Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law

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SUMMARY

If (international) commercial law is to keep pace with (international) commercial practices, then there has been much to do in the way of (international) law reform over the past forty years. During this period, commercial practices have changed substantially due to numerous factors: advances in telecommunications; the fall of the Soviet Union and attendant re-unification of Europe; systemic financial crises in South East Asia and South America; globalization; and developments, indeed, the revolution, in information and payment technology—the Internet and Electronic Funds Transfers, to name just a few. To meet this challenge, UNCITRAL (the United Nations Commission on International Trade Law) has done more than simply reform trade law; it has also reconceived its very mission and the means by which it carried out its central purposes.

Although the UN resolution creating UNCITRAL initially spoke in terms of the "progressive harmonization and unification" of the law of international trade,[1] UNCITRAL now defines its mission as the "modernization and harmonization" of trade law.[2] Arguably, the task of modernizing the law of international trade was implicit in UNCITRAL's core mission. The resolution creating UNCITRAL referred to the "progressive" harmonization

1. G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6594 (Dec. 17, 1966), *available at* http://www.un.org/documents/ga/res/21/ares21.htm (follow "2205 (XXI)" hyperlink).

2. *See* Welcome to the UNCITRAL Web Site, http://www.uncitral.org/uncitral/welcome.html (last visited on May 24, 2007) (describing its mission as: "The core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specializing in commercial law reform worldwide for over 40 years. UNCITRAL's business is the modernization and harmonization of rules on international business.").

and unification of trade law, not simply its harmonization and unification.[3] This resolution also emphasized that the progressive harmonization and unification of trade law followed from the United Nation's broader agenda of economic development and the promotion of friendly relations among nations.[4]

Nonetheless, there may be an enormous difference between the task of harmonizing and unifying existing bodies of national law on the one hand, and the modernization of national laws on the other hand. Depending upon how one defines the task,[5] harmonization may present only minimal intrusions upon national legislation, involving the identification of common approaches among existing domestic laws. Reports to the General Assembly and the Commission in the late 1960s suggest that international actors understood the "progressive harmonization and unification" of trade law as involving the reconciliation of divergent practices and an articulation of emerging international norms. Current statements of UNCITRAL's efforts in achieving the "modernization and harmonization" of trade law depict UNCITRAL as a more pro-active participant in the reform of global commercial law. This version of international law reform—which looks to modernize, rather than simply harmonize, national laws—can come with one of two purposes. Where technical or market developments have outstripped existing law and the lack of suitable regulation is viewed by the international community to stall commercial development, modernization would require an (international) organization to create new law. With this relatively new method of

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3. G.A. Res. 2205 (XXI), *supra* note 1, pt. I (stating that the General Assembly "[*d*]*ecides* to establish a United Nations Commission on International Trade Law . . . , which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade . . . .").

4. In establishing UNCITRAL, the General Assembly stated:

> *Considering* that international trade co-operation among States is an important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security,
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> *Recalling its belief* that the interests of all peoples, and particularly those of developing countries, demand the betterment of conditions favouring the extensive development of international trade,
>
> *Reaffirming* its conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade.

G.A. Res. 2205 (XXI), *supra* note 1.

5. In its website, UNCITRAL defines the terms harmonization and unification in this way:

> "Harmonization" and "unification" of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.
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> "Harmonization" may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. "Unification" may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level. Texts resulting from the work of UNCITRAL include conventions, model laws, legal guides, legislative guides, rules, and practice notes. In practice, the two concepts are closely related.

FAQ – Origin, Mandate and Composition of UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin_faq.html (last visited May 24, 2007).

modernization, the global actor purports to speak authoritatively to national legislatures both about both the need and the content of law. Modernization may threaten national legislatures' sovereignty more acutely than an "in with the new" reform agenda where national law exists on a topic, but is viewed by the international community as out-of-date. This "out with the old" method of modernization requires the international organization both to reject existing legislation and create new law, whereas "in with the new" modernization requires simply the filling of a gap in the old law with new law. In either case modernization might work against harmonization or unification since "modernization" presumably relates to a revision of the law to meet new exigencies, revisions that might not be consistent with existing national laws or global norms.[6]

Both "in with the new" and "out with the old" modernization challenge traditional concepts of international law and law reform, and with this challenge comes an impetus for new tools. Because uniformity may not be necessary to (and may, in some cases, undermine) the goal of modernization, there is room to question whether law reform projects intending to modernize the law of international trade should rely on international instruments meant to produce a single, uniform legal standard.

UNCITRAL has predominantly relied on conventions and model laws to reach agreement on international instruments promoting international trade. A *convention* takes the form of a multilateral treaty. Countries accede to a single standard. As a result, the demands for accession are high since countries may not alter any part of the convention to suit domestic political or legal differences. Likewise, conditions of formulation require zero-sum bargaining in order to reach agreement. Both conditions mean that conventions are more likely to succeed where agreement across radically different legal families and levels of economic development is possible.[7] Those conditions further imply that the politics of formulation and implementation will be time-consuming and the prospects of subsequent adaptation prohibitive.[8]

A *model law* relaxes some of the strictures of conventions.[9] It takes the form of a legislative text that the UNCITRAL recommends for enactment. However, in order to be responsive to the particular needs of a given state, a model law may implicitly permit states to exclude or modify some provisions.[10] While a model law sets a global standard, neither its conditions of formulation are as demanding nor its conditions of implementation as severe as a convention.[11] As a result—although it appears as a less harmonizing instrument

6. Frequently, of course, "modernization" is a euphemism for adaptation of a weaker country's laws in the direction of a powerful sovereign state or international organization which has the cultural authority to define the meaning of "modern." This implies that modernization might either take the form of a functional adaptation of law to new circumstances, or the form of cultural conformity with a powerful symbolic standard promulgated by a "modernizing" global institution, or both.

7. One senior official of UNCITRAL stated: "[T]he realities of many subjects are that you couldn't do a convention on them." Interview 4003 (unpublished interview, on file with authors).

8. It can be argued that conventions are easier to "enact" because there may be no legislative process. Interview 2071 (unpublished interview, on file with authors).

9. *See* UNCITRAL, Working Group on Insolvency Law, *Working Paper: Possible Future Work on Insolvency Law*, paras. 162-68, U.N. Doc. A/CN.9/WG.V/WP.50 (Sept. 20, 1999) [hereinafter UNCITRAL, *Possible Future Work on Insolvency Law*].

10. It permits it by default because international model laws can only recommend; they cannot prescribe. By contrast, it is impossible to sign on to only portions of a convention.

11. There are also variations in the form of model laws. Contrast the Model Law on International Commercial Arbitration, which is a procedural instrument with tightly linked inter-dependent articles, and the Model Law on Electronic Commerce, which offers sets of principles with potential variations for satisfying them. UNCITRAL, *Possible Future Work on Insolvency Law*, *supra* note 9, paras. 165-66. A former Secretary of UNCITRAL observes that the Model Law on Arbitration now covers approximately one third of the world,

than a convention—it may permit a higher threshold in the standard itself and encourage a greater number of countries to adopt a form of it.[12] As an enhancement on a model law, UNCITRAL coupled a model law with a *guide to enactment* that sets out background information, explanations of decisions, and information on various policy options that might enable legislators to make informed decisions.[13]

Whatever the merits of conventions and models for the inducement of unification or harmonization, UNCITRAL has also historically understood the need for flexibility, diplomacy and patience in its law reform projects and the potential inflexibility of uniformity as a goal of global law reform. Because conventions can limit drafters' room to maneuver, lead to the exclusion of issues on which delegates cannot reach consensus or, worse still, be conducive to reliance on compromise language that leaves an issue either unresolved or muddier than before, international conventions may not provide the best route toward modernization. While model laws are generally viewed as softer tools in the hands of international reformers than conventions, they too may possess an appearance of completeness and intractability.

Cognizant of these trade-offs, as UNCITRAL has shifted its focus toward modernization it has invented new legal technologies—guides to enactment, recommendations, model legal provisions, and legislative guides—that offer greater flexibility to reform a broader range of laws, especially with the benefit of time and incremental progress.[14] Indeed, the implementation of this more expansive mission could only have proceeded on the basis of a broader repertoire of legal technologies.[15]

This shift in goals through the invention of technologies is well illustrated by UNCITRAL's work on the Legislative Guide on Insolvency Law.[16] Although many experts were pessimistic about the prospect of a legislative guide on insolvency, the UN General Assembly confounded their expectations and ratified a Legislative Guide on Insolvency Law in December 2004.[17] How did UNCITRAL succeed in promulgating the Legislative Guide on Insolvency Law?[18] How did its reliance on a legislative guide, rather than a convention

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something that would have been impossible with a convention. Interview 4003, *supra* note 7; Interview 2071, *supra* note 8.

12. In practice, UNCITRAL observes that "deviations from the Model Law text have, as a rule, very rarely been made by countries adopting enacting legislation, suggesting that is has been widely accepted as a coherent model text." UNCITRAL, *Possible Future Work on Insolvency Law*, *supra* note 9, para. 165. This is something of an overstatement—scholars and practitioners agree that various countries' legislation to implement the Model Law on Cross Border Insolvencies have varied considerably in how true the bills have been to the terms of the Model Law.

13. *Id.* para. 164.

14. Other scholars have argued the UNCITRAL acts "incrementally" and count this incrementalism as among its strengths. The term was first employed by John Pottow. *See* John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935 (2005) (describing UNCITRAL Model Law on Cross Border Insolvency as fundamentally procedural in focus and describing merits of process of incremental proceduralism).

15. By "social technologies," social scientists refer to systematic social means of achieving a particular outcome. A legal technology is simply a social technology adapted to and employed in the legal arena. *See* Terence C. Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 33 BROOK. J. INT'L L. (forthcoming 2007).

16. UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Sales No. E.05V.10 (2005) [hereinafter Insolvency Guide], *available at* http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

17. *Id.* at iii.

