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Less is More in International Private Law

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Introduction

1 For nearly a hundred years, efforts to unify, harmonize or coordinate private law consisted of the drafting of a diplomatic convention that would enter into force once a specified number of countries had acceded to its terms.[1] Conventions might look to regulate private interaction within a specified (substantive) issue area, or only specific (procedural) interactions involving resolution of disputes arising between private parties. The choice between public and private international law, and between a focus on substance and procedure, were the limited formal strategies employed in the making of international private laws in the early twentieth century.[2]

2 Since the late 1960s, international law-making organizations, especially the United Nations Commission on International Trade Law ("UNCITRAL"), have drawn from a widening range of formal strategies that include choosing among model laws, legislative guides, statements of principles, recommendations or rules, as well as the drafting of purely explanatory texts. In our forthcoming book, *Global Legislators*, we explore UNCITRAL's increasing reliance on a broad array of formal strategies.[3] Our examination focuses mostly on three case studies involving

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[1] S. Block-Lieb and T. Halliday, "Contracts and Private Law in the Emerging Ecology of International Law-making", in G. Mallard and J. Sgard (eds), *Contracting beyond Borders: The Law of International Markets in the Twentieth Century* (forthcoming 2016).

[2] H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*, Chapter XI (1946, Cambridge University Press, Cambridge) (generally addressing movement for unification of private law); H.C. Gutteridge, "The Technique of the Unification of Private Law" (1939) 20 *British Yearbook of International Law* 37-51. The choices between international public and private law-making, and between the drafting of laws governing procedure and substance, remain valid today. See Block-Lieb and Halliday, above note 1 (discussing the history of the Hague Conference on Private International Law, the International Institute for the Unification of Private Law – UNIDROIT, the UN's International Law Commission – ILC, and its Commission on International Trade Law – hereafter referred to as "UNCITRAL").

[3] S. Block-Lieb and T. Halliday, *Global Legislators: Producing Commercial Laws for the World*, Chapter 6 (forthcoming 2016).

UNCITRAL's production of Legislative Guides on Insolvency[4] and Secured Transactions Laws[5] and of a draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea[6] and, thus, on two sorts of technologies (e.g., legislative guides and conventions). Chapter 6 of this forthcoming book finds that these strategies permit flexibility along five axes: discretion; audience; detail; and breadth. We argue that this flexibility aids UNCITRAL internally in achieving consensus on texts drafted by its working groups and ratified by its governing assembly. It also, we contend, serves important functions external to the legislative chamber, both in terms of a State's willingness and ability to implement UNCITRAL texts and UNCITRAL's centrality to the general ecology of international law-making organizations.

3 In this essay, we shift away from our three case studies to explore the formal strategies surrounding UNCITRAL's production of model laws, and particularly its Model Law on Cross-Border Insolvency.[7] Because the Model Law mostly considers procedural aspects of cross-border insolvency practice,[8] this exploration invites comparison to international and transnational texts focused on topics of private international law (that is, the procedural laws governing these cross-border insolvency practices), and specifically to comparison of UNCITRAL's Model Law to the European Union Regulation on Cross-Border Insolvency.[9] Although on each of these five axes UNCITRAL's Model Law mostly looked to accomplish "less" than the EIR, in other ways it arguably also looked to accomplish "more".

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[4] United Nations Commission on International Trade Law, Legislative Guide on Insolvency, Parts I and II (2004), available at: <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>.

[5] United Nations Commission on International Trade Law, Legislative Guide on Secured Transactions (2007), available at:
<http://www.uncitral.org/uncitral/en/uncitral_texts/security/Guide_securedtrans.html>.

[6] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, available at:
<http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html>. This convention, commonly referred to as the Rotterdam Rules, has not (yet?) entered into force. At a diplomatic conference convened to obtain state's accession to this convention, 25 states signed on. To date, only three countries have fully ratified their accession – Togo, Congo and Spain; its entry into force nonetheless requires ratification by 20 states.

[7] UNCITRAL Model Law on Cross-Border Insolvency (1997), available at: <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (referred to hereafter as the "Model Law").

[8] J. Pottow, "Procedural Incrementalism: A Model for International Bankruptcy" (2005) 45(4) *Virginia Journal of International Law* 935-1016.

