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

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It is the orthodox belief that treaties and—within the EU—directly applicable regulations represent hard, binding international law, while other international instruments - including model laws - are forms of soft law. In a previous publication[2] I discussed how the traditional distinction between hard and soft law is less firm, due particularly to economic and behavioural implications of instrument choice and design. Building on that analysis, this article focuses on the new rules for the international insolvency of enterprise groups in the Recast EU Insolvency Regulation 2015 ("the EIR") and in the forthcoming UNCITRAL model law on enterprise groups. Contrasting the instruments and using a multi-layered assessment illustrates the blur between hard and soft law. This article argues that only on the first layer—the agreement to participate in the international instrument—the EIR (chapter on groups) is robustly harder than the UNCITRAL instrument. On the second and third layers—enforcement of the instrument and the agreement on hard, more complete, rules within it—the UNCITRAL instrument is almost as hard or even harder than the EIR, and, as such, more promising. The article also provides certain concrete conclusions regarding the way that regional and global regimes may be hardened in the future to meet the challenges of enterprise groups' insolvencies.

INTRODUCTION

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[2] I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press 2018).

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 groups. While the enterprise group is a prevalent business structure, it comes about in different arrangements, each which may require different solutions.[3] 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 of concentration of the proceedings, to promote solutions that can maximize value for stakeholders. Such an approach, however, may raise concerns about interfering with the "corporate form"[4] and with state control over local entities.[5]

In recent years, much focus and deliberation concentrated on this problem, largely driven by lessons from the 2007-09 global financial crisis.[6] 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 - EU Regulation on Insolvency Proceedings (2015) (hereinafter "EIR").[7] The new EIR contains a chapter dedicated to enterprise groups.[8] Internationally, since 2013, building on the general UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI")[9] and previous work on the UNCITRAL Legislative Guide,[10] UNCITRAL Working Group V[11] has been deliberating on an instrument (a model law) for the cross-border insolvency of enterprise groups (hereinafter "MLG").[12]

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[3] Group enterprises may range from closely controlled vertical structures to more decentralized, horizontal forms and may operate with different levels of integration. See I. Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2009), ch 1.

[4] The notions of corporate separate personality and limited liability.

[5] See I. Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2009), ch 2.

[6] 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 JM Peck, 'Cross- Border Observations Derived from My Lehman Judicial Experience' (2013) 30 Butterworths J Intl Banking & Fin L 131).

[7] Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast).

[8] EIR, Chapter V. The original EIR (Council Regulation 1346/ 2000, of 29 May 2000 on Insolvency Proceedings, 2000), 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.' (M Virgos and E Schmit, 'Report on the Convention on Insolvency Proceedings' (1996) 6500/1/96, REV1, DRS 8 (CFC), [76]).

[9] The MLCBI 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.

[10] Part Three of the UNCITRAL Legislative Guide on Insolvency Law, on the treatment of enterprise groups in insolvency (United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law, part three, 1 July 2010).

[11] See http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

[12] The MLG and the Guide to Enactment of the MLG are still in draft form but deliberations are in final stages (see -A/CN.9/WG.V/LIV/CRP.1/Add.3, Draft report of Working Group V (Insolvency Law) on the work of its

Would these new instruments now 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 a hard, binding international law, will provide the stronger commitments compared with the MLG, which as a model law is considered "soft law" and thus weaker.[13] 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 where it is more 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 in the instruments require hardening and where the challenges are going forward.

This article proceeds as follows. Part I provides 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, such that can lead to optimal solutions. Against this backdrop, Part III evaluates and contrasts the EIR and the MLG. It highlights the strength of the MLG, which is regarded a soft law instrument, especially when compared with the regime agreed in the EIR (which is a hard law instrument). The Conclusion provides certain 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?

fifty-fourth session (Vienna, 10–14 December 2018 ("draft report"); draft Guide to Enactment provided in A/CN.9/WG.V/WP.162, United Nations Commission on International Trade Law Working Group V (Insolvency Law) Fifty-fourth session Vienna, 10-14 December 2018, Enterprise group insolvency: guide to enactment of the draft model law (as contained in A/CN.9/WG.V/WP.161) Note by the Secretariat). The references in this Article to articles in the MLG are to the draft MLG provided as an Addendum to the draft report which will be posted on UNCITRAL.org website (on file with author). It is expected that the draft MLG and the Guide to Enactment will be finalized in the next Working Group session in May 2019 (only minor changes are anticipated including in the numbering of the provisions) and that they will be submitted to UNCITRAL for adoption in July 2019.