18. Not all share our opinion that UNCITRAL has succeeded in this arena. *See, e.g.*, Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT'L REV. L. & ECON. 446 (2005) (expressing skepticism about the necessity and desirability of efforts to unify and harmonize laws governing international commerce); Paul B. Stephan, *The Futility of Unification and Harmonization in International*

or model law, enable the UNCITRAL's Working Group on Insolvency to produce global rules on insolvency law? In this article,[19] we argue that by inventing a new legal technology UNCITRAL was able to join specific recommendations with lengthy and nuanced commentary intended to educate domestic legislatures. In addition, by inventing an array of rule-types within the recommendations made in the legislative guide, UNCITRAL enabled the Working Group to speak authoritatively and in great detail on a range of topics, but on other issues to say little in deference to social and political concerns. In short, UNCITRAL succeeded in this arena by embracing its diplomacy as a strength and not a weakness.

Our examination of UNCITRAL's Legislative Guide on Insolvency Law demonstrates that modernization may come at a price. A legislative guide is on its face less harmonizing than a model law, just as a model law is on its face less harmonizing than a convention. Nonetheless, we argue that less is more, at least in this instance. Many in the Insolvency Working Group believed that it would have been impossible to achieve a convention or a model law on insolvency law. UNCITRAL consciously decided to rely on a legislative guide to structure its work principally because the flexibility of this technology took away the need to reach consensus on myriad details, and more importantly, the contentious policy issues inherent in such an endeavor. UNCITRAL created a legal technology purporting to require less harmonization because it viewed the flexibility of a legislative guide as increasing the likelihood that it would succeed in promulgating an international instrument on domestic insolvency law.

This is not to deny that the Legislative Guide on Insolvency Law might have a harmonizing effect. Nor should we view UNCITRAL's reliance on technologies other than conventions and model laws as an abandonment of the desirability of promoting the "progressive harmonization and unification" of trade law. Harmonization takes time, and global law reform involves the efforts of both international and domestic actors. Because national actors may not feel international pressure to adopt the recommendations in a legislative guide wholesale, they can feel free to adopt what they can. With a convention or model law, accession or implementing legislation may fail precisely because the choices are binary—either accept it in its entirety or reject it outright. A legislative guide offers national actors choices, albeit within limits. The decision to promulgate a legislative guide might in practice result in greater harmonization "on the ground" than a model law or convention.[20]

The remainder of this Article is organized as follows. Part One briefly traces the organizational development of UNCITRAL and demonstrates that UNCITRAL broadened its mission over time to include not just the harmonization of international commercial law but also its modernization. This Part finds that, in the course of more broadly defining its core mission, UNCITRAL also broadened the range of international instruments it relied upon to accomplish law reform, and that the breadth of mission and technologies are inter-related. Part Two focuses on UNCITRAL's most recent project—the Legislative Guide on Insolvency Law—and compares and contrasts it with UNCITRAL's earlier work. This Part describes this new legal technology—a legislative guide—as combining legislative recommendations with commentary. The commentary somewhat justifies the

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Commercial Law, 39 VA. J. INT'L L. 743 (1999) (decrying wisdom of UNCITRAL's quest for global harmonization in commercial law as wrong-headed).

19. This Article builds on a companion work in which we argue that UNCITRAL's success as an agent of global law reform follows from its unique claim to legitimacy among international actors given its representativeness and consensual decisionmaking. *See* Susan Block-Lieb & Terence Halliday, *How Global Law-Making is Possible: Legitimation Strategies and Rule Production in the UNCITRAL Legislative Guide on Insolvency Law* (unpublished draft, on file with authors).

20. In part, this may occur because a guide has greater legitimacy—both formulated by a global quasi-legislature *and* adopted by a national legislature. *See id.*

recommendations made in the Guide in terms of the policy purposes of the provisions; where recommendations are more open-ended, the commentary assists legislatures with the Herculean task of assessing the choices that remain. We conclude that the array of linguistic forms in which the recommendations were expressed in the Guide give UNCITRAL the flexibility to adjust its level of prescription to the level of consensus it could achieve and, as a result, the flexibility to modernize insolvency law. Part Three turns back to the apparent tension between modernization (at least of the "out with the old" variety) and UNCITRAL's original mission: the "progressive harmonization and unification" of trade law. We argue that UNCITRAL's pursuit of the modernization of the law of international trade should not be viewed as inconsistent with the goals of "harmonization and unification;" instead, UNCITRAL has adapted its implementation of the goals of harmonization and unification in recognition of pragmatic limitations that inhere in (second order) international lawmaking. In the end, we conclude that UNCITRAL's adoption of modernization as a goal both expands its organizational reach and demands technologies that will underwrite its expansive aspirations.

I.

The United Nation's General Assembly adopted a resolution to establish its Commission on International Trade Law in 1966. In justifying the creation of UNCITRAL, the General Assembly "*[r]eaffirm[ed] its conviction* that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade."[21] Thus, the decision to establish a Commission, "which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade," was based on a belief that "the extensive development of international trade" could best be furthered by removing "divergencies arising from the laws of different States"—by harmonizing and unifying the law of international trade through "promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures."[22] The harmonization and unification of the law of trade was sought on the presumption that it enabled international trade and not simply for the sake of harmonizing and unifying laws. International trade was said to favor "the interests of all peoples" and "particularly those of developing countries" because "international trade co-operation among States is an important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security."[23]

Over time, UNCITRAL has pursued its mission of the "progressive harmonization and unification" of trade law with a pragmatic vision of its primary purpose—the promotion of international trade. UNCITRAL is probably best known for its drafting of the Convention on Contracts for the International Sales of Goods,[24] which has been adopted in more than fifty countries including the United States.[25] Over the past forty years, UNCITRAL has

21. G.A. Res. 2205 (XXI), *supra* note 1.

22. G.A. Res. 2205 (XXI), *supra* note 1.

23. G.A. Res. 2205 (XXI), *supra* note 1.

24. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 59, *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf.

25. For a list of the roughly seventy nations that have adopted the United Nations Convention on Contracts for the International Sale of Goods (CISG) in one form or another, see Status, 1980 – United Nations Convention on Contracts for the International Sale of Goods, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited May 26, 2007).

produced conventions, model laws, legislative guides and other international instruments on many areas of procedural and substantive law, including international arbitration,[26] e-commerce,[27]

TABLE 1. UNCITRAL WORK PRODUCTS AND LEGAL TECHNOLOGIES, 1976-2005

Year	*UNCITRAL Work Product*	*Legal Technology*
1976	Arbitration Rules	Rules
1978	Convention on the Carriage of Goods by Sea (the "Hamburg Rules")	Convention
1980	Conciliation Rules	Rules
1980	Convention on Contracts for the International Sale of Goods	Convention
1982	Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules	Recommendations
1982	Unit of Account Provision and Provisions for the Adjustment of the Limit of Liability in International Transport and Liability Conventions	Model legislative provisions
1985	Model Law on International Commercial Arbitration	Model law
1985	Recommendation on the Legal Value of Computer Records	Recommendation

Neither Japan nor the United Kingdom has adopted the CISG.

26. *See, e.g.*, UNCITRAL Arbitration Rules, 15 I.L.M. 701 (1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf; UNCITRAL Conciliation Rules, G.A. Res. 35/52, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/35/52 (July 23, 1980), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf; *Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations Under the UNCITRAL Arbitration Rules*, 1982 Y.B. Int'l Trade L. Comm'n 420, U.N. Sales No. E.84.V.5, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-recommendation/arb-recommendation-e.pdf; UNCITRAL: Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf; *UNCITRAL Notes on Organizing Arbitral Proceedings*, U.N. GAOR, 29th Sess., Supp. No. 17, U.N. Doc. A/51/17 (1996), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf; UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE, U.N. Sales No. E.05.V.4 (2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf.

27. *UNCITRAL Recommendation on the Legal Value of Computer Records* (1985), *available at*, http://www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf; UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.4 (1996), *available at* http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf; UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT, U.N. Sales No. E.02.V.8 (2001), *available at* http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf; United Nations Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. GAOR, 60th Sess., Supp. No. 49, U.N. Doc. A/RES/60/21 (Dec. 6, 2005), *available at* http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

1987	Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works	legal guide
1988	Convention on International Bills of Exchange and International Promissory Notes	Convention
1991	Convention on the Liability of Operators of Transport Terminals in International Trade	Convention
1992	Model Law on International Credit Transfers	Model law
1993	Model Law on Procurement of Goods and Construction with Guide to Enactment	Model law + guide to enactment
1994	Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment	Model law + guide to enactment
1995	Convention on Independent Guarantees and Stand-by Letters of Credit	Convention
1996	Notes on Organizing Arbitral Proceedings	Notes
1996	Model Law on Electronic Commerce with Guide to Enactment	Model law + guide to enactment
1997	Model Law on Cross-Border Insolvency with Guide to Enactment	Model law + guide to enactment
2000	Legislative Guide on Privately Financed Infrastructure Projects	legislative guide
2001	Model Law on Electronic Signatures with Guide to Enactment	Model law + guide to enactment
2001	Convention on the Assignment of Receivables in International Trade	Convention
2002	Model Law on International Commercial Conciliation with Guide to Enactment and Use	Model law + guide to enactment and use
2003	Model Legislative Provisions on Privately Financed Infrastructure Projects	Model legislative provisions
2005	Convention on the Use of Electronic Communications in International Contracts	Convention
2005	Legislative Guide on Insolvency Law	legislative guide

international payments,[28] procurement and infrastructure development,[29] international transport of goods,[30] and insolvency.[31] There currently are six active UNCITRAL working groups, whose topics range from insolvency[32] and secured transactions[33] to electronic commerce, procurement, transport law, and international arbitration and conciliation.[34] Consistent with its mandate to coordinate legal activities among international organizations working in the field of international trade law,[35] UNCITRAL also partners loosely from time to time with entities such as the Hague Convention, the World Bank and the International Monetary Fund (IMF) for the drafting and implementation of core areas of commercial law in transitional and developing countries.[36]

Table 1 lists UNCITRAL's work product over time. It also lists the legal technologies UNCITRAL employed for these projects. Table 1 demonstrates that UNCITRAL has historically relied on model laws and conventions to communicate to domestic legislatures.