[9] Council Regulation (EC) No. 1346/2000 (29 May 2000), on insolvency proceedings, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1346&from=en> (hereafter referred to as the "EIR"). Under EU law, a "regulation" works similar to a multilateral convention. A regulation is a legal text, which becomes national law within the current 28 Member States with the European Union without the need for enactment of implementing national legislation. By contrast, although a "directive" is also a legal text with European-wide implications, it is effectuated only through the enactment of implementing legislation within each of the Member States' legislatures. For general discussion of the distinction between regulations and directives under European law, see, e.g. N. Siegel, "International Delegations and Principles of Federalism" (2008) 71(1) *Law and Contemporary Problems* 93-113, at 109.

4 It is the "lightness" and "weight" of the Model Law that is the focus of this essay, which looks to celebrate the long and illustrious scholarly career of Ian Fletcher, an expert in the private international law (that is, the procedural and other coordinating rules) of insolvency practices, in the European Insolvency Regulation ("EIR") and in the earlier draft EU convention on which the EIR was based.

5 Our argument proceeds in two broad brushstrokes.[10] The first part considers both the Model Law and EIR from the perspective of the five-part typology demarcated in Chapter 6 of *Global Legislators*. Based on this analysis, we describe the Model Law as "private international law-light" (or, "PIL-light"). The second part explains how this PIL-light may accomplish "more." It assesses the breadth of possibilities suggested by the mere procedural coordination of cross-border insolvency proceedings and practices.

Five Grounds for Comparison

6 Since its emergence in 1968, UNCITRAL has differentiated itself from other international organizations engaged in private law-making in terms of its representativeness across geo-political, economic and legal lines, in terms of its distinct methods of work, and in terms of the broad range of formal strategies through which it worked.[11] Although earlier organizations – UNIDROIT, the Hague Conference on Private International Law and even the UN's International Law Commission – work predominantly (and for many years worked exclusively) to produce conventions on various topics of private law (whether substantive or procedural), the UN General Assembly expressly enabled UNCITRAL's to draft a broad range of international texts.[12]

7 Some of the earliest texts promulgated by UNCITRAL were "rules",[13] "recommendations"[14] and "legal guides".[15] By 2000, UNCITRAL was engaged in producing a wide range of legal technologies that included not only conventions,

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[10] See, e.g. I. Fletcher, *Insolvency in Private International Law* (2nd ed) (2007, Oxford University Press, Oxford).

[11] See Block-Lieb and Halliday, above note 1.

[12] UN General Assembly Resolution 2205 (XXI) Establishment of the United Nations Commission on International Trade Law (Dec. 17, 1966), at Part II, paragraph 8(c) (enabling UNCITRAL to prepare or promote "the adoption of new international conventions, model laws and uniform laws," as well as promote "the codification and wider acceptance of international trade terms, provisions, customs and practices").

[13] See, e.g. UNCITRAL Arbitration Rules (1976), available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

[14] See UNCITRAL Recommendations on the Legal Value of Computer Records (1985), available at: <http://www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf>.

[15] See, e.g. UNCITRAL Legal Guide on Electronic Funds Transfers (1987), available at: <http://www.uncitral.org/pdf/english/texts/payments/transfers/LG_E-fundstransfer-e.pdf>.

but also rules, model laws and model legal provisions, legislative guides and a plethora of explanatory texts.

8 UNCITRAL relied on these distinctive formal strategies to accomplish greater flexibility than predecessor organizations. Flexibility is a multi-faceted goal, however. Within the broad range of legal technologies produced by UNCITRAL, we see an effort to achieve flexibility along five axes: discretion; audience; direction; detail; and breadth. In the sections that follow, we analyse the Model Law according to each of these strategies, while at the same time comparing the Model Law to the EIR.

Discretion

9 A model law differs from a convention in terms of the discretion it offers to states. A state qua state agrees to be bound to the provisions of a convention. How a state binds itself to the terms of a convention is a matter of domestic (usually constitutional) law, much as the question of a corporate signator's agency to agree to the terms of a contract is a matter of the corporation's bylaws and the laws governing corporate governance and not contract law.[16] With a model law, by contrast, a state accedes to a model law by enacting implementing legislation. Because the ratification comes in the form of domestic legislation, all implementing states must act through legislative processes.

10 The EIR binds twenty-seven countries within the European Union.[17] Because this is a regulation and not a directive, it is binding without the need for domestic legislatures to enact domestic legislation.[18] The Model Law is binding on a similar number of countries, although these enacting states are widely dispersed around the globe and not concentrated in a single region. Twenty countries have enacted legislation to implement UNCITRAL's Model Law on Cross-Border Insolvency.[19]

11 As a consequence of channelling state accession to the provisions of a model law through statutory implementation, model laws are inherently more discretionary than conventions. A model law invites domestic legislatures to adopt implementing

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[16] The domestic law governing accession to the terms of a convention sits outside the terms of the convention itself, and differs from state to state.