[13] 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" (Note by the IBA Insolvency Section Delegation to UNCITRAL Working Group V <https://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/Projects.aspx#uninsolvencyconvention> fn 19). See also R. Bork, *Principles of Cross-Border Insolvency Law* (Intersentia 2017) 10.

Several specific legal sources are considered "hard," binding international law. Importantly the international treaty,[14] is a primary source of international hard law.[15] Within the EU, regulations as well are key sources of hard international law.[16] Regional regulations as forms to foster inter-state coordination and promote a "proper functioning" of an internal market[17] are even harder than treaties in terms of their binding force when they do not require ratification or transformation into domestic law and are supported by an institutional framework that promotes uniformity.[18]

Other instruments such as guides, recommendations, and model laws, are understood as forms of non-binding "soft" law.[19] Soft law is a general 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, under this divide, always binding.[20] Conventionally, soft law is considered a weakened version of hard law, with diminished levels of bindingness, obligation, and precision of the rules. 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.[21] The reciprocity enshrined in treaties is also recognized as a "force" that induces compliance.[22]

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

[14] The Article refers to "treaty" and "convention" interchangeably.
[15] The binding force of treaties is recognized by the 1969 Vienna Convention on the Law of Treaties, which states that "a treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law" (Vienna Convention on the Law of Treaties 1969, Article 26). 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. See generally H Thirlway, *The Sources of International Law* (OUP 2014) 1– 3, 11.
[16] http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf.
[17] See EIR, recital 3.
[18] See Section III(B) below.
[19] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018) 141, referring to AE Boyle, 'Soft Law in International Law Making' in MD Evans (ed), *International Law* (4th edn, OUP 2014) 120, and, in the context of international financial regulation, to C Brummer, *Soft Law and the Global Financial System, Rule Making in the 21st Century* (CUP 2015) 120–23)).
[20] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 141, referring to AE Boyle, 'Soft Law in International Law Making' in MD Evans (ed), *International Law* (4th edn, OUP 2014) 119-20.
[21] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 141, referring to AE Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 ICLQ 901, 902–04.
[22] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 139-40, referring to AT Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008) 42–45.

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.[23] In contrast, a model law, which is perceived as a form of soft law is thought to be an interim alternative for governing cross-border insolvency.[24] However, in a previous publication,[25] I have pointed to the prominence of so-called soft law in various international law sub-systems,[26] 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.[27] Instruments that are formally considered hard international law, or provisions within them, can be characterized, de facto, as soft (even though formally binding) because of their vagueness, indeterminacy, or generality.[28] Further, the binding nature of hard international law is sometimes merely theoretical, where in practice hard law instruments are often ignored by countries.[29] Vagueness in treaty or regulation provisions may also undermine their enforceability.[30]

The rigid divide between hard and soft law and between treaties/regulation 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 law-making, on the other. Soft law enables the development of

[23] See e.g., K Nadelmann, 'Bankruptcy Treaties' (1944) 93 U Pa L Rev 58, 60–61; JL Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276, 2287, 2292.

[24] 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." (Note by the IBA Insolvency Section Delegation to UNCITRAL Working Group V based on an article by Gregor Baer, Insolvency Section Co- Chair, published in Business Law International (January 2016): 'International Insolvency Convention: Issues, Options and Feasibility Considerations' (with the publisher's permission) < file:///C:/Users/Irit/Downloads/IBA%20Submission%20UNCITRAL%20re%20Insolvency%20Convention%20May%202016.pdf >). fn 19) (emphasis added).

[25] I Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press 2018), ch 4.

[26] Including international financial law (see CM Bruner, 'States, Markets and Gatekeepers: Private-Public Regulatory Regimes in an Era of Economic Globalisation' (2009) 30 Mich J Intl L 125, 172; C Brummer, *Soft Law and the Global Financial System, Rule Making in the 21st Century* (CUP 2015) 120).

[27] See e.g. AE Boyle, 'Soft Law in International Law Making' in MD Evans (ed) *International Law* (OUP 2014) 121; CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850; KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Intl Org 421.

[28] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 141, referring to CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850, 851) who notes that a treaty with vague or weak requirements may be characterized as "legal soft law".

[29] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 142, referring to AT Guzman, 'Against Consent' (2012) 52 Va J Intl L 747, 752–53; Brummer, *Soft Law and the Global Financial System* (n 81) 141.