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28. United Nations Convention on International Bills of Exchange and International Promissory Notes, Dec. 9, 1988, 28 I.L.M. 177 (1989), *available at* http://www.uncitral.org/pdf/english/texts/payments/billsnotes/X_12_e.pdf; *UNCITRAL Model Law on International Credit Transfers*, 32 I.L.M. 587 (1992), *available at* http://www.uncitral.org/pdf/english/texts/payments/transfers/ml-credittrans.pdf; United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 190, 35 I.L.M. 735, *available at* http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf; United Nations Convention on the Assignment of Receivables in International Trade, Dec. 12, 2001, G.A. Res. 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81 (2002), *available at* http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf.

29. UNCITRAL LEGAL GUIDE ON DRAWING UP INTERNATIONAL CONTRACTS FOR THE CONSTRUCTION OF INDUSTRIAL WORKS, U.N. Doc. A/CN.9/SER.B/2, U.N. Sales No. E.87.V.10 (1987), *available at* http://www.uncitral.org/pdf/english/texts/procurem/construction/lgconstr-e.pdf; *UNCITRAL Model Law on Procurement of Goods and Construction with Guide to Enactment* (1993), *available at* http://www.uncitral.org/pdf/english/texts/procurem/proc93/proc93.pdf; *UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment*, U.N. Doc. A/CN.9/403 (1994), *available at* http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf; UNCITRAL LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS, U.N. Doc. A/CN.9/SER.B/4, U.N. Sales No. E.01.V.4 (2000), *available at* http://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf; MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS, U.N. Sales No. E.04.V.11 (2003), *available at* http://www.uncitral.org/pdf/english/texts/procurem/pfip/model/annex1-e.pdf.

30. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3, 17 I.L.M. 608, *available at* http://www.uncitral.org/pdf/english/texts/transport/hamburg/XI_d_3_e.pdf (referred to as the Hamburg Rules); Unit of Account Provision and Provisions for the Adjustment of the Limit of Liability in International Transport and Liability Conventions (1982); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, Apr. 19, 1991, 30 I.L.M. 1503, *available at* http://www.uncitral.org/pdf/english/texts/transport/ott/X_13_e.pdf.

31. UNCITRAL, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3 (1997), *available at* http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf; *see also* INSOLVENCY GUIDE, *supra* note 16.

32. For a list and description of the ongoing work of the Insolvency Working Group, see Working Group V, http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited June 4, 2007).

33. The Working Group on Secured Transactions Law began its work on the Secured Transactions Guide in 2000 and projects the guide's completion in late 2007. For a list and description of the ongoing work of the Secured Transactions Working Group, see Working Group VI, http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html (last visited June 4, 2007).

34. For a description of Working Groups I, II, III, and IV and their ongoing projects and draft work product, see Working Groups, http://www.uncitral.org/uncitral/en/commission/working_groups.html (last visited June 4, 2007).

35. G.A. Res. 2205 (XXI), *supra* note 1.

36. For a description of UNCITRAL's coordination with other international organizations, see Coordination of Work on International Trade Law, http://www.uncitral.org/uncitral/en/tac/coordination.html (last visited June 4, 2007).

Over time, it has adopted two sets of rules, seven conventions, two recommendations, two sets of model legal provisions, eight model laws (four of which it combined with guides to enactment), one legal guide and one set of notes. Of the twenty-five international instruments produced by UNCITRAL since its inception, fifteen constitute model law or conventions. When we focus exclusively on legal technologies directed to domestic legislatures and other public audiences, however, these technologies nearly uniformly have taken the form of conventions, model laws or model legal provisions (with three exceptions). On this ground, we exclude UNCITRAL's product on arbitration and conciliation from this count, since these media are directed to private parties, including international arbitrators, rather than domestic legislatures. Similarly, we exclude UNCITRAL's Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works for nearly the same reason: it is directed to private parties, although in this case the intended audience includes private parties drafting construction contracts with an international focus. When it has spoken to domestic legislatures, UNCITRAL has overwhelmingly chosen to speak through conventions (of which it has produced seven), model laws (of which there are eight) and model legal provisions (of which there exist two sets). The only exceptions to this general observation include one recommendation (on the Legal Value of Computer Records) and two legislative guides (one on Privately Financed Infrastructure Projects and another on Insolvency Law).

UNCITRAL's reliance on conventions, model laws and model legal provisions seem well matched with its core mission to produce "the progressive harmonization and unification of the law of international trade."[37] Conventions necessarily unify the law that a convention covers, at least for those nations who accede to the convention; where numerous countries agree to be bound by the terms of the convention, the unification of law follows a broad path. Model laws can have similarly unifying effects, although only where national legislatures implement the model law provisions by adopting domestic legislation that closely tracks the model law.[38] Because model laws are not self-executing because they depend upon national legislatures to adopt implementing legislation for their effectiveness, they intrude less on national sovereignty.[39] In permitting national legislatures greater

37. G.A. Res. 2205 (XXI), *supra* note 1, pt. I. The resolution goes on to provide that:

> 8. The Commission shall further the progressive harmonization and unification of the law of international trade by:
>
> . . . .
>
> (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field. . . .

G.A. Res. 2205 (XXI), *supra* note 1, para. 8.

38. For a similar statement of the relationship between unification and conventions, harmonization, and model laws, see FAQ – Origin, Mandate and Composition of UNCITRAL, *supra* note 5 ("A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level.").

39. UNCITRAL's secretariat describes a model law in the following terms:

> A model law is a legislative text that is recommended to States for adoption as part of their national law. In incorporating the text of the model law in its system, a State may tailor the text of the law to its needs and, if appropriate, modify or leave out some of its provisions.

UNCITRAL, *Possible Future Work on Insolvency Law*, *supra* note 9, para. 162.

freedom to adjust the model law provisions to local social and political demands, model laws risk non-uniformity.[40] Where implementing legislation differs only in small ways from the model law, however, the distinction between a convention and a model law pertains not so much to the uniformity of the resulting legal rules but to the number of countries who agree to be bound.[41] The assumption is that fewer nations will sign and ratify a convention, given the lack of flexibility on its terms, than will support UNCITRAL's promulgation of a model law and adopt their own implementing legislation.

Table 1 also demonstrates that conventions and model laws retain importance, even today, evidencing UNCITRAL's continued commitment to the goals of unification and harmonization. UNCITRAL promulgated six conventions between 1978 and 2005.[42] Its reliance on model laws is also evenly spread over time; between 1982 and 2003, UNCITRAL adopted ten model laws or model legislative provisions.[43] Table 1 does not, however, demonstrate any obvious correlation between whether UNCITRAL chose to rely on a convention or model law and the subject matter of the instrument. Every Working Group has produced at least one model law. UNCITRAL was most likely to rely on conventions when international transport of goods[44] and international payments[45] were the topic, but there are also conventions regarding electronic commerce[46] and the international sales of goods.[47] Indeed, since 2000, UNCITRAL's work has been fairly evenly divided between conventions (2), model laws (3) and legislative guides (2).[48]

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40. *See id.* para. 162-63 ("A model law is an appropriate vehicle for modernization and unification of national laws when it is expected that States will wish or need to make adjustments to the uniform text to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary.").

41. In some instances, UNCITRAL understood from the promulgation of a model law that States would deviate from the text of the model. In a recent report, the Secretariat put the issue in this way:

> 165. Within the category of model laws prepared by UNCITRAL, two texts, the Model Law on International Commercial Arbitration and the Model Law on Electronic Commerce, illustrate the flexibility of the form. The Model Law on International Commercial Arbitration, which could be described as a procedural instrument, provides a discrete set of inter-dependent articles. It is recommended that, in adopting the Model Law, very few amendments or changes are required. Deviations from the Model Law text have, as a rule, very rarely been made by countries adopting enacting legislation, suggesting that it has been widely accepted as a coherent model text.
>
> 166. The Model Law on Electronic Commerce, on the other hand, is a more conceptual text. Legislation adopting or proposing to "enact" the Model Law largely reflects the principles of the text, but may depart from it in terms not only of drafting, but also in the combination of provisions adopted or proposed for adoption. As such, and so far as it is appropriate to distinguish between a model law and model provisions, the Model Law on Electronic Commerce perhaps can be regarded as establishing a set of model principles, which are drafted in the form of legislative provisions to facilitate consideration by legislators and assist in the development of laws.

Id. paras. 165-66.

42. *See supra* Table 1 (listing conventions promulgated by UNCITRAL during that time period).

43. *Id.* (listing model laws developed by UNCITRAL during that time period).

44. *See supra* note 30 (listing UNCITRAL conventions dealing with the international transport of goods).

45. *See supra* note 28 (indicating that there are three conventions and one model law on the topic of international payments).

46. *See supra* note 27 (indicating that UNCITRAL has promulgated one convention concerning electronic commerce).

47. *See* United Nations Convention on Contracts for the International Sale of Goods, *supra* note 24.

48. *See supra* Table 1 (listing conventions, model laws, and legislative guides created by UNCITRAL). This does not count work in progress, and so does not include ongoing work on the Legislative Guide on Secured Transactions Law, for example.

When we look at UNCITRAL's ongoing work, we see a similar pattern. There are six Working Groups, five of which met during 2006. Working Groups I, II, and III are engaged in revisions to an earlier UNCITRAL model law or convention. Working Group I (procurement and project finance) continues to meet to discuss possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services.[49] Working Group II (international arbitration and conciliation) actively is considering revisions to the UNCITRAL Arbitration Rules.[50] Moreover, in its meeting in June and July of 2006, the Commission adopted amendments to the Model Law on International Commercial Arbitration that Working Group II had approved in its earlier meetings.[51] Working Group III (transport law) is engaged in a review of a draft convention on the carriage of goods by sea.[52] Only Working Groups V (insolvency) and VI (secured transactions) are not working on revisions to a model law or convention. The Secured Transaction Working Group has been working steadily since 2000 on its Legislative Guide on Secured Transactions Law, with its work projected to be complete by some time in 2007.[53] Following ratification of its Legislative Guide on Insolvency Law by the Commission and the UN's General Assembly, UNCITRAL recently directed the Insolvency Working Group to consider three additional topics: the treatment of corporate groups, particularly in cross-border insolvency proceedings; financing of cross-border insolvency proceedings; and court-to-court communication and the use of protocols in cross-border insolvency proceedings.[54]

A. The Shift Toward Modernization

What can be said about UNCITRAL's work that did not take the form of a convention or a model law but still was addressed to legislatures and national actors (rather than private parties)? For instance, what of the Recommendation on the Legal Value of Computer Records, promulgated by UNCITRAL in 1985? We view this Recommendation as UNCITRAL's first effort at modernizing the law of trade, and note that with this international instrument UNCITRAL walked very gingerly into the topic of "automatic data processing," computer records and electronic communications. Comprising no more than two pages in length, the Recommendation amounts to little more than a "Recommendation" to "Governments" that they review their "legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission," as well as any "legal requirements" that "trade related documents" or "documents for submission to governments" be "in writing" or signed.[55] The preamble paragraphs of the Recommendation make clear that, although the commercial practices associated with electronic communications were rapidly changing, domestic commercial laws had not.[56]

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49. For a description of UNCITRAL's ongoing work on procurement, see Working Group I, http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html (last visited June 4, 2007).

