in accordance with the treatment the claims would be accorded in the non-main jurisdiction).¹⁴⁸ This follows the mechanism of “synthetic secondary proceedings” developed in practice¹⁴⁹ and adopted in the EIR concerning single companies.¹⁵⁰ Thus, the EIR now allows avoiding secondary (non-main) proceedings in addition to main proceedings concerning the same debtor. Adapting this concept to the group scenario, the MLG provides that, where a group representative is appointed, the undertaking concerning the treatment of claims “should be given jointly by the insolvency representative and the group representative.”¹⁵¹ It is then binding on the insolvency estate of the main proceeding. Local courts may then stay or decline to commence non-main proceedings and approve the treatment of local creditors’ claims to be provided in the main proceeding.¹⁵²

The MLG goes even further and gives legislators the option to adopt mechanisms to minimize the commencement of multiple *main* proceed-

143. Draft MLG, *supra* note 9, art. 20.

144. *See supra* Part II.

145. Draft MLG, *supra* note 9, art. 27.

146. “Non-main proceeding” is defined as “an insolvency proceeding, other than a main proceeding, taking place in a State where the enterprise group member debtor has an establishment . . .” *Id.* art. 2(k).

147. “Establishment” is defined as “any place of operations where the enterprise group member debtor carries out a non-transitory economic activity with human means and goods or services.” *Id.* art. 2(l).

148. Draft MLG, *supra* note 9, art. 28.

149. *See, e.g., Re Collins & Aikman Europe SA* [2006] EWHC (Ch) 1343 (Eng.); *Re Nortel Networks SA & ORS*, [2009] EWHC (Ch) 206 (Eng.).

150. EIR, *supra* note 6, art. 36.

151. Draft MLG, *supra* note 9, art. 28.

152. *Id.* art. 29.

ings¹⁵³ in a group context.¹⁵⁴ A supplement to the MLG provides that a foreign representative or a group representative, where appointed, may give an undertaking, which the court may approve, regarding creditors' claims that may be brought in main proceedings.¹⁵⁵ Generally, if the recognizing court is satisfied that the interests of creditors are adequately protected, it may stay or decline to commence insolvency proceedings regarding an enterprise group member participating in the planning proceedings in addition to any other relief, even if no undertaking has been given (but more so if it has). The court may also approve the group solution and give it effect.¹⁵⁶ Such relief may avoid the need to submit the solution for approval and implementation in multiple countries.

The agreement in the EIR is more modest (softer). The EIR's framework for group coordinating proceedings presupposes the opening of multiple main proceedings against group members and the appointment of multiple insolvency practitioners with no concrete mechanisms for avoiding those openings and appointments. The EIR provides for the synthetic proceeding (undertaking to creditors in secondary proceedings) for individual entities. However, no such solution is provided for in the chapter on groups concerning main or non-main proceedings.

The fact that the provisions in the MLG regarding the avoidance of multiple main proceedings are presented as optional may limit their adoption. Even though the entire MLG does not mandate participation (that is, adoption by countries), presenting some of the provisions as supplemental may suggest that countries should be more careful and perhaps enact only the core text. Even if the supplementary tools are adopted, courts with a more territorialist tradition may be less inclined to approve such undertakings and to defer to a foreign group planning proceeding. Courts may feel bound by their local insolvency processes. Yet, the new formulation in the MLG provides a certain dispensation for host countries to support efficient group solutions, including in circumstances of hold-out strategies by local creditors.

D. Summary

Despite the MLG traditionally being a form of soft law, it is in fact stronger than the EIR, which is regarded as a hard law instrument. Only on the first layer—the agreement to participate in the international instrument—is the EIR (chapter on groups) robustly harder than the MLG. However, even in this respect, the MLG exhibits certain hard characteristics.

153. “Main proceeding” is defined as “an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests.” *Id.* art. 2(j).

154. *Id.* art. 30.

155. *Id.*

156. *Id.* art. 32.

Although requiring adoption by countries, it is generally designed as a complete law and encourages enactment with limited modifications. Adoption of a model law is also a simple process.

On the second and third layers—enforcement of the instrument and the agreement on hard, more comprehensive rules within it—the MLG is almost as hard and, in important ways, even harder than the EIR. As such, it is more promising. Once adopted, the MLG's provisions can be enforced through domestic mechanisms. Importantly, the MLG framework is quite precise and elaborated. Although the regime is voluntary—besides a duty to cooperate—once group entities decide to participate in group solutions, they can be subject to a range of remedies. The MLG provides a wide array of tools that can be utilized both in the central (planning) forum and in the states hosting aspects of the enterprise group. Notably, the MLG provides mechanisms for minimizing multiple proceedings. In contrast, the EIR, while indeed binding, prescribes soft solutions for groups in insolvency in the form of cooperation and a limited coordination tool.

CONCLUSION

Traditional conceptions of hard law generating stronger commitments and soft law generating softer commitments are misleading and inaccurate. So-called soft law regimes are often less hollow and can generate greater compliance with coordinated international solutions. In the context of cross-border insolvency, even though the European Union's EIR is a hard law instrument, its provisions concerning groups manifest significant weaknesses. The MLG, UNCITRAL's forthcoming regime for cross-border groups, on the other hand, is considered a form of soft law. However, it can elicit more robust consequences compared with the EIR in important respects. Once the MLG is enacted, it will be enforceable under domestic legal orders. Then, its wider relief provisions and its potential to prevent multiple proceedings can promote enforcement of group solutions that can benefit the enterprise stakeholders. For these reasons, the MLG, although taking the form of soft law, has more potential efficacy than the EIR's provisions on groups, and it can thus be regarded as harder and stronger.

The analysis in this Article also highlighted certain specific aspects of the regimes for groups that require improvement. Both the EIR and the MLG can be strengthened. Cooperation and coordination can be more than a duty to cooperate and an option to coordinate in a single forum. Instead, cooperation may be mandatory in order to achieve the most optimal solutions in given circumstances, with appropriate safeguards of course. The notion of a group forum can be further developed. At least the possibility of grouping COMIs in one jurisdiction highlighted more. In addition, in the EIR, the restrictions concerning consolidation should be removed. Further, drawing on the provisions in the MLG, the notion of avoiding multiple non-main or main multiple proceedings should be developed in the EIR to apply in the

context of enterprise groups, including through expansion of the notion of undertaking given to local creditors.