[30] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 142, referring to CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850, 863–64.

international norms through more relaxed processes. Although assumed to be non-binding, such laws can be concluded with 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.[31]

The cost of hard law instruments like treaties may also be high especially where the international agreement aims at resolving complex problems between multiple participants.[32] Treaties typically entail a long and cumbersome negotiation and a ratification process that may ultimately undermine the project.[33] The binding character of hard law may involve sovereignty costs and countries may be reluctant to relinquish powers.[34] Agreement on hard law to resolve international problems can also present significant hurdles in view of extant biases and bounds on decision-making, highlighted by behavioural international law scholars.[35] In reality perceived losses loom larger than perceived gains and departing from existing endowments is disliked.[36] Therefore, the sovereignty costs (i.e. 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 bias[37] may slow or impede

[31] In certain circumstances, soft law may be even more effective than traditional hard law (I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 142, referring to C Brummer, *Soft Law and the Global Financial System, Rule Making in the 21st Century* (CUP 2015), 145–47; 180-1).

[32] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 144, referring to AT Guzman, 'Against Consent' (2012) 52 Va J Intl L 747,764–65; BC Matthews, 'Prospects for Coordination and Competition in Global Finance' (2010) 104 Proceedings of the Annual Meeting (American Society of International Law) 104, *International Law in a Time of Change* 289, 292.

[33] Indeed, there have been various attempts to conclude treaties on cross-border insolvency, which have failed (see I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018),, 130 et seq.).

[34] I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 144, referring to KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Intl Org 421, 436.

[35] Drawing on "prospect theory" (A Tversky and D Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124; D Kahneman and A Tversky, 'Prospect Theory: An Analysis of Decisions under Risk' (1979) 47 Econometrica 263), the field of "behavioural international law" reveals the potential influence of cognitive biases in international law contexts, including regarding negotiating treaties (see e.g., A van Aaken, 'Behavioral International Law and Economics' (2014) 55(2) Harv Intl L J 421; T Broude, 'Behavioral International Law' (2015) 163 U Pa L Rev 1099; J Galbraith, 'Treaty Options: Towards a Behavioral Understanding of Treaty Design' (2013) 53 Va J Intl L 309).

[36] The "prospect theory" has revealed the robust effect of "loss aversion" where perceived utility is increased less by gains than by averted losses (D Kahneman and A Tversky, 'Prospect Theory: An Analysis of Decisions under Risk' (1979) 47 Econometrica 263, 265–69).

[37] The tendency to prefer to stick to the current position and avoid change (see D Kahneman, JL Knetch, and R Thaler, 'Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias' (1991) 5(1) Journal of Economic Perspectives 193).

initiatives to agree to or ratify such an instrument where any change from the status quo may be unattractive.[38]

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—or bypassing—at least some restraints on decision-making: direct applicability removes the requirement that domestic policy and law-makers adopt the rules.[39] Yet, even directly applicable regulation requires 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.[40]

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 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

[38] See I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 146 et seq.

[39] Guzman notes that "the 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" (AT Guzman, 'Against Consent' (2012) 52 Va J Intl L 747, 751).

[40] For a comprehensive description of the process of negotiating the SE legislation, see M. Cristina di Luigi, 'An invasive top-down harmonisation or a respectful framework model of national laws? A critique of the Societas Europea model' [2008] ICCLR 58.

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.[41] 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 rules and to allow for a fair and efficient global collective process.[42]

Agreeing on optimal levels of "universalism," i.e., a global approach to multinational default, is difficult, however. Often the best solution in cross-border insolvency, including in cases involving groups, is concentrating proceedings in one country to create a "procedural consolidation" of the process.[43] Many groups which face financial difficulties have been at least to some extent integrated in the ordinary course (because due to the economic integration of the group the insolvency of one entity affects the rest of the group, or because the group's integrated business as a whole faces financial or operational distress). 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"[44] if the group was heavily integrated in terms of its assets and/or liabilities.[45] 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 a global