50. For a description of UNCITRAL's ongoing work on arbitration, see Working Group II, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited June 4, 2007).

51. *Id.*

52. For a description of the UNCITRAL's ongoing work on transport law, see Working Group III, http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (last visited June 4, 2007).

53. *See* G.A. Res. 2205 (XX1), *supra* note 1.

54. For a description of the ongoing work of the Insolvency Working Group, see Working Group V, *supra* note 32. Because the newly-reconstituted Insolvency Working Group has yet to meet, it is unclear whether the Group conceives of its mandate as one to draft a convention, model law, legislative guide, or other document (or to revise either the Model Law on Cross-Border Insolvencies or the Legislative Guide on Insolvency Law, or both).

55. *UNCITRAL Recommendation on the Legal Value of Computer Records*, *supra* note 27.

56. *Id.* It reads:

Because there were no existing domestic laws on the books, there was nothing particular to harmonize; instead, there was a sense that the technology was poised to mushroom in importance and a fear that international trade would be held back if commercial law was not brought up to speed with these commercial practices. The case for "in with the new" modernization was, thus, first made with this Recommendation.

The concepts of electronic commerce and, indeed, of UNCITRAL as an agent of modernization, were so new that eleven years passed before UNCITRAL next spoke on the topic of the computerization of commercial practices,[57] but since then, UNCITRAL has promulgated two model laws and one convention on the topic[58] and the term "modernization" is regularly employed with reference to these instruments and the topic of electronic communication and electronic commerce. For example, the UNCITRAL Model Law on Electronic Commerce explains its history and background as "prepared in response to a major change in the means by which communications are made between parties using computerized or other modern techniques in doing business"[59] and, thus, "to enhance the needed modernization of legislation."[60] The Guide to Enactment of the Model Law on Electronic Commerce also employs the rhetoric of modernization, explaining the need both for the Model Law[61] and for the accompanying Guide to Enactment[62] in terms of a need to

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> *Noting* that the use of automatic data processing (ADP) is about to become firmly established throughout the world in many phases of domestic and international trade as well as in administrative services, [and]
>
> *Noting* also that legal rules based upon pre-ADP paper-based means of documenting international trade may create an obstacle to such use of ADP in that they lead to legal insecurity or impede the efficient use of ADP where its use is otherwise justified . . . .

Id.

57. It may be unfair to say that UNCITRAL waited eleven years to speak on the topic of electronic communications. Its Legal Guide on Electronic Funds Transfers (1987) and Model Law on International Credit Transfers (1992) focused on the needs of electronic commerce. UNCITRAL LEGAL GUIDE ON ELECTRONIC FUNDS TRANSFERS, Sales No. E.87.V.9 (1987); *UNCITRAL Model Law on International Credit Transfers*, *supra* note 28; *see* UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT, *supra* note 27, at 9 (discussing the background to the UNCITRAL Model Law on Electronic Signatures with Guide to Enactment).

58. In 1996, UNCITRAL adopted a Model Law on Electronic Commerce with Guide to Enactment; in 2001, it promulgated the Model Law on Electronic Signatures with Guide to Enactment. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, *supra* note 27; UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT, *supra* note 27. Most recently, in 2005, the UN adopted its Convention on the Use of Electronic Communications in International Contracts. United Nations Convention on the Use of Electronic Communications in International Contracts, *supra* note 27; *see supra* Table 1 (listing the above provisions with dates of enactment).

59. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, *supra* note 27, at 64.

60. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, *supra* note 27, at 67.

61. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, *supra* note 27, at 16 (describing the objectives of the Model Law as premised on the emergence of this "modern" technology: "The use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as technical supports such as information highways and the INTERNET become more widely accessible."); *id.*, *supra* note 27, at 64 (explaining the history and background of the Model Law as follows: "The Model Law is intended to serve as a model to countries for the evaluation and modernization of certain aspects of their laws and practices in the field of commercial relationships involving the use of computerized or other modern communication techniques, and for the establishment of relevant legislation where none presently exist.").

62. *Id.*, *supra* note 27, at 15 (explaining the need for a Guide to Enactment on the grounds that "the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory

modernize. Similarly, the UNCITRAL Model Law on Electronic Signatures notes, in its Guide to Enactment, that it "is designed to assist States in establishing a modern, harmonized and fair legislative framework to address more effectively the issues of electronic signatures."[63] The United Nations Convention on the Use of Electronic Communications in International Contracts also justifies its need on the grounds that it "may help States gain access to modern trade routes."[64]

An interest in the modernization of trade law, including revisions to existing UNCITRAL product, currently dominates the Working Groups' work in progress and, frequently, the focus is on "in with the new" modernization intended to enable reliance on recent applications of electronic media to new industries. For example, among the reasons Working Group I (procurement and project finance) provides for its consideration of revisions to the Model Law on Procurement of Goods, Construction and Services is the need to add provisions in the Model Law addressing procurement by electronic means (for example, by email or over the Internet). Similarly, Working Group II (international arbitration and conciliation) proposed amendments to the Model Law on International Commercial Arbitration and is considering revisions to UNCITRAL's Arbitration Rules partly to address issues raised by online dispute resolution. In addition, the work of Working Group III (international transport) on a draft convention on the carriage of goods by sea addresses, among other issues, questions regarding the validity and enforceability of electronic transportation documents.

References to the need for modernization are not limited to "in with the new" modernization. In its 1999 report on Possible Future Work on Insolvency Law, the UNCITRAL Secretariat noted that an important justification for authorizing the Working Group on Insolvency Law to begin its work on the Legislative Guide on Insolvency Law "was to modernize insolvency practices and laws."[65] With this reference, the term "modernization" took on a new meaning. Unlike UNCITRAL work to modernize commercial laws so that they reflect modern commercial practices involving electronic means of communication and commerce, the Legislative Guide on Insolvency Laws sought to "modernize insolvency practices and laws" by recommending to national actors that they reject their existing domestic insolvency laws to more modern ones. "Out with the old" modernization is not limited to insolvency reform. Similarly, a 2000 report on the then-current activities and possible future work of the Working Group on Secured Transactions justified authorizing it to begin work on the Legislative Guide on Secured Transactions Law on the grounds that "modernization and optimization of secured credit law can lead to expanded economic development and, therefore, promote the general welfare."[66] In every

information would be provided to executive branches of Governments and legislators to assist them in using the Model Law."). This Guide to Enactment also as much as admits harmonization had no role in its provisions. *Id.*, *supra* note 27, at 16 ("While a few countries have adopted specific provisions to deal with certain aspects of electronic commerce, there exists no legislation dealing with electronic commerce as a whole.").

63. UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT, *supra* note 27, at 8.

64. United Nations Convention on the Use of Electronic Communications in International Contracts, *supra* note 27, at 1, 25 ("*Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes. . . .").

65. UNCITRAL, *Possible Future Work on Insolvency Law*, *supra* note 9, para. 2.

66. UNCITRAL, Working Group on Secured Transactions Law, *Security Interests: Current Activities and Possible Future Work*, para. 45, U.N. Doc. A/CN.9/475 (April 27, 2000) [hereinafter UNCITRAL, *Security Interests*], *available at* http http://www.uncitral.org/uncitral/en/commission/sessions/33rd.html (follow "A/CN.9/475 - Security Interests - Current activities and possible future work" hyperlink).

year since 2000, the Commission's yearly report to the UN General Assembly reaffirms "its belief that the progressive modernization and harmonization of international trade law" both "reduce[es] or remov[es] legal obstacles to the flow of international trade" and "contribute[s] significantly to universal economic cooperation among all States on a basis of equality, equity and common interest . . . ."[67]

By now, UNCITRAL has incorporated the modernization of the law of international trade within its core mission. Although the term "modernization" nowhere appears in the UN Resolution establishing UNCITRAL,[68] UNCITRAL's mandate to "modernize" the law of international trade has become deeply ingrained in the ethos of the Commission so much so that UNCITRAL describes its "business" as "the modernization and harmonization of rules on international business."[69]

This focus on the modernization of the law of trade infuses more than UNCITRAL's substantive choices about what projects to adopt. It also affects the legal technologies through which UNCITRAL articulates its recommendations to domestic legislatures. The development of more flexible international technologies somewhat derives from the expanded list of topics on which UNCITRAL has focused. In a 1981 Report to the Commission, UNCITRAL's Secretariat reports success on its initial "four fields of interest: the law of international sales of goods, carriage of goods by sea, international negotiable instruments and international commercial arbitration."[70] In each of these fields, the Secretariat reported the adoption of "comprehensive texts," but went on to opine that "[t]he subject matter of the Commission's new programme of work does not always require a comprehensive solution. The difference in magnitude of the problems considered may have an impact of the final form which the Commission's work might take."[71] Specifically, the Secretariat suggested that, if it was not feasible for the Commission to propose "a text ready for adoption," then it might instead adopt a "guidelines approach" on the grounds that "the development of guidelines or recommendations may be an appropriate first objective,

67. G.A. Res. 58/75, U.N. GAOR, 58th Sess., Supp. No. 17, U.N. Doc. A/RES/58/75 (Dec. 9, 2003), *available at* http://www.uncitral.org/uncitral/en/GA/resolutions.html (follow "A/RES/58/75" hyperlink). Similar language appears in the General Assembly resolutions to adopt the Commission's reports on sessions between 2000 and 2005. The reference to "modernization" does not appear in reports pre-dating 2000. The report reaffirms "its convictions that the progressive harmonization and unification of the law of international trade" would both "reduce[e] or remov[e] legal obstacles to the flow of international trade" and "contribute significantly to universal economic cooperation among all States on a basis of equality . . . ." *Id.* For a complete list of these reports of the General Assembly, see General Assembly Resolutions, http://www.uncitral.org/uncitral/en/GA/resolutions.html (list visited June 4, 2007).