[17] Although there twenty-eight nations are members of the European Union, one of these members, Denmark, is not bound by the terms of the EIR. See G. Moss and I. Fletcher, *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2009, Oxford University Press, Oxford).

[18] Ibid.

[19] UNCITRAL identifies the following twenty countries as having implemented the Model Law: Australia, Canada, Chile, Colombia, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Philippines, Poland, Republic of Korea, Romania, Serbia, Slovenia, South Africa, Uganda, United Kingdom (including British Virgin Islands), and United States. See UNCITRAL, Status Model Law on Cross-Border Insolvency (1997), available at:
<http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>.

legislation, but legislatures are by no means bound by the terms of offer. As a result, domestic legislation might implement a model law although this legislation also incorporates non-uniform provisions that are distinct from the provisions of the model law.[20] Conventions are not subject to this sort of non-uniform accession, however. In addition, domestic legislatures are freer to amend or repeal legislation enacted to implement a model law than to amend or repeal involvement in a convention; de-accession from a convention is an international event governed by international law, but repeal of domestic legislation enacted to implement a model law is purely a matter of domestic law.

12 The discretionary nature of a convention or model law is not simply a consequence of how these are ratified; it also partly follows from how they are written. A convention might be drafted so that some of its provisions offer discretion to the states that ratify it. Although generally a convention is drafted so that it employs an imperative rhetoric, a convention may also contain a handful of provisions that states are invited to ratify separately. For example, two chapters of provisions within the Rotterdam Rules – one on arbitration and another on jurisdiction – must be separately acceded to in order to govern a ratifying State.[21]

13 Alternatively, a convention might be conceived as presenting a "hub" of provisions that might apply across multiple related protocols such that a State is invited to ratify the central convention and at least one but not all of the related protocols. The Cape Town Convention on International Interests in Mobile Equipment presents an example of this sort of "hub and spoke" convention, with current protocols on aircraft, spacecraft, rolling stock and another protocol on agricultural equipment in the making.[22] Finally, a convention may be crafted to allow private parties to contract around its terms. The UN's Convention on the International Sale of Goods, for example, allows parties to opt out of its application by specifying contractually that some law other than the CISG governs the terms of their transaction.[23] Similarly, the Rotterdam Rules permit parties to a "volume contract" to deviate from certain of its provisions.[24]

14 A model law might similarly be drafted to invite this sort of discretion. Embedded within a model law may be provisions that offer multiple options to

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[20] These non-uniform enactments might look to accommodate distinct aspects of domestic law so that the model law fits better with the domestic legal regime into which it is inserted. Alternatively, non-uniform domestic enactments might reject some aspect of a model law although accepting the remainder of its provisions.

[21] See Rotterdam Rules, above note 6, at Chapters 14 and 15.

[22] See Convention on International Interests in Mobile Equipment (commonly referred to as the "Cape Town Convention"), available at: <http://www.unidroit.org/instruments/security-interests/cape-town-convention>.

[23] See United Nations Conventions on International Sales of Goods, available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>.

[24] See Rotterdam Rules, above note 6.

States. For example, the UNCITRAL Model Law on International Credit Transfers offers both a choice of law provision and a substantive provision in footnotes to Articles 1 and 19 that "states might wish to adopt".[25] Alternatively, a model law may contain bracketed language intended to invite variation in implementing domestic legislation. UNCITRAL's Model Laws on Electronic Commerce contains a number of provisions that invite enacting states to specify in their implementing legislation transactions that sit outside its scope.[26]

15 Although a convention may contain permissive provisions, most provisions in a convention are drafted with the sort of precise, imperative language that allows a State to understand the terms to which they have agreed to be bound. The EIR, like most conventions, is drafted with this sort of imperative language that offers little discretion to Member States.

16 By contrast, the Model Law leaves discretion for enacting states. Although twenty nations have enacted legislation to implement the Model Law, the precise language of these statutes differs from country to country. Some of this variation was invited by UNCITRAL in the way in which it drafted the Model Law, and some is a consequence of the structure of the domestic insolvency laws into which these cross-border provisions were added. For example, Article 23(1) of the Model Law provides that:

> Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of action to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation].