[41] UNCITRAL defines an enterprise group as "two or more enterprises that are interconnected by control or significant ownership" (UNCITRAL Legislative Guide, Part III, Glossary, 4(a)).
[42] "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" (MLCBI GEI, para 70; MLCBI, art 2).
[43] Namely, administration of the process under the same court and supervisor and contemplation of a group solution. See J Sarra, 'Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings' (2009) 44 Tex Intl L J 547, 558; I Mevorach, 'The Home Country of a Multinational Enterprise Group Facing Insolvency' (2008) 57 ICLQ 427, 433 et seq.
[44] Namely, mixing of assets and/or debts together.
[45] I Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP 2009), 215 et seq. See also J Sarra, 'Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings' (2009) 44 Tex Intl L J 547, 566 et seq.; J Sarra, "Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies" (2008) 17(2) Int. Insolv. Rev. 73; S.L. Schwarcz, "Collapsing Corporate Structures: Resolving the Tension Between Form and Substance" (2004) 60(Nov.) Bus. Law. 109; S Madaus, 'Insolvency proceedings for corporate groups under the new Insolvency Regulation' IILR 2015, 235, 247.

collective approach, countries may avoid cooperation and they may race to collect, fearing that others will do the same.[46]

Negotiators of international instruments and domestic implementing institutions may be concerned, however, about the possible prospective loss of control to foreign bodies, about limiting sovereignty, and about disempowering local courts.[47] Even when countries are inclined to accept universalism, there remains the potential for a prisoner's dilemma—the fear that other countries will not commit to the same approach—and thus an unwillingness to enter into an agreement.[48]

A paradox exists: countries recognize the need for an international approach buttressed with widespread commitment, yet countries have reason to be suspicious and avoid entering into such commitments.[49] 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.[50] Through experience and peer effect,[51] modified universalism has become the dominant approach for addressing cross-border insolvency.[52]

But modified universalism is not uniformly accepted—there have been deviations and pushback.[53] "Territorialism" persists; some states continue to prefer, or at least conduct, state-

[46] See JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am Bankr L J 457, 466, 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.

[47] See Tung F, 'Fear of Commitment in International Bankruptcy' (2001) 33 Geo Wash Intl L Rev 555, 573.

[48] Tung F, 'Is International Bankruptcy Possible?' (2002) 23 Mich J Intl L 31, 60 et seq.

[49] As Professor 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. See AT Guzman, 'Against Consent' (2012) 52 Va J Intl L 747, 764-67, 775.

[50] See J.L. Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Mich L Rev 2276; I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018),, 14 et seq.

[51] 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 I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 74-76). It has been shown that people's choices can be significantly influenced by the choices of peers and that there is social and psychological benefit from meetings others' expectations (see e.g. E Asch, 'Effects of Group Pressure upon the Modification and Distortion of Judgments' in H Guetzkow (ed), *Groups, Leadership and Men; Research in Human Relations* (Carnegie Press 1951); R Goodman and D Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 Duke L J 621**,** 640–41).

[52] Ibid, 32 et seq.

[53] The notable example from recent times is the English Supreme Court approach expressed in the case of *Rubin* (*Rubin and another v Eurofinance SA and others* and *New Cap Reinsurance Corporation (in Liquidation) and*

by-state administration of cross-border insolvency proceedings.[54] 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 over-weighted,[55] yet they remain a hurdle for those committed to developing an effective universalist solution. Avoiding modernization and movement towards universalism is also influenced by inequality of systems and problems of institutional capacity, which also affect trust between systems.[56]

These international apprehensions are further mixed with and exacerbated by other fears when coordination involves enterprise groups. A group solution can minimize costs, maximize value, and ensure fairness, including in circumstances where assets have been 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.[57] When dealing with cross-border insolvency of groups such concerns exist in the background, including when negotiating instruments, even though not every group solution interferes with limited liability (i.e. mixes assets or debts as part of the solution). A "fear of the unknown" may also be in play as countries have limited experience in this field. It has been shown in experiments on decision-making 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

another v AE Grant and others [2012] UKSC 46) where the court refused to enforce an insolvency-related judgment that emanated from the main proceedings.

[54] See I.F. Fletcher, *Insolvency in Private International Law* (OUP 2005) 11; LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98 Mich L Rev 2216, 2218.

[55] See n [36] above.

[56] See I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 71, 183 et seq.

[57] Including 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 H. Hansmann and R. Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000)).

[58] See R. Hertwig and I. Erev, 'The description–experience gap in risky choice' Trends in Cognitive Sciences Vol.13 No.12 (2009) 516-523; E.A. Ludvig, M.L. Spetch (2011) 'Of Black Swans and Tossed Coins: Is the Description-Experience Gap in Risky Choice Limited to Rare Events?' PLoS ONE 6(6); C.R Madan, E.A. Ludvig, & M.L. Spetch (2017) 'The role of memory in distinguishing risky decisions from experience and description' Quarterly Journal of Experimental Psychology, 70, 2048-2059.