68. *See* G.A. Res. 2205 (XXI), *supra* note 1, pt. I (establishing a UN Commission "which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade. . . . "). Perhaps the term "modernization" derives from emphasis on the need for "progressive" harmonization and unification of trade law.

69. Welcome to the UNCITRAL Web Site, *supra* note 2. A similar statement appears at the index to UNCITRAL's website. Welcome to the UNCITRAL Web Site: Highlights, http://www.uncitral.org/uncitral/index.html. The "frequently asked questions" section of the website defines both "harmonization" and "unification" and provides examples of each. FAQ – Origin, Mandate and Composition of UNCITRAL, *supra* note 5. However, nowhere does the website define "modernization."

70. Report of the United Nations Commission on International Trade Law on the Work of Its Fourteenth Session, U.N. GAOR, 36th Sess., Supp. No. 17, U.N. Doc. A/36/17 (1981), *available at* http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/a-36-17-e.pdf.

71. *Id.* at 251.

leaving until later a decision as to whether further actions are desirable."[72] By 1985, UNCITRAL promulgated its Recommendation on the Legal Value of Computer Records.[73]

Neither a convention nor a model law would seem appropriate tools when law reform looks to reject out-moded law in favor of new, more modern text. These sorts of international instruments are ill-suited to directing national actors to reform existing bodies of law because, to some degree, they demand adherence to the terms of the international instrument. For example, national actors face a binary choice with regard to a convention: accede to the terms of the convention in full or fail to follow it at all. Model laws permit slightly greater freedom, in that domestic legislatures may adopt implementing legislation that fails to adopt all of the provisions of the model law, but it stretches the concept of a "model" law to invite national actors to pick and choose among the provisions of a model law. Not surprisingly, then, we find that both the Insolvency and Secured Transactions Working Groups consciously chose to work on legislative guides rather than a model law or convention.[74] In its Reports to the Working Groups on Possible Future Work on Insolvency and Secured Transactions Laws, intended to convince the Commission to take on the task of drafting these legislative guides, UNCITRAL's Secretariat talks openly about the need for flexibility in modernizing these areas of the law, particularly in light of the global dissensus the drafters faced. Both reports emphasize the need for a legislative guide rather than a convention or model law.

When reporting to the Working Group on Insolvency Law, the Secretariat put the issue this way:

> It is not always possible to draft specific uniform provisions in a suitable form, such as a convention or a model law, for incorporation into national legal systems. One reason may be, for example, that national legal systems use widely disparate legislative techniques and approaches for solving a given issue, or that States are not yet ready to agree on a common approach or a common rule. A further reason may be that not all States perceive a sufficiently urgent need to find a uniform solution to a particular issue.[75]

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72. *Id.*; *see also id.* at 252 (further discussing advantages and disadvantages of conventions, model laws, and recommendations).

73. We do not claim that UNCITRAL has not relied on conventions or model laws when it seeks to "modernize" global commercial laws to accord with modern commercial practices; it has. For examples of "in with the new" modernization accomplished by means of conventions and model laws, see *supra* note 27 (referring to Model Law on Electronic Commerce with Guide to Enactment (1996); Model Law on Electronic Signatures with Guide to Enactment (2001); and United Nations Convention on the Use of Electronic Communications in International Contracts (2005)). Our claim is that recommendations, legislative guides, and other more flexible international instruments have been instrumental in UNCITRAL's shift from the harmonization and unification to the modernization and harmonization of trade law, not that they are a requirement of modernization.

74. However, legislative guides are the invention of neither the Working Group on Insolvency nor on Secured Transactions Law. UNCITRAL promulgated earlier legislative guides with its 1987 Legal Guide on Drawing up International Contracts for the Construction of Industrial Works and, later, in 2000, its Legislative Guide on Privately Financed Infrastructure Projects. In this arena, the Legislative Guide on Privately Financed Infrastructure Projects served as a stepping stone toward the adoption of Model Legislative Provisions on Privately Financed Infrastructure Projects. A report from Working Group I (procurement and project finance) explains the relationship between the Legislative Guide and the Model Legislative Provisions as clear cut. [Find Authority]. Work on the Model Legislative Provisions followed nearly on the heels of the Guide, although it was agreed to carve out several subjects from the scope of topics previously covered in the Guide for fear that consensus would not be reached on these topics in the Model Legislative Provisions.

75. UNCITRAL, *Possible Future Work on Insolvency Law*, *supra* note 9, para. 167.

In this event, "it may be appropriate not to attempt to elaborate a text in the form of a model statute, but to limit the action to a set of principles or legislative recommendations."[76] In other words, given the Working Group's need for flexibility, it may be best to produce a legislative guide rather than a model law.

A similar debate on the form of reform occurred within the Secured Transactions Working Group. Before beginning to draft the Legislative Guide on Secured Transactions Law, Working Group VI debated the merits of a "convention unifying substantive rules governing security interests," a "convention establishing uniform conflict rules," a "convention or model law creating an international security interest," a "statement of principles accompanied by a model law" and "more limited solutions," a "statement of principles accompanied by a legal guide."[77] The Secured Transactions Working Group favored the latter both because "at present the national legal systems are still too divergent" and because a convention or model law would not be "flexible enough to take into account the varying circumstances of the countries of the world . . . ."[78]

B. Redefining Harmonization to Meet the Challenges of Modernization

UNCITRAL reconciled its goal to promote "in with the new" and "out with the old" modernization with its core mission – the "progressive harmonization and unification" of the law of trade—by expanding the definition of harmonization to subsume modernizing law reform. Currently, UNCITRAL defines harmonization "as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions,"[79] but it did not always conceive of harmonization so expansively.

UN documents pre-dating the creation of UNCITRAL define "harmonization" in a way that approximates or, at least, approaches "unification." In the year before UNCITRAL was created, the UN General Assembly requested the Secretary-General to submit to it a comprehensive report on the need for UNCITRAL.[80] This Resolution 2102 (XX) explained the UN's preliminary interest in establishing a UN-connected international organization on trade law based on a recognition "that conflicts and divergencies arising from the laws of different States in matters relating to international trade constitute an obstacle to the development of world trade . . . ."[81] It described the mission of such an organization as focused on the "progressive unification and harmonization"[82] of trade law "by promoting the

76. *Id.* para. 168.

77. UNCITRAL, *Security Interests*, *supra* note 66, paras. 46-62.

78. UNCITRAL, *Security Interests*, *supra* note 66, para. 46.

79. FAQ – Origin, Mandate and Composition of UNCITRAL, *supra* note 5. This definition seems intended to disassociate "harmonization" from "unification." In the same "frequently asked questions" section of the UNCITRAL's website, we are told that "'[u]nification' may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions." *Id.* These definitions go on to distinguish harmonization from unification in terms of the international instruments most likely to be employed to pursue each interest: "A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level." *Id.*

80. G.A. Res. 2102 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 20, 1965), *available at* http://www.un.org/documents/ga/res/20/ares20.htm (follow "2102 (XX)" hyperlink).

81. *Id.*

82. *Id.* Note the inversion of these terms by the time Resolution 2205 (XXI) establishes UNCITRAL; this phrase shifts from "progressive unification and harmonization" to "progressive harmonization and unification." *Compare* G.A. Res. 2205 (XXI), *supra* note 1, *with* G.A. Res. 2102 (XX), *supra* note 80.

adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures . . . ."[83]

In response to Resolution 2102 (XX), the Secretary-General commissioned a report from Prof. Clive M. Schmitthoff of the City of London College, a prominent scholar on the law of international trade and conflicts of law, and, in September 1966, Prof. Schmitthoff submitted a lengthy report to the Secretary-General.[84] Like Resolution 2102 (XX), the Schmitthoff Report referred to "the progressive harmonization and unification of the law of international trade . . . ."[85] It referred to "harmonization" as a technique for "reduc[ing] conflicts and divergencies arising [in] international trade [law],"[86] and described unification as "[t]he most effective method of conflict avoidance . . . ."[87] Implicit in the Schmitthoff Report is a view of harmonization as the convergence of legal rules toward a unified code of conduct; in this view, harmonization would, over the long run, approach a unification of legal rules.

This substance-focused definition of harmonization also permeates UN Resolution 2205 (XXI), which subsequently established UNCITRAL.[88] When it created UNCITRAL, the General Assembly "*[r]eaffirm[ed] its conviction* that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade."[89] The decision to establish a Commission was based on a belief that "the extensive development of international trade" was best advanced by removing "divergencies arising from the laws of different States," differences which would dissipate "by promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures . . . ."[90] This is a "hard" definition of harmonization that views harmonization in terms of the convergence of non-uniform national laws around an agreed upon international standard. It is at the same time, however, a definition of harmonization couched in terms of the pragmatic and progressive ends it envisions: harmonization is sought in order to enable international trade and not for its own sake; international trade is viewed as favoring "the

83. G.A. Res. 2205 (XXI), *supra* note 1.

84. *See* The Secretary-General, *Report of the Secretary-General*, para. 2, *delivered to the General Assembly*, U.N. Doc. A/6396 & Add.1, Add.2 (Sept. 23, 1966), *available at* http://www.uncitral.org/pdf/english/yearbooks/archives-e/A-6396-E.pdf.

85. *Id.* para. 8.

86. *Id.* paras. 15-17 (surveying existing work in the field of harmonization and unification of the law of international trade and reviewing legal techniques employed in "reduc[ing] conflicts and divergencies arising [in] international trade [law]" and finding two basic techniques: "choice of law rules" and the "harmonization and unification of substantive rules").