17 This bracketed language virtually requires legislatures in an Enacting State to exercise flexibility in determining the extent of a foreign representative's authority to bring an avoidance action in the recognizing state.[27]

Audience

18 Variations in discretion are sometimes accomplished by altering the audience to whom an international instrument is directed. For example, when an international organization drafts a model law it invites engagement with domestic legislatures. Although members of the executive and judicial branches of a state may be

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[25] See UNCITRAL Model Law on International Credit Transfers (1994), available at: <http://www.uncitral.org/pdf/english/texts/payments/transfers/ml-credittrans.pdf>.

[26] See, e.g. Article 12(2), UNCITRAL's Model Laws on Electronic Commerce ("The provisions of this article do not apply to the following: [.....].") (1999), available at: <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf>.

[27] For discussion of this discretion, see UNCITRAL Model Law on Cross-Border Insolvency Guide to Enactment (1997), at paragraphs 165-167.

involved (ex ante) in the drafting and (ex post) in the interpretation of a model law, the legislative branch of an enacting state holds veto over whether a model law will be implemented at all. The Model Law on Cross-Border Insolvency is directed to domestic legislatures in this way. Because the EIR was drafted as a regulation and not a directive, it limits the discretion that might be exercised by national legislatures in Member States.[28]

19 Legislatures are not the only audience to which an international text might get directed, however. International law-making organizations might draft a text to create judicial discretion by incorporating open-ended standards rather than bright line rules into the terms of the text.[29] Article 35(2) of the CISG provides that goods do not "conform" to a contract unless they are "fit for the purposes to which goods of the same description would ordinarily be used", and Article 49 provides that a buyer may declare a contract "avoided" if "the failure by the seller to perform any of his obligations under the contract amounts to a fundaments breach of contract." The determination of either standard rests, nearly entirely, within the discretion of the judge hearing the parties' dispute.

20 Alternatively, UNCITRAL and other international law-making organizations might include within a text directed to a state (or its legislative or judicial branches) provisions intended to delegate discretion to private parties – that is, default rules that permit private parties to opt-out of the terms of the convention or model law as a matter of contract. For example, the CISG broadly invites private parties to opt out of its applicability.[30] The Rotterdam Rules similarly validate "volume contracts" containing provisions that deviate from specified provisions of that convention.[31] International law-making organizations might also draft a text so that it is directed to private parties. UNCITRAL refers to a legal technology as "rules" or "a practice guide" when it looks to speak directly to contract parties, litigants or other private actors.[32] Its Arbitration Rules present an example of the former; UNCITRAL has promulgated practice guides on issues relating to procurement and international agreements (i.e., protocols). [33]

21 Both the Model Law and EIR refer to a debtor's "centre of main interests" as a key standard for coordination of cross-border insolvency proceedings.[34] This

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[28] See text associated with above note 9.
[29] A convention might also reserve judicial discretion institutionally by specifying the location of dispute resolution. For example, a convention might include international agreement on resolution of specified disputes. See Understanding the WTO: Settling Disputes, available at: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>.
[30] CISG, above note 23, at Article 6: "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."
[31] See Rotterdam Rules, above note 6.
[32] See text associated with above notes 13-15.
[33] Idem.
[34] Article 16(3), Model Law, above note 7; EIR, above note 9.

COMI standard is not defined in either international text. Language in the preamble paragraphs to the EIR suggest key attributes of a debtor's COMI;[35] UNCITRAL's Guide to Enactment and Interpretation of the Model Law similarly offer guidance in interpreting this open-ended standard.[36] Nonetheless, in both instances, courts hold substantial discretion to fill in the details of this definition. Other provisions of the Model Law (which are absent from the EIR) delegate additional discretion to recognizing courts: for example, the provisions of the Model Law requiring courts and foreign representatives to cooperate and coordinate to the maximum extent possible contain no further direction on how this discretion should be exercised.

22 One important difference exists between the judicial discretion delegated in the EIR and in the Model Law: With the EIR, a domestic court's interpretation of a debtor's COMI is subject to review by the European Court of Justice; with legislation enacted to implement the Model Law, there exists no centralized, international court to sit in review of domestic courts' interpretations, even when they sit in tension with each other.[37]

Breadth

23 There is no denying that the Model Law covers less ground than the EIR. On several topics on which the EIR provides detailed direction, the Model Law is completely silent.