[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 A.A. Berle Jr, 'The Theory of Enterprise Entity', 47 *Columbia Law Review* (1947) 343; C.M. Schmitthoff, 'The

insolvencies, and 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 international instruments designed for group are generally quite soft. But the approach in the EIR (which is regarded a hard law instrument), in particular, represents a compromise with soft elements, likely a result of states' apprehension and concerns about perceived costs of traditional hard law. 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 processes 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.

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 EU Regulation, governed by the provisions of the main EC Treaty, 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 had been originally contemplated in a treaty,[63] but in that form was ratified by only one country.[64] A later effort to conclude an EU Convention also

Wholly Owned and the Controlled Subsidiary', *Journal of Business Law* (1978) 218; P.I. Blumberg, 'The Corporate Entity in an Era of Multinational Corpora-tions', 15 *Delaware Journal of Corporate Law* (1990) 283. 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 note [10] above; legislation has been introduced for example in Germany, Argentina, and Romania).

[60] For example, when Working Group V has deliberated in the past on the notion of a group coordination centre or group COMI (see Section III(C)(2) below).

[61] See http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf. Denmark is an exception as it is in a special position regarding legislation such as the EIR enacted under arts 61(c) and 67(1) of the EC Treaty (see I.F. Fletcher, *Insolvency in Private International Law* (OUP, 2005) 357).

[62] Cf. 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 http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf.

[63] The European Convention on Certain International Aspects of Bankruptcy, Istanbul, 5 June 1990.

[64] See I.F. Fletcher, *Insolvency in Private International Law* (OUP, 2005) 315.

failed because not all participating states eventually singed 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 has the potential to govern any group where its member entities are located in MLG party countries.

However, the MLG 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 where it is directly applicable in member states' laws. If the MLG is not adopted by a significant amount of countries, it will be difficult or in certain circumstances impossible to cooperate and coordinate group solutions where important aspects 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 even in terms of inducing 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

[65] Deliberations on a European Union Convention on Insolvency Proceedings lasted more than thirty years (ibid, 343-6).
[66] Cf. The Istanbul Convention 1990 which allowed reservations from various important chapters (see Fletcher () 317).
[67] EIR, article 3.
[68] The EU regime is also susceptible to regional turmoil like the UK decision to leave the EU (Brexit).
[69] The solutions envisaged by the MLG are described and assessed in Section III.C below.
[70] Cf. 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 highlighting its importance for cross-border inter-State cooperation and coordination in insolvency-related matters." (A/CN.9/937, Report of Working Group V (Insolvency Law) on the work of its fifty-third session (New York, 7–11 May 2018, para 48).

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 also 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 it 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] It is required that they have uniform effect, which is further guarded by the delegation of interpretive powers to an international tribunal, the Court of Justice of the European Union (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

[71] MLG draft Guide to Enactment (n 12 above), para 13.
[72] See I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 154 et seq.
[73] See http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.
[74] See http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf. See also Fletcher, Insolvency () 355 ("all national courts and officials are required to give effect to them.")
[75] Ibid.
[76] See EIR 2015, recital 65. See also CG Paulus, 'The ECJ's Understanding of the Universality Principle' (2014) 27(5) Insolv Int 70.
[77] See draft MLG, art 7.
[78] See n 12 above.

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 where 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] But 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 too. There are already indications that, although the EIR is directly applicable, there have been "startling" differences in its adoption by member states, which 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, which attempts to promote cooperation, centralization, and/or coordination of the

[79] UNCITRAL Texts (CLOUT) is maintained by the UNCITRAL Secretariat with the purpose of promoting international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts' (<http:// www.uncitral.org/ uncitral/ en/ case_ law.html>).

[80] Cf. the Guide to Enactment and Interpretation of the MLCBI which was revised in 2013 (http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf) as a result of uncertainties regarding the application of the notion of COMI.

[81] See I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 180 et seq. Experience also show that domestic courts often endorse or rely on the jurisprudence of other countries that have adopted the MLCBI.

[82] See I Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 EBOR 517, 537 et seq.

[83] See CERIL REPORT 2018- 1 on Insolvency Regulation (Recast) and National Procedural Rules, 4 June 2018 (http://www.ceril.eu/publications/publicatie-1/).

[84] The classic example was the Daisytek group saga (for the judgment of the English High Court see *Re Daisytek-ISA Ltd, and others* [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 I.F. Fletcher, *Insolvency in Private International Law* (OUP, 2005), 388 et seq.).