87. *Id.* para. 18. The Schmitthoff Report refers to "harmonization and unification" as the "'preventive' method" of private international law because it "has the purpose of avoiding law conflicts" thus preventing the need to rely on choice of law rules. *Id.* para. 17. It describes both harmonization and unification as achievable because "[t]he similarity of the law of international trade transcends the division of the world between countries of free enterprise and countries of centrally planned economy, and between the legal families of the civil law of Roman inspiration and the common law of English tradition." *Id.* para. 22. The report identifies the primary obstacles to harmonization and unification, not as dissensus in the law of trade, but rather the existence of a plethora of international law reforming institutions whose work overlapped and whose membership represented developed nations, predominantly in Europe and North America, and not developing nations. *Id.* para. 210. The Schmitthoff Report recommended the formation of a UN-related international law reform entity on the grounds that it would provide more inclusive representation of the nation's legal and economic systems and, thus, better coordinate among other international actors. *Id.* para. 225. His conception of UNCITRAL, thus, was primarily as a coordinating entity that derived the representative benefits of the UN.

88. G.A. Res. 2205 (XXI), *supra* note 1, pt. I.

89. *Id.*

90. *Id.*

interests of all peoples" and "particularly those of developing countries" because "international trade co-operation among States is an important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security . . . ."[91]

Even this "hard" definition of harmonization leaves room for ambiguity. Did UNCITRAL view harmonization as intended to remove all dissensus among national laws, or simply to reduce the number of divergencies and their impact on international trade? Some support for a "unification over time" definition of harmonization can be found in the form of legal technologies employed by UNCITRAL: Conventions look for a single set of principles or legal rules that can garner international agreement; a model law differs from a convention more in terms of its means of implementation than in the number of options and alternatives it leaves open for national deliberation.[92] UNCITRAL has relied predominantly on conventions and model laws when addressing national actors. We also find support for a "reduction of differences over time" perspective on harmonization, although evidence of this "softer" definition of harmonization emerges only slowly over time.

UNCITRAL's first international instruments directed to national actors are conventions—namely, the Convention on Carriage of Goods by Sea and the Convention on Contracts for the International Sale of Goods, adopted in 1978 and 1980, respectively—but two years later, in 1982, UNCITRAL promulgated the Unit of Account Provision and Provisions for the Adjustment of the Limit of Liability in International Transport and Liability Conventions, model legal provisions but not a model law. Model legal provisions do not attempt to cover an area of commercial law in its entirety. Because they intentionally leave some portion of the topic for non-uniform national laws, they are best described as intended to reduce rather than eradicate divergencies among national laws; they look for harmony on only a limited set of issues. Nonetheless, model legal provisions do offer national actors a single set of options around which to converge.

The next UNCITRAL product directed to a public audience, the Recommendation on the Legal Value of Computer Records, dated 1985, cannot be described as seeking either uniformity or harmonization on the topic of computerization in commercial transactions. As noted earlier,[93] the Recommendation speaks only in broad generalities and merely recommends that national actors review and update existing laws to account for technological developments. This Recommendation should not be viewed as a rejection by UNCITRAL of an interest in reaching international consensus on a single unified set of principles on the topics of computerization and electronic commerce, for the Recommendation was followed, nearly immediately, with a long string of conventions[94] and model laws.[95] We note, however, that the model law projects changed during this period.

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91. *Id.*

92. But even this unifying ideal suffers from practical limitations. Neither conventions nor model laws are self-enforcing. Conventions require national actors to sign, ratify, and accede to the terms of the convention. Model laws leave even more discretion to national actors' decisions to abide by its terms; model laws are not binding on States unless domestic legislatures adopt implementing legislation. With either technology, uniformity is achieved one nation at a time, and, thus, "universally" only over time. Moreover, UNCITRAL's practice of consensual decisionmaking limits the extent of the uniformity that either form of international instrument can achieve. To reach consensus on the terms of a convention or model law, UNCITRAL may agree not to cover some more controversial topic; these gaps in the convention or model law permit divergent national practices to persist, contrary to the need for "one unified" rule on the topic.

93. *See supra* notes 55-56 and accompanying text.

94. These are the Convention on International Bills of Exchange and International Promissory Notes (1988), Convention on the Liability of Operators of Transport Terminals in International Trade (1991), and Convention on Independent Guarantees and Stand-by Letters of Credit (1995). *See supra* Table 1.

95. These are the Model Law on International Credit Transfers (1992); Model Law on Procurement of Goods

Beginning with the Model Law on Procurement of Goods and Construction, all subsequent model law projects are joined with an accompanying Guide to Enactment.

We see UNCITRAL's reliance on guides to enactment as connected to its recognition of the pragmatic difficulties of promoting "the progressive harmonization and unification" of the law of trade by means of a model law. While on their face harmonizing, model laws reduce the divergencies among national laws only if national actors enact implementing legislation that replicates the terms of the model law. UNCITRAL recognized that national delegates' willingness to adopt the text of a model law as an UNCITRAL product did not guarantee that nations would accede to the terms of the convention or adopt legislation modeled on the UNCITRAL model law. Guides to enactment are intended to explain the model law to a domestic legislature; they advocate enactment of implementing legislation.

If Guides are used to bolster the "one rule" espoused in the model law, they would be consistent with a "unification over time" concept of harmonization, but UNCITRAL used its guides to enactment for other purposes, as well. Over time, UNCITRAL recognized that domestic legislatures could do more than enact legislation to implement a model law or reject its terms in toto. Where a Working Group could not reach consensus on some provisions in a model law, it needn't abandon the model law project in favor of a more limited set of model legal provisions that did not cover the field. For example, it could include alternative provisions in the model law (option A; option B), and leave it to domestic legislatures to choose between the two;[96] alternatively, a model law might on its face allow for domestic legislatures to adopt exclusions from its terms to reflect social or cultural norms contrary to the international norms expressed in the model law.[97] In this event, guides to enactment developed a secondary purpose: With a model law that offered an array of choices to national audiences, the accompanying guide to enactment explained how alternatives might work in practice and the competing policies and principles embedded in the choices offered.

Alternative model law provisions and open-ended exclusions permitted by the terms of the model law promote a "softer," "reduction of differences over time" concept of harmonization. By 1999, UNCITRAL's Secretariat put the issue in this way:

> 165. Within the category of model laws prepared by UNCITRAL, two texts, the Model Law on International Commercial Arbitration and the Model Law on Electronic Commerce, illustrate the flexibility of the form. The Model Law on International Commercial Arbitration, which could be described as a procedural instrument, provides a discrete set of inter-dependent articles. It is recommended that, in adopting the Model Law, very few amendments or changes are required. Deviations from the Model Law text have, as a rule, very rarely been made by countries adopting enacting legislation, suggesting that it has been widely accepted as a coherent model text.
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> 166. The Model Law on Electronic Commerce, on the other hand, is a more conceptual text. Legislation adopting or proposing to "enact" the Model Law largely reflects the principles of the text, but may depart from it in terms not only

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and Construction with Guide to Enactment (1993); Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994); Model Law on Electronic Commerce with Guide to Enactment (1996); and Model Law on Cross-Border Insolvency with Guide to Enactment (1997). *See supra* Table 1.

96. *See* Working Group VI, *supra* note 33.

97. *See* UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, *supra* note 27, arts. 6-8, 11-12, 15, 17.

> of drafting, but also in the combination of provisions adopted or proposed for adoption. As such, and so far as it is appropriate to distinguish between a model law and model provisions, the Model Law on Electronic Commerce perhaps can be regarded as establishing a set of model principles, which are drafted in the form of legislative provisions to facilitate consideration by legislators and assist in the development of laws.[98]

This is a pragmatic acceptance of the limitations of second-order decisionmaking in that these "more conceptual" model laws, such as the Model Law on Electronic Commerce, only indirectly and over the long haul accomplish the "harmonization" needed to promote international trade. This "conceptual" form of model law does not offer unification, even in the long run.[99] But rather than despair of the inherent constraints of international lawmaking, UNCITRAL accepts these limits as part of the challenge.

Once UNCITRAL shifts its gaze from the accepted wisdom that a convention unifies and a model law harmonizes to the notion that unification and harmonization are to be judged by looking, not at international instruments, but at domestic practices, it is only a small step to the conclusion that a legal technology, such as a legislative guide, might also harmonize domestic practices even though a legislative guide provides national actors with more than one or two options. A recognition that what matters is, not so much harmonization "on the books," but rather harmonization "in practice," might also constitute an acceptance that the form of "the book"—that is, the form of the legal technology or international instrument employed by the decisionmaking institution – is less important than its practical consequences.

A changing context and a challenging diversity in the world's legal systems stimulated UNCITRAL to shift its mission and invent new forms of modernizing instruments that vindicate that mission. What, then, are the formal properties of a legislative guide that allow it to function in ways that other UNCITRAL technologies do not? What is it about a legislative guide that might stimulate modernization concomitantly with enhancing global trade across an enormous diversity of the world's legal systems? We turn to these questions in the next section.

II.

Based on a multi-faceted empirical study of UNCITRAL's Working Group on Insolvency,[100] the interplay of two broad formal strategies enabled UNCITRAL to craft a

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98. UNCITRAL, *Possible Future Work on Insolvency Law*, *supra* note 9, paras. 165-66.

99. *See* UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, *supra* note 27, at 18:

> "9. The objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion of certain situations from the scope of articles 6, 7, 8, 11, 12, 15 and 17, an enacting State may well decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law."

100. The empirical sources for this study include the classic social science methods of (a) participant observation (attendance at all meetings of the Working Group, the Commission, and expert groups held between formal meetings), (b) interviews of participants—staff, delegates, observers—at all stages of deliberations from the Commission's initial exploratory meeting to its final vote, and (c) statistical analysis of all speech turns by delegates at all formal meetings. The sources also include a legal analysis of the Working Group's texts, most importantly its final authorized version, and those of UNCITRAL from its founding.

technology capable of modernizing exceedingly diverse national laws.[101] First, it created a combination of design elements within the structure of the Guide itself. Second, it invented a sophisticated array of rule-types that could be deployed, combined and recombined, as the consensus-building challenge demanded.