24 The EIR is built like a typical private international law convention. PIL rules typically govern (up to) three topics: jurisdiction; applicable law; the recognition and enforcement of judgments. The EIR contains provisions involving all three of these conventional PIL topics, and adds a fourth: the recognition of the *opening and course of* insolvency proceedings (a topic distinct from the recognition of a judgment entered as a consequence of closing or resolving a proceeding). By contrast, the Model Law addresses only one of the four topics covered by the EIR. The Model Law speaks to the recognition of the opening of insolvency proceedings in another country, the "fourth leg" of the EIR referred to above, but not applicable law or enforcement judgments.

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[35] See Preamble at paragraph 13, EIR, above note 9.

[36] Part G, UNCITRAL Model Law on Cross-Border Insolvency and Guide to Enactment, at paragraphs 30-31. A copy of the Guide to Enactment is attached to the Legislative Guide on Insolvency Law as an Annex. See above note 4. In 2010, UNCITRAL subsequently revised and renamed this as a Guide to Enactment and Interpretation. See above note 7.

[37] UNCITRAL's Model Law directs courts' attention to international interpretation, but this direction offers little guarantee of uniform judicial interpretation of its provisions. See Article 8, Model Law, above note 7.

25 The Model Law does not purport to address what law should govern an insolvency proceeding or any dispute arising within the proceeding.[38] It is completely silent on this topic.[39] Nor does it limit jurisdiction to open insolvency proceedings governing a debtor. It refers indirectly to the issue of jurisdiction by considering the topic through the lens of recognition of the opening and conduct of insolvency proceedings; this recognition is permitted only as pertains to insolvency proceedings pending in the State in which the debtor's COMI is situated (in which case, these are recognized a foreign main proceedings) or insolvency proceedings in the State in which an establishment of the debtor is situated (in which case, these are recognized as foreign non-main proceedings).[40] The Model Law also specifies the (personal) jurisdiction – that is, the standing – of the foreign representative appointed by the court that has opened proceedings (either where the debtor's COMI or an establishment of the debtor is located), but does not otherwise speak to the jurisdiction of an insolvency representative, whether appointed by a court in the "enacting state" or in a state other than the state in which the foreign representative has been appointed. Nor does the Model Law expressly govern the circumstances under which judgments entered in the context of such an insolvency proceeding should be recognized or enforced.[41]

26 Because of these differences from the EIR, we refer to the Model Law as "PIL-light". The Model Law covers none of the three typical topics covered by a PIL convention. Instead, it predominately addresses the fourth PIL variant added with the EIR – recognition of the *opening* and *course* of insolvency proceedings.[42]

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[38] See Guide to Enactment, above note 36, paragraph 3, at 19: "The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law." Note also the UNCITRAL's Legislative Guide on Insolvency Law contains several non-binding recommendations on this topic, although even these are more architectural and imperative. See Insolvency Guide, above note 4, at Recommendations 30-34.

[39] Because the Model Law is silent on the topic, the insolvency law applicable in an ancillary proceeding is likely to be the insolvency law of the state in which the recognizing court is situated. See Guide to Enactment, above note 36, at paragraph 143: "Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State." Some domestic legislation enacted to implement the Model Law makes this clear; other countries' implementing legislation leaves the issue for resolution under other legislation (such as the private international law rules governing in the recognizing court) or legal rules (such as the common law rules applicable there).

[40] Domestic rules governing jurisdiction to open an insolvency proceeding remain unchanged and might well extend beyond a debtor's COMI or establishment.

[41] While it directs that courts recognizing the opening of insolvency proceedings pending in a debtor's COMI or establishment should cooperate and coordinate with the court(s) in the jurisdiction in which the proceeding was opened, it does not specify that this cooperation must extend to the recognition of judgments entered in that proceeding. While this broad language might be construed to permit such recognition and enforcement, it does not expressly require it. See *Rubin et al v. Eurofinance SA* [2012] UKSC 46.

[42] And this fourth topic, the recognition of the opening of insolvency proceedings, is novel to the EIR and sat outside the scope of a typical PIL convention.

27 In addition and distinct from the EIR, the Model Law layers on top of this concept of the recognition of the opening of an insolvency proceeding an obligation for recognizing courts to cooperate and coordinate with an opening court and with the insolvency representative appointed by the opening court. This obligation to "coordinate and cooperate" is largely undefined within the Model Law and, as such, delegates substantial discretion to "recognizing courts".[43] These obligations constitute open-ended standards that provide domestic courts substantial discretion regarding the conduct of multiple cross-border insolvency proceedings.

Detail

28 Even on those topics covered both in the Model Law and EIR, the provisions of the EIR are more detailed and precise.

29 Take first the topic of recognition of the opening and course of an insolvency proceeding. Both the EIR and Model Law couch recognition on the debtor's connection to the opening state – and extend additional deference to proceedings entered in the state in which a debtor's COMI is located (the so-called "main proceeding") than that extended to proceedings entered in a state in which a debtor's establishment is located (referred to by the EIR as a "secondary proceeding" and a "foreign nonmain proceeding" in the Model Law). While the definition of establishment is virtually identical in both international instruments,[44] the EIR provides recognizing courts with greater guidance on the concept of a debtor's COMI than does the Model Law. Importantly, language in the preamble paragraphs to the EIR direct that the facts establishing a debtor's COMI are those readily observable to third parties.[45] This language nowhere appears on the provisions of the Model Law or in its Guide to Enactment. Although language situated in preamble paragraphs describing the purposes of the EIR would seem relatively insignificant and unlikely to be controlling, this language has become central to definition of a debtor's COMI under the EIR, especially since the European Court of Justice emphasized the importance of objective indicators of this standard that are observable to third parties.[46]

30 Moreover, while the definitions of "foreign proceeding" and "foreign representative" in the Model Law are very similar to the definitions for "insolvency proceeding" and "liquidator" in the EIR, these concepts are more fully defined in the EIR than in the Model Law. In the EIR, the term "insolvency proceeding" is not simply defined but also connected to Annexes A and B to the text, which set out agreed upon lists of Member States' "main proceedings" and "secondary

[43] See Articles 25-27, 29-30, Model Law, above note 7.
[44] Compare Article 2(f), Model Law, above note 7, with Article 2(h), EIR, above note 9.
[45] See Preamble, EIR, above note 9, at paragraph 13.
[46] In the matter of *Eurofood IFSC Ltd*. (Case No. C-341/04) (4 May 2006).

proceedings" governed by the terms of the Regulation.[47] Similarly, Annex C to the EIR specifies those insolvency representatives that are "liquidators" entitled to automatic recognition under its terms.[48] The Model Law contains no similar listings to clarify the defined terms.[49]

Less is More With the Model Law on Cross-Border Insolvency

31 The previous section compared UNCITTRAL's Model Law to the EIR through the lens of a four-part typology of formal strategies (discretion; audience; breadth and detail). There, we found that the Model Law is less hard, less broad, and less detailed than the EIR, and that it is directed to solely domestic legislatures and not states generally. It is, we claim, PIL-light, whereas the EIR is a proper PIL convention. In this section, we argue that UNCITRAL's Model Law accomplishes "more" despite these paucities. We see "more" as measured in at least three ways: range; substance; decision-making; and incremental effect.

32 First, UNCITRAL's Model Law looks to set *international* standards on the coordination of cross-border insolvency proceedings, not merely *regional* ones. This breadth is more than simply geographic. It applies across a range of economic, political and cultural interests. Nearly all of the EU's Member States are rich by any standard. They are also nearly uniformly organized as liberal democracies. By contrast, the Model Law must accommodate not just Western interests in insolvency law, but also the potentially distinct goals embedded in Asian, South American and African laws of this sort, if its adoption is to occur globally and not just episodically, for example in the OECD members states. The EIR looks to mesh interests embedded in a range of Continental civilian legal codes, which view bankruptcy and insolvency laws as fundamentally procedural, with those of the United Kingdom, whose bankruptcy and insolvency laws derive from practices developed by courts of equity, but only as relates to a unified European market. UNCITRAL's Model Law looks to coordinate insolvency laws affecting trade throughout the world – including perhaps especially US corporate reorganization law. The US Chapter 11 differs in important ways from every other country's insolvency laws; the EIR could safely ignore this important outlier but the Model Law needed to address American interests head on.

33 This brings us, second, to issues of substance. Neither the EIR nor UNCITRAL's Model Law looked to harmonize insolvency law. When these were promulgated, insolvency laws were too different from each other to consider such a goal, even solely within Europe. Although the Model Law says less about the goals

[47] Annexes A and C, EIR, above note 9.
[48] Ibid., at Annex B.
[49] Nor could it do so very easily, as any "annex" to the Model Law would need to address differences in insolvency laws throughout the globe not simply throughout the European Union.

of insolvency law, it accomplishes "more" by remaining open about the objectives of a secondary (that is, a nonmain) proceeding. While the EIR provides that the sole purpose for secondary proceedings (certainly those commenced after the opening of a main proceeding in the location of a debtor's COMI) is the winding up of a debtor's establishment within the territory of "secondary" jurisdiction,[50] the Model Law remains silent on the purpose of nonmain proceedings. In several places in the Guide to Enactment, provisions of the Model Law are described as accommodating the interests of both liquidation and reorganization proceedings.[51] By remaining agnostic on the proper goals of a nonmain proceeding, practitioners and commentators were free to describe their vision of the Model Law as a means for main, nonmain and other ancillary proceedings to work together to assist in a reorganization of the debtor.[52]

34 Third, this substantive multi-directionalism accomplished important benefits, both in terms of decision-making inside the working group's deliberations and implementation of the Model Law by national legislatures. The US delegation holds an important position within UNCITRAL, given the centrality of its economic and political circumstances; US delegates were unlikely to join in a project on coordinating cross-border insolvency practice unless the Model Law was fully to accept US Chapter 11 corporate reorganization proceedings as entitled to recognition. But in the late 1990s, when the Model Law was drafted, corporate reorganization was nowhere near the global norm; for the Model Law to be implemented broadly around the globe, its embrace of reorganization practices must be quiet (that is, referred to only within the Guide to Enactment) and coupled with equally enthusiastic endorsements of the coordination of liquidation proceedings as its goal.

35 Finally, the Model Law accomplished "more" with "less" because it set the table for subsequent work on drafting international standards on corporate insolvency laws.

36 After promulgation of the Model Law, UNCITRAL continued efforts to promote corporate reorganization as preferable to corporate liquidation. Within a few short years after having promulgated the Model Law, UNCITRAL also published its Legislative Guide on Insolvency, which more explicitly recommended

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[50] Article 3(3), EIR, above note 9.

[51] See, e.g. Guide to Enactment, above note 36, at paragraph 24 (noting that the Model Law would govern "a variety of collective proceedings," whether "compulsory or voluntary, corporate or individual, winding-up or reorganization," and expressly refers to "those in which the debtor retains some measure of control over its assets, albeit under court supervisions (e.g. suspension of payments, 'debtor in possession')."

[52] See, e.g. Jay Lawrence Westbrook, "A Global Solution to Multinational Default" (2000) 98(7) *Michigan Law Review* 2276-2328, at 2280: "In most adopting countries, it [the Model Law] is likely to make coordination in reorganization cases much easier, while frustrating efforts to engage in manipulation of assets and other fraudulent activity."

this preference for corporation reorganization. It would have been far more difficult for UNCITRAL to set international standards on corporate insolvency law that emphasize corporate reorganization over corporate liquidation if the Model Law had not, first, allowed corporate reorganization laws into the definition of "foreign proceedings" entitled to recognition.

37 Revision of the EIR is not impossible, but this work has proceeded in fits and starts, and mostly following in the wake of the current financial crisis, as distinct from the incremental progress UNCITRAL has made on corporate insolvency law standard setting. Nonetheless, the Regulation does mandate reflection and reports that allow for the possibility of revision within the scope of this transnational agreement. Recently, this review process has produced proposals for revision of the EIR; alongside proposals to revise the EIR, the European Commission also has promulgated a report on the possibility of achieving greater convergence on the insolvency laws within Europe.[53] In making these proposals, reports out of the European Commission and European Parliament point to UNCITRAL as an inspiration.

Conclusion

38 The Model Law looks for new procedural solutions, whereas the EIR stuck with a century-old format. The EIR, while not exactly a convention, still follows the format of PIL conventions that had been hammered out in the Hague and at other diplomatic conferences convened since at least the 1890s. PIL conventions have had limited success, however, with most of these success stories limited to PIL conventions adopted within the European Union. The Hague Conference on Private International Law has promulgated dozens of PIL conventions since the late nineteenth century, but despite the decades spent in negotiating these instruments only a few of them have entered into force.[54] The EU has had greater success with regional PIL conventions, but regional agreement on matters of procedure is no guarantee that similar sorts of conventions will succeed on a broader transnational or international basis.