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 less threatening than "binding international law." That more nuanced perception seems to have worked to limit concerns to some extent and achieve stronger commitments. 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 centre (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 (Chapter V on groups) for resolving international group insolvencies. It is also only the cooperation which 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 conducive to an effecting 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] and that insolvency representatives supervising group members proceedings cooperate too, including with other courts.[89]

The instruments do not require that cooperation culminate in any prescribed result, though. It is only required to consider 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

[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 S. Madaus, 'Insolvency proceedings for corporate groups under the new Insolvency Regulation' IILR 2015, 235, 238 (noting that this language should "not be interpreted as an excuse not to engage in any kind of cooperation across borders at all.")
[87] EIR, article 57. The cooperation duty is also extended to the interaction between insolvency representatives and courts (EIR, article 58), and between insolvency representatives and a coordinator where appointed (EIR, article 74; on the notion of the "coordinator" see Section III.C(3) below).
[88] Draft MLG, Articles 8-11; see on the concept of "group representative" in Section III.C(3) below.
[89] Draft MLG, articles 12 and 13.
[90] Draft MLG preamble (d).

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]

Like 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 towards what is called "cooperative territorialism"- where each jurisdiction may administer the assets or the insolvency of a subsidiary located within its own borders separately but may still cooperate including through 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, 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" (a 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 was acknowledged that centralization and avoidance of parallel proceedings can reduce costs, assist in coordination of sales, and in maximization of value, including through global reorganization of the group. This is particularly true where there is high integration between group members.[96]

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[91] EIR, Recital 51.
[92] EIR, article 56(2).
[93] LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 Cornell L Rev 696, 742–43.
[94] See e.g. 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 an inefficient process and litigation took place, and parallel proceedings opened both in Germany and Austria, notwithstanding the effort of the German representative to concentrate the process in Germany and to open both the proceedings against the parent and the subsidiary in the same place. 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, Nichtabhilfebeschluss vom 4. January 2018, Aktenzeichen 36n IN 6433/17) and as a result, main proceedings were opened in Austria regarding the subsidiary (on January 12, 2018) and additional secondary proceedings in Germany.
[95] During deliberations that commenced in 2006 on the expansion of the Legislative Guide to address the treatment of enterprise groups (United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law, part three, 1 July 2010, pp 83 et seq.).
[96] U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group V (Insolvency Law), Treatment of Corporate Groups in Insolvency, U.N. Doc.A/CN.9/WG.V/WP.76/Add.2 (Mar. 6, 2007), 11; U.N. Comm'n on Int'l Trade

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] In the EU, it was previously recommended in a report of the EU Parliament produced during the EIR revision process[98] to identify 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 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] Indeed, such centralizations can be attempted pursuant to the existing

Law [UNCITRAL], Working Group V (Insolvency Law), Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, U.N. Doc.A/CN.9/WG.V/WP.82/Add.4 (Sept. 10, 2008), 11.

[97] See U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group V (Insolvency Law), Treatment of Corporate Groups in Insolvency, U.N. Doc.A/CN.9/WG.V/WP.76/Add.2 (Mar. 6, 2007), 3-4.

[98] European Parliament, Report with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), 17.10.2011.

[99] 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." 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", and that "[a] single insolvency practitioner should be appointed." 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" (ibid).

[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." (ibid).

[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, 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, article 19(1)).

[103] The revised Guide to Enactment of the MLCBI (2013) (n 80) 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 office) ascertainable by third parties (United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross- Border Insolvency (1997) with Guide to Enactment and Interpretation with Guide to Enactment and Interpretation (2013), para 145). 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.

MLCBI if proceedings are opened and recognized based on the presence of COMI of separate entities belonging to the same group.[104] But the MLCBI lacks explicit provisions on groups and the application of its provisions in this way is not straight forward and had 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 and may lead to inefficient solutions.[106] The result under both 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 in the specific group instruments 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

The main innovation, and indeed important international coordination tool, in both the EIR and the MLG 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, including in circumstances of decentralized enterprises where group entities' COMI is in different jurisdictions. A group solution may be an optimal approach even if the group was largely decentralized but was nonetheless integrated. Stakeholders can then benefit from the value of the group business or a combined value in realization of assets. Both the EU and the UNCITRAL rule-makers have, therefore, attempted

[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 I Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 EBOR 517, 537 et seq.