A. The Design of the Legislative Guide on Insolvency Law.

The content and structure of the Legislative Guide on Insolvency Law exemplify the formal capacities of a technology to facilitate agreement among a broad diversity of actors and interests in a contentious policy domain. Following an introduction and glossary, the Guide is divided into two parts. Part One of the Insolvency Guide articulates broad policies and purposes common to all insolvency laws. Drawing on earlier works promulgated by the International Monetary Fund, the Asian Development Bank and the World Bank, Part One identifies nine "key objectives," providing high order principles that orient the remainder of the Guide. They are accompanied by a word of caution regarding the tensions among these fundamental purposes. Part Two of the Guide details the core provisions for an effective and efficient insolvency law. It comprises the lion's share of the Guide, and provides a detailed discussion of the core provisions of a modern insolvency law. Divided into eight sections (and twenty subparts), it covers topics ranging from commencement to the closing of a liquidation or reorganization proceeding. Cognizant of the difficulty of absorbing this amount of detail, the Guide takes great pains to organize this commentary with indices and headings and to sum up each section with Recommendations that derive from the lengthier commentary that precedes them. The Guide provides 198 numbered recommendations divided among the twenty topics it covers. Occasionally, the Guide provides commentary on a topic (institutional framework; corporate groups), but no recommendations.

Three formal elements of the Guide demonstrate how the Secretariat crafted a product that could embrace existing extremes of substantive and institutional variation.

1. *Glossary.* The Guide begins with a Glossary. What first appears as a technical aid to an understanding of the text, in fact functions as a formal mechanism for defusing national contests over legal concepts and terminology. UNCITRAL both adopts and creates a universal vocabulary to standardize usage within the Guide. By relying on no particular country's terminology, and instead creating its own internal language, the Guide adeptly promotes "out with the old" modernization of insolvency laws without the need for explicit rejection of terms of concepts. In addition to the obvious political advantage of avoiding identification of UNCITRAL's products with any particular legal system, this also has the juridical effect of detaching national actors, such a legislatures and judges, from standard interpretations of terms in their own legal traditions.[102]

The Glossary accomplishes this feat of transcending the particularity of the national with several techniques. It does adopt terms that are terminological universals, such as

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101. For a discussion of the degree of dissensus that separates national laws on insolvency practices, see Block-Lieb & Halliday, *supra* note 19.

102. Interview 2065A (unpublished interview, on file with authors). The interviewee stated:

> If you use a particular word in this actual text, the judge in one legal system will give it its own meaning, and we don't want the judge to give it that historical meaning. We want to give the international meaning, which is then spelled out. So we want not to confuse the user of the text by using a text which he learned it in law school.

Id.

"debtor" and "creditor. " These terms are common to all legal families. In other instances, UNCITRAL embraces terms that are associated with a politically important actor. For example, in both the Guide and the Model Law on Cross-Border Insolvency, UNCITRAL solved a problem of jurisdiction over cross-border insolvencies by incorporating the term "centre of main interests," which was first employed in the European Union's draft Convention on Cross-Border Insolvency.[103] Although its Regulation on Cross-Border Insolvency was not adopted by the EU and its member states until after promulgation of UNCITRAL's work product on the same topic, UNCITRAL successfully co-opted a term first coined by a "competing" international lawmaking body.

The Guide also excludes terms that are associated with one particular insolvency system: even though concepts of US bankruptcy law informed many of the debates over the Guide, the Guide does not uniformly adopt terms of art from the US Bankruptcy Code or practice. For example, the Guide addresses the treatment of contracts, but refers to the continuation of such contracts rather than to their assumption as is true under US law. As another example, the Guide recommends that stay or moratorium of creditor collection activity ensue upon the commencement of an insolvency proceeding, but nowhere refers to is as an "automatic stay."[104]

In addition, the Guide invents terms to avoid aligning itself with one country and to provide universal umbrella concepts that transcend the practices associated with particular insolvency regimes. UNCITRAL's term "insolvency representative" corresponds with no such usage in any legal system, yet it encompasses every configuration of insolvency actor in the world's insolvency systems, including not only roles (e.g., trustees, liquidators, administrators, insolvency practitioners) but also professionals (e.g., lawyers, accountants, bureaucrats). UNCITRAL's term "court" is also a universal defined to include any kind of supervising agency, including both administrative agencies and judicial decisionmakers.

At times, this invented language launders terms that might appear too derivative of one country's system. Rather than adopt the US term of "adequate protection," the Glossary adopts the concept but with another term—"protection of value."[105] And in the text of the Guide, rather than referring to the US concept of "pre-packaged" reorganization plans to describe a practice of reorganization, UNCITRAL adopts the phrase "expedited procedures," even though the underlying meaning is virtually identical. Similarly, retention of title transactions, which has created a major sticking point for UNCITRAL's Working Group on Secured Transactions Law, are referred to only obliquely. Rather than refer to the transaction, the Guide refers only to the subject of the transaction, and then talks in terms of "third party-owned assets," which are in turn defined to include, among other assets, those that are the subject of a retention of title transaction.

UNCITRAL's manipulation of form to solve problems that are inherently political extends to terms and concepts. In the former case, it embraces a diversity of substance or practice with the substitution or invention of a term. This may be as little as substituting a label or as much as inventing a higher order term. In the latter case, it invents a new concept to solve a distinctively transnational problem, such as deciding on jurisdiction in cross-border insolvency cases.

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103. European Union Convention on Insolvency Proceedings, Nov. 23, 1995, 35 I.L.M. 1223.

104. Later versions removed one or two terms too closely associated with one country, such as the U.S. concept of "super-priority," or the English and European concept of "retention of title."

105. INSOLVENCY GUIDE, *supra* note 16, at 6. In this case, the definition of "protection of value" does include in parentheses the statement that "(in some jurisdictions referred to as 'adequate protection.')". *Id.*

2. Commentary. The Working Group on Insolvency pitched the text of its Legislative Guide on Insolvency Law between a minimalist threshold, which would go no farther than producing a comparative report, and a maximal threshold, which would include only statutory language. Most of the twenty substantive sections in the Guide present commentary followed by recommendations.

The commentary combines several elements. First, it usually identifies an issue and indicates why it is important. Second, it may offer a principle in relation to the issue and justify the principle (e.g., "it is desirable that the commencement standard be transparent and certain . . . ."[106] "an insolvency law will need to clearly identify the assets" because this will produce "transparency and predictability . . . .").[107] Third, where there is considerable cross-national variation on an issue, the commentary presents a comparative analysis, without ever identifying countries. For example, on standards for commencing an insolvency proceeding, the Guide distinguishes between a cash flow and a balance sheet test of insolvency.[108] Fourth, it discusses the benefits and deficiencies of the alternatives, focusing both on juridical and practical advantages and disadvantages.[109] Finally, it often expresses a preference (e.g., it is increasingly recognized that a certain course of action will have more advantages to the economy).[110] Or, if two possibilities are acceptable, the Guide may explicate how the two versions might be related to each other. For example, on the test for insolvency, it explains why a cash flow test might be acceptable, and goes on to note that a balance sheet test should not be used alone but only in combination with a cash flow test.[111]

The commentary thereby serves both internal and external functions. For purposes of reaching agreement among the Working Group, the commentary provides a space where disagreements can be defused by signaling that dissent has been heard and that points of view have been fairly aired for debate. By including contending views in the commentary, even if one of those views will be preferred over others, groups may be pacified and country delegates can signal to their ministries that their opinions were expressed and recorded. As a result, "out with the old" modernization can implicitly reject out-moded approaches by failing to include them within the recommendations offered by the Guide, but cushion this rejection in the recommendations with explanatory text in the commentary that may describe in great detail the pros and cons of the rejected approach. For purposes of implementation, the commentary has a significant didactic role for it expresses a global consensus on what issues must be addressed in legislation, it explains to national law-makers the costs and benefits of alternatives, and it offers a guide to judges, providing reasoning to support recommendations.[112]

Within the commentary, UNCITRAL engages in a rhetoric of self-validation. UNCITRAL must rely on persuasion and the intrinsic merits of a product in order to facilitate adoption by national law-makers. The Guide makes claims about the value of adopting it for investment, economic development, and integration into the world economy. On specific provisions, the Guide uses three additional techniques of persuasion of the rightness of a particular preference in the Guide and of extrinsic reasons for its adoption.

106. *Id.* pt. 2, I(B)(1), para. 21.
107. *Id.* pt. 2, II(A)(1), para. 3.
108. *Id.* pt. 2, I(B)(2)(a), (b), paras. 23-26.
109. INSOLVENCY GUIDE, *supra* note 16, pt. 2, I(B)(2)(a), (b), paras. 23-26.
110. *Id.* pt. 2, I(B)(2)(a), (b), paras. 23-26.
111. *Id.* pt. 2, I(B)(2)(a), (b), paras. 23-26.
112. *See* Interview 2071, *supra* note 8.

First, the Guide endeavors where possible to signal that a recommendation reflects *universal consensus* or at least a heavy preponderance of practice. It is said, for instance, that exceptions for banking and insurance companies from coverage by insolvency laws are "widely reflected in insolvency laws"[113] or that insolvency laws "generally permit" an application for liquidation to be made by debtors, creditors, and government agencies.[114]

Second, if universality cannot be claimed, the Guide relies on a *quantitative criterion.* The commentary states that "many insolvency laws identify the minimum threshold of support required from creditors,"[115] or that a standard is "used extensively,"[116] or that the "most common approach" to application of the stay is that it begins at commencement of proceedings.[117]

Third, the Guide occasionally invokes the notion of a *trend.* On the highly contentious issue of whether secured property should be included in a bankruptcy estate, the world divides probably with a preponderance of countries in favor of its exclusion. Yet the move towards reorganization requires that secured property be brought the bankruptcy estate, even if a minority of countries follows that principle. Although the Guide takes the minority view, it concludes that this view is "increasingly recognized" and that inclusion has economic advantages over exclusion.