39 UNCITRAL's decision to draft the Model Law with less breadth, less depth and less detail than typical PIL conventions was, thus, an intentional move toward "PIL light." Global agreement on jurisdictional rules for opening an insolvency proceeding and choice of law rules for determining what laws should govern such a proceeding were rejected as unlikely given the substantive dissensus among insolvency laws around the world. Nor did UNCITRAL's working group on

[53] European Commission, Recommendations on a new approach to business failure and insolvency, 12 March 2014, C (2014) 1500.
[54] For a list of the various private international law conventions promulgated by the Hague Conference on Private International Law, see: <http://www.hcch.net/index_en.php?act=conventions.listing>.

insolvency law agree on express standards for enforcing and recognizing the judgments emerging out of an insolvency context. But there was an important kernel of agreement that the working group thought might work on an international basis. Inspired by the draft EU Convention's novel distinction between recognition of the "commencement and course" of an insolvency proceeding, and recognition of the ultimate judgments entered as a result of such proceedings, UNCITRAL's Model Law set out model legal provisions for streamlined recognition of cross-border insolvency proceedings.

40 Although it did not adopt a provision in the Model Law that resembled Article 25 of the EIR, UNCITRAL's insolvency working group did agree on the basic parameters of what recognition of the opening of a proceeding should involve, and on additional orders that the recognizing court might determine to be appropriate depending on the circumstances of the foreign proceedings (including whether the foreign proceeding was deemed to be a "main" or "nonmain" proceeding). For example, automatically upon recognition of a foreign main proceeding, the Model Law would stay "commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities," as well as execution against the debtor's assets; it would also "suspend" a debtor's "right to transfer, encumber or otherwise dispose of any assets."[55] Moreover, the working group included within the Model Law provisions requiring cooperation "to the maximum extent possible," and did not condition this obligation of cooperation on recognition of a foreign proceeding.[56] Although the Model Law did not attempt to define the limits of this cooperation, it did provide examples of it;[57] the Guide to Enactment generally describes an important goal of this cooperation as including especially the reorganization of a viable corporate debtor's business operations.[58] The Guide's emphasis on the importance that the Model Law facilitate cross-border cooperation and the reorganization of a multinational corporation was somewhat controversial in that there were, at the time the Model Law was promulgated, corporate reorganization was nowhere near the global norm.

41 But this Model Law built on the notion of "PIL light" was just enough PIL to accomplish more than a formal PIL convention would have done. A PIL convention on cross-border insolvency might well have grown dusty in the drawers of interested state actors (ignored and not entered into force), as had been the case with many earlier PIL conventions. A model law, which vests more discretion in sovereign hands than a convention, on only a few of the traditional topics of private international law, eschewing especially any effort to reach agreement on difficult

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[55] Article 20(1), Model Law, above note 7.
[56] Ibid., at Article 25.
[57] Ibid., at Article 27.
[58] Guide to Enactment, above note 36, at paragraph 173 (noting that "cooperation . . . is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets . . . or to find the best solutions for the reorganization of the enterprise.").

topics of jurisdiction and applicable law, involved just enough PIL to catch the attention of key national actors.

42 Quick enactments by South Africa, Japan and Mexico might have been ignored by the international community, but the Model Law's adoption by the US in 2005 paved the way for other legislative efforts – by Canada, Australia, and the United Kingdom, but not only by common law countries. Important civil law countries – such as the Republic of Korea – demonstrated that the Model Law might be made to work outside the common law. Practice within the UK, which was also bound to the terms of the EIR, showed the fundamental consistency between the EIR and Model Law. Recent review of practices under both the EIR and Model Law, revisions to the Guide to Enactment and Interpretation of the Model Law, and proposals to reform the EIR all build on the foundational similarities between the two.

43 Although most commentators focus on the Model Law's heft and weight – its move toward setting international standards for corporate insolvency law and, specifically, its focus on facilitating corporate reorganization – this essay has concentrated on the role of the Model Law as a set of "light" rules on private international law for cross-border insolvency practice. We have argued that the Model Law's lightness accomplishes "more," both as relates to UNCITRAL's decision-making on the Model Law as well as its later work on corporate insolvency law norm, and to national determinations to enact implementing legislation.

44 While the EIR achieved formal transnational agreement on the topic of cross-border insolvency, the flexible pragmatism embedded in the Model Law left "more" room for coordination across a greater range of legal dissensus. Unlike the EIR, which governs only insolvency proceedings within Europe, UNCITRAL's Model Law looked to set international standards on the topic. Unlike the EIR, which as initially drafted identifies liquidation of an establishment as the only purpose of a "secondary" insolvency proceeding, UNCITRAL's Model Law is instead framed intentionally to promote the possibility of a corporate reorganization. All this, and more. Time will tell the full extent to which the Model Law facilitates coordination of global insolvency practice.

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