[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 (see at para [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 (n [94] above).

[107] Cf. 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 G Moss, "Group Insolvency – Choice of Forum and Law: the European Experience under the Influence of English Pragmatism" (2007) 32 Brook J Inl'l L 1005; I Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 EBOR 517, 537 et seq.).

to address an important gap in the existing instruments by recognizing the enterprise group[108] and providing a framework for group solutions and recognition across borders, beyond the obligation to cooperate.

The EIR allows the opening of "coordination proceedings"[109] in any of the courts having jurisdiction over the insolvency proceeding of a member of the group.[110] 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 coordinating proceeding).[111] The opening request should present the outline of the proposed group coordination[112] and the court should 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 group members is likely to be financially disadvantaged by the inclusion of the group member in the proceeding.[113] Any of the other representatives appointed in proceedings of group members may object to the inclusion of the member in the coordinating proceedings and shall in that regard obtain any approval that may be required under the local law (of the state where they were appointed).[114] In case of objection, the group member is not included in the group coordination proceedings unless at a later stage the insolvency representative decides to opt-in and be included.[115] The "coordinator" appointed in the coordination proceedings may recommend a group coordination plan,[116] which shall be considered by the other insolvency representatives "[w]hen conducting their insolvency proceedings."[117] The plan proposal is just a recommendation and it is not binding[118]—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.[119]

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

[108] The "enterprise group" is recognised and is defined in both instruments (see EIR, article 2; draft MLG, article 2).
[109] EIR, articles 61-77 of Chapter V.
[110] EIR, article 61.
[111] EIR, articles 62 and 66.
[112] EIR, article 61(3)(b).
[113] EIR, article 63.
[114] EIR, article 64.
[115] EIR, articles 65 and 69.
[116] EIR, article 72.
[117] EIR, article 70(1).
[118] It is not 'an enforceable "European rescue plan" voted on and confirmed on a European level' (S. Madaus, 'Insolvency proceedings for corporate groups under the new Insolvency Regulation' (2015) IILR, 235, 242).
[119] EIR, article 70 (2) and (3).

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, even if the objection is, for example, 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. Cooperation with a group 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 . . ." [120] 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 members' 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.[121] The focus is on group reorganizations and restructurings. In addition, the coordinator may mediate disputes, be heard and participate in members' proceedings, 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 for the benefit of the creditors in the proceedings for which the stay is requested . . ."[122]

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.[123] Additionally, the EIR explicitly prohibits any form of consolidation: of the proceedings (procedural consolidation) or of the estates (substantive consolidation).[124] This

[120] EU Parliament report (n [98] above) (emphasis added).
[121] EIR, article 72(1).
[122] EIR, article 72(2).
[123] EIR, article 2.
[124] EIR, article 72(3).

prohibition has no clear base rationale that accounts for the economic reality of the group in question. The prohibition is absolute.[125] As such, it shows that it was difficult to reach an international agreement on optimal tools that adequately respond to different group circumstances[126] within the EIR instrument.[127] Instead, the negotiators (on this hard law instrument) compromised on more limited, soft tools. [128]

With the MLG the international community managed to develop and agree on a more comprehensive, 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."[129] 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." 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

[125] Except where some form of consolidation may be achieved by finding a grouping of COMIs (see Section III.C(2) above) or through cooperation, and where the domestic law allows for such consolidation (see also recital 61 which notes that member states may develop supplementary rules concerning the insolvency of enterprise groups).

[126] See e.g. 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 BR 494 (Bankr D Del 2015); *Re Nortel Networks Corp*, 2015 ONSC 2987 (Ont SCJ [Commercial List]; JAE Pottow, 'Two Cheers for Universalism: Nortel's Nifty Novelty' in JP Sarra and Justice B Romaine (eds), Annual Review of Insolvency Law (Carswell 2015)). See also the agreement on the concepts of procedural and substantive consolidation in the UNCITRAL Legislative Guide (UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of Enterprise Groups in Insolvency (United Nations, New York, 2012), recommendations 202-210; 220-228).

[127] See also S. Madaus, 'Insolvency proceedings for corporate groups under the new Insolvency Regulation' (2015) IILR, 235, 247 noting as "bad news" the fact that the Regulation 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."