The juxtaposition of the discursive commentary with the statutory-like language of the recommendations gives the Guide added flexibility. Depending on the shifting sense of the Working Group, materials on which consensus could not be reached might be shifted from the recommendations back to the commentary; conversely, materials thought to be critical by influential delegations could be made more imperative by moving them from the commentary into the form of a recommendation. The content moves to the formal locus where the micro-politics of Working Group negotiation permit.

3. *Recommendations.* At the end of each substantive section of commentary, the Guide includes recommendations. Recommendations are always prefaced by a set of purposes, which themselves have been negotiated by delegates.[118] These statements of purposes range from a single sentence to four to six specific goals, providing both an introduction to the recommendations they precede and a statement of their intended reach.

The commentary, purposes and recommendations work together to guide domestic legislatures to adopt modern insolvency laws. The commentary provides a detailed examination of each of the topics on which the Guide expresses recommendations. The key objectives and purpose provisions offer national law-makers a checklist of issues and goals to guide law-making.

We now turn to examine in detail the recommendations. The variety of forms in the recommendations provides the Guide with a repertoire of rule-types that alone or in combination enable the Guide to adjust for the degree of diversity and dissent on issues.

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113. INSOLVENCY GUIDE, *supra* note 16, pt. 2, I(A)(1)(c), para. 11, at 41.

114. *Id.* pt. 2, I(B)(3)(a), para. 32, at 49.

115. *Id.* pt. 2, IV(A)(5)(g), para. 47.

116. *Id.* pt. 2, I(B)(2)(a), para. 23, at 45 (referring to the liquidity or cash flow test as "used extensively").

117. *Id.* pt. 2, II(B)(5)(c), para. 46, at 90.

118. *Id.* at 233 (stating that the "purpose of provisions relating to the reorganization plan" is "(a) To facilitate the rescue of businesses subject to the insolvency law, thereby preserving employment and, in appropriate cases, protecting investment . . . . ").

B. Arrays of Rule-Types.

In the Legislative Guide on Insolvency Law, the UNCITRAL Secretariat created a variety of rule-types that can be arrayed along a spectrum of specificity that ranges from broad statements of commercial norms to explicitly detailed language ready for enactment:

1. *Imperative recommendations* propose that national legislatures take specific types of action whose content is expressly stated. These subsume several sub-categories of norms.

a. *Substantive recommendations* take the general form: "There should be a rule [about the substantive entitlements of participants in an insolvency proceeding] that [contains particular substantive provisions]." For instance, on the all-important scope of an insolvency law, a key substantive recommendation reads: "The insolvency law should govern insolvency proceedings against all debtors that engage in economic activities, whether natural or legal persons, including state-owned enterprises, and whether or not those economic activities are conducted for profit."[119]

b. *Procedural recommendations* take a similar form: "There should be a rule [about how an insolvency proceeding should be conducted] that [contains particular procedural elements]." For example, on commencement of an insolvency proceeding, a procedural recommendation provides that: "The law generally should specify that, where a creditor makes the application for commencement: *(a)* Notice of the application promptly is given to the debtor . . . ."[120]

c. *Conditional recommendations.* Some imperative recommendations are *conditional* and provide roughly as follows: "If a rule [about some substantive or procedural topic of insolvency law] is enacted, then it should [have the following content]." For example, in the provisions on the confirmation of a reorganization plan, the Guide recognized that not all laws require that all classes must approve a plan. Even so, it directed that in this subset of nations:

> Where the insolvency law does not require a plan to be approved by all classes, the insolvency law should address the treatment of those classes which do not vote to approve a plan that is otherwise approved by the requisite classes. That treatment should be consistent with the grounds set forth in recommendation 152.[121]

A conditional recommendation can be distinguished from a substantive or procedural recommendation in that, while conditional recommendations identify the content of language that might be adopted by a domestic legislature, they leave the question of whether such a rule should be enacted to local discretion. This has the tactical effect that a *conditional recommendation* can be combined with any number of other rules. Substantive and procedural rules might both be qualified by the condition, "if you have a substantive/procedural rule, then it should include this content." Conditional recommendations give UNCITRAL the capacity to acknowledge local contingencies and variations in an orderly way.

Imperative recommendations have in common that they all provide domestic legislatures with proposed statutory language. If a legislative guide were comprised of only imperative recommendations, it would closely resemble a model law.

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119. INSOLVENCY GUIDE, *supra* note 16, Recommendation 8, at 44.
120. *Id.* Recommendation 19, at 65.
121. *Id.* Recommendation 151, at 236.

2. C*onstraining recommendations* are not explicitly directive of particular legislative language, although they are conducive to convergence. Often they point in a direction and then give choices. We discern at least three variants of these.

a. *Baseline recommendations* take the form – "there should be a rule on a topic, and it should include at least the following elements (with the implication that other elements might also be included)." For instance, in the section on expedited proceedings, baseline recommendations set a floor or minimal standard for commencement of such a proceeding:

> The insolvency law should specify that the following additional materials should accompany an application for commencement of expedited reorganization proceedings:
>
> *(a)* The reorganization plan and disclosure statement;
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> *(b)* A description of the voluntary restructuring negotiations that preceded the making of the application for commencement, including the information provided to affected creditors to enable them to make an informed decision about the plan;
>
> *(c)* Certification that unaffected creditors are being paid in the ordinary course of business and that the plan does not modify or affect the rights or claims of unaffected creditors without their agreement;
>
> *(d)* A report of the votes of affected classes of creditors demonstrating that those classes have accepted the plan by the majorities specified in the insolvency law;
>
> *(e)* A financial analysis or other evidence that demonstrates that the plan satisfies all applicable requirements for reorganization; and
>
> *(f)* A list of the members of any creditor committee formed during the course of the voluntary restructuring negotiations.[122]

This non-exclusive list—like many found in the Guide—merely sets minimum standards to be found in enacting legislation.

b. *Permissive recommendations* take the form – "a country may adopt a rule that includes [X], [Y] and [Z]." Permissive recommendations are often supported by explanatory footnoted materials and commentary. They enable UNCITRAL to acknowledge the acceptability of a strongly-held preference by a nation-state, permitting it to give some guidance without endorsing the position for all nations. For example, on the protection of debtors and creditors when a stay is placed on creditors' efforts to collect on claims, the Guide grants courts power in those countries that so choose and indicates what those powers might be:

> The insolvency law may provide the court with the power to:

122. *Id.* Recommendation 162, at 245.

> *(a)* Require the applicant for provisional measures to provide indemnification and, where appropriate, to pay costs or fees; or
>
> *(b)* Impose sanctions in connection with an application for provisional measures.[123]

The Guide often combines permissive recommendations with others, such as a substantive rule that has an imperative element plus a permissive element.

c. *Norms of minimalism* instead take the form—"if there is to be a rule on a topic, or an exception to the rule on a topic, it should be kept to a minimum. " There are many examples in the Guide of the norm of minimalism. When discussing the choice of law rules that should govern an insolvency proceeding, Recommendation 31 establishes the general rule, when it provides that:

> The insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus)* should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects.[124]

Recommendations 32 and 33 provide two exceptions to the general rule: one pertaining to the rights and obligations of the participants in a payment or settlement system or in a regulated financial market (imperative recommendation) and another pertaining to the rejection, continuation and modification of labor contracts (permissive recommendation). On the topic of additional exceptions to the general rule in Recommendation 31, the Guide also turns to the norm of minimalism: "Any exceptions additional to recommendation 32 and 33 should be limited in number and be clearly set forth or noted in the insolvency law."

The same norm of minimalism dictates the contours of Recommendation 188, on the topic of secured claims:

> The insolvency law should specify that a secured claim should be satisfied from the encumbered asset in liquidation or pursuant to a reorganization plan, subject to claims that are superior in priority to the secured claim, if any. Claims superior in priority to secured claims should be minimized and clearly set forth in the insolvency law.[125]

Recommendations applying the norm of minimalism frequently also rely on the norm of disclosure or some other specifying recommendation, as noted below.

3. *Focusing recommendations* look only to sharpen the focus of any law adopted by a domestic legislature. We identify two of these.

a. *Architectural recommendations* state that—"there should be rule on [some specific topic of insolvency law]," but do not specify what the rule should be. On the topic of plans of reorganization, Recommendation 185 speaks of the need to create classes of creditors and to make clear what priority they should be accorded, but it does not indicate how it should

123. *Id.* Recommendation 40, at 100.

124. *Id.* Recommendation 31, at 73.

125. INSOLVENCY GUIDE, *supra* note 16, Recommendation 188, at 275.

be done: "The insolvency law should specify the classes of creditors that will be affected by the commencement of insolvency proceedings and the treatment of those classes in terms of priority and distribution."[126]

The Working Group viewed it as important for an insolvency law to provide for the appointment of a committee, but did not feel the need to provide detailed directions on how that appointment should be accomplished in an insolvency law. If the architectural recommendation is very detailed about the subject of the rule on which it views the need for legislation, then it may differ only subtly from an imperative recommendation. If, on the other hand the architectural recommendation speaks in broad generalities, it more closely resembles a norm of disclosure.

b. *Norms of disclosure* indicate only that some rule "should be clearly and expressly set forth in the insolvency law." For example, in Recommendation 186 on priority claims in distributions, a norm of minimalism is immediately followed by a norm of disclosure in Recommendation 187. Together they read as follows:

> The insolvency law should establish the order in which claims are to be satisfied from the estate.[127]

> The insolvency law should minimize the priorities accorded to unsecured claims. The law should set out clearly the classes of claims, if any, that will be entitled to be satisfied in priority in insolvency proceedings.[128]

The norm of disclosure often works hand in hand with the norm of minimalism.

4. *Policy recommendations* identify and affirm broad normative statements of insolvency law. These are the highest order principles in the Guide. They are found primarily in a list of eight governing norms or key objectives. These include the need to provide certainty in the marketplace sufficient to permit economic stability and growth, the desirability maximizing asset values and striking a balance between liquidation and reorganization, and the need to provide timely, efficient and impartial resolution of an insolvency proceeding and to establish a framework for resolution of cross-border insolvency proceedings.

Although these norms might, at first glance, be dismissed as little more than blandishments of "motherhood and apple pie," in fact, they are much more than that. Each addresses potentially ubiquitous problems in the functