

International Insolvency Law's Cross-Roads and the New Modularity

UNCITRAL has been modernizing international trade law for a half-century. Its Model Law on Cross-Border Insolvency has been heralded as a success in integrating various legal traditions to take incremental steps towards the establishment of harmonized bankruptcy procedures.

But this project now stands at a cross-roads. Some have complained that far from being a success, the Model Law is a failure due to its purportedly disappointing adoption rate. Calls have consequently been raised to jettison the soft law approach altogether and switch gears to treaty negotiations. Others have noted that the Model Law will never realize its full potential until it tackles the questions of corporate groups for multinational debtors, which its tentative forays in the Legislative Guide have been insufficient to achieve. And still others have complained that the first wave of fixes to the Model Law is already required, noting the European Union's "recast" of its cognate Insolvency Regulation. Thus, the cross-roads: should UNCITRAL amend the Model Law, supersede it with a convention, or try something else?

The cross-roads reflect the confluence of three challenges: first, an unexpected interpretation of the Model Law by an important enacting state; second, critique from academics, bemoaning perceived imperfections in the Model Law; and third, agitation from a particular NGO important in the international insolvency reform process. And as always, the ever-shifting political dynamics of the "transnational legal order" of international insolvency exert their own pressure. This brief article addresses each in turn before noting UNCITRAL's apparently novel solution of *modularity*.

First, the U.K. *Rubin* decision. Part of the genius of the Model Law was its intentional vagueness, leaving contentious provisions up for ex post interpretation, rather than ex ante pre-specification, enabling "recursive" content revision. But this open-endedness comes with a cost. In *Rubin*, the U.K. Supreme Court propounded an unexpectedly restrictive reading of the Model Law, holding that it forecloses recognition of a U.S. foreign main proceeding judgment when the U.S. court's exercise of *in personam* jurisdiction did not comport with British law. The U.K. court pointedly held that the Model Law's vague references to "cooperation" and intent to foster greater international "assistance" to foreign bankruptcy proceedings were insufficient to provide a statutory foundation. *Rubin* has led calls to amend the Model Law to confirm its cooperative intent.

Next, the academics. An intellectual whipping boy of the Model Law has been COMI, a concept also anchoring the kindred-spirit EU Insolvency Regulation. Numerous commentators complain its undefined standard causes untoward uncertainty. They, too, have called for amendments.

Finally, and likely relatedly, the groundswell of opposition from the International Bar Association, an important NGO whose initial Concordat provided the theoretical foundation for the Model Law. The IBA has spearheaded a glass-half-empty effort to suggest that the Model Law's uptake rate has been a disaster. The IBA even trumpeted a questionnaire, couched as a pseudo-empirical study, showing support for a convention as an alternative to the faltering Model Law. It also arranged informal discussions at two meetings of Working Group V, going so far as to suggest that consideration of the

viability of a convention is on the formal agenda per a charge from the Commission. Suffice it to say, this has called the model law “technology” into question.

How has UNCITRAL responded to this methodological cross-roads? With what I call *modularity*. The *Rubin* decision prompted the design of a new model law on cross-border recognition of judgments. It is intended to be *either* a standalone vehicle *or* an addition to the pre-existing Model Law. Thus, UNCITRAL has doubled down on the model law framework, deploying its flexibility to establish modularity, namely, the ability to build upon, but also function independently from, pre-existing instruments.

This brings us to politics. The simplest solution to a *Rubin* decision getting the Model Law “wrong,” would be to amend the Model Law (or promulgate interpretative guidance), to get it “right.” The standalone recognitions model law does something different. It corrects *Rubin*, but it also makes adoption possible by states still skeptical of the underlying Model Law. This modularity has enabled a State to adopt the new recognitions model law, but *not* the underlying Model Law. This provides political cover to expand cooperative insolvency norms through the side door—achieving some of the same benefit as adopting the Model Law itself.

As for the academics, UNCITRAL has largely ignored them, by which I mean insisting that the perfect not become enemy of the good. But the response to the “threat” of the IBA has been most interesting. Much like when confronted with the infamous French “Observation” that called into question the legitimacy of much of UNCITRAL’s working group practice, the Secretariat responded as it does best: inclusive, fulsome procedure that sets the stage for an issue to die its own death after natural catharsis. While not opposing a convention, it clarified the need for States to demonstrate willingness to get behind a convention, especially so from States not already behind the Model Law. There was no stampede.

Thus, the path forward from the cross-roads seems to be more model laws. Far from path-dependence, this is adroit incrementalism. IBA grumbling notwithstanding, a model law is a nimble and cost-effective technology that allows states to adopt and adapt as need be. It also permits modularity, an important new technological feature with political payoff. This is an important innovation for UNCITRAL, and may well show a new path forward.