[128] See S. Madaus, 'Insolvency proceedings for corporate groups under the new Insolvency Regulation' (2015) IILR, 235, 241 who notes regarding the coordination tool in the EIR that "it can be considered a rather soft approach intended to incentivise stakeholders more than making them bound to perform specific duties". See also C. Thole and M. Dueñas, 'Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation, (2015) 24 Int. Insolv. Rev., 214, 220; G. McCormack, 'Something old, something new: recasting the European Insolvency Regulation' (2016) 79(1) M.L.R 121, 144; 'Insolvency of Corporate Groups Under the New Insolvency Regulation: Progress or Reason for Concern?' in Hess/Oberhammer/Bariatti/Koller/Laukemann/Requejo Isidro/Villata (eds.), The Implementation of the New Insolvency Regulation - Improving Cooperation and Mutual Trust, Nomos/Hart, Baden-Baden/Oxford 2017.

[129] Draft MLG, article 2.

[130] Ibid, article 2(f).

[131] '"Planning proceeding" means a main proceeding commenced in respect of an enterprise group member . . .' Subject to the requirements in the definition, "the court may recognize as a planning proceeding a proceeding that

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 planning proceeding is voluntary and group members may opt-in or opt-out.[133] 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 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 overprotect 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. Thus, whilst the instrument does not require participation by group members, once group members decide to participate and local courts do not prohibit such participation, the group members may be subject to various relief in the course of the group-wide insolvency process. 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 of the distribution of such assets with

has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the prupse of developing a group insolvency solution. . ." (ibid, article 2(g)).

[132] Ibid.

[133] Draft MLG, article 17(3).

[134] Ibid, article 22(2).

[135] Ibid, articles 20 and 22.

[136] See I Mevorach, 'On the Road to Universalism: A Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency' (2011) 12 EBOR 517, 533 et seq.

[137] See also I Mevorach, The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps (Oxford University Press 2018), 234.

[138] Draft MLG, articles 18, 19, 21 and 23.

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 from refraining from conducting local proceedings in multiple jurisdictions.[142] The range of relief contemplated in the instrument can facilitate procedural consolidation, such as 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 the conditions and safeguards are met, namely if 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 the practice[149] and adopted in the EIR concerning single companies,[150] which is designed to avoid the opening of secondary (non-main) in addition to main proceedings

[139] Ibid.
[140] Draft MLG, articles 19(1)(h) and 23(1)(i).
[141] MLCBI Guide to Enactment and Interpretation (n 80) para 154.
[142] See Section III(C)(4) below.
[143] Draft MLG, Article 19.
[144] See Section II(A) above.
[145] Draft MLG, article 26.
[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 . . ." (ibid, article 2(l)).
[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." (ibid, article 2(m)).
[148] Draft MLG, article 27.
[149] See eg *Re Collins & Aikman Europe SA, [2006] EWHC (Ch) 1343; Re Nortel Networks SA & ORS*, [2009] EWHC (Ch) 206.
[150] EIR, article 36.

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* proceedings[153] in a group context.[154] A supplement part 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, and even if no undertaking has been given (but more so if it has), where a group planning proceeding takes place and is recognized, the recognizing court, if it is satisfied that creditors are adequately protected, may in addition to any other relief stay or decline to commence insolvency proceedings regarding an enterprise group member participating in the planning proceedings. 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. No such solution is provided for, however, 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 (i.e. adoption by countries), presenting some of the provisions as supplemental may suggest that countries should be more careful and perhaps enact only the

[151] Draft MLG, article 27.
[152] Ibid, article 28.
[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;" (ibid, article 2(K)).
[154] Draft MLG, article 29.
[155] Ibid.
[156] Draft MLG, articles 30 and 31.

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 (an international group approach that can benefit the group stakeholders), including in circumstances of hold-out strategies by local creditors.

D. Summary

The MLG, which, traditionally speaking, is a form of soft law, 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—the EIR (chapter on groups) is robustly harder than the MLG. But even regarding this aspect, the MLG exhibit certain hard characteristics: although requiring adoption by countries, it is generally designed as a complete law and it 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, other than a duty to cooperate, the regime is voluntary (group entities may not participate in group solutions), once group entities decide to participate, 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, a hard law instrument, while indeed binding, prescribes soft solutions for groups in insolvency – cooperation and a limited coordination tool.

CONCLUSION

Traditional conceptions of hard law generating stronger commitments and soft law softer commitments are misleading and inaccurate. Often so-called soft law regimes are 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, is on the other hand considered a form of soft law but in important respects it can elicit more robust consequences compared with the EIR. 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 be regarded as harder and stronger.

The analysis 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 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, and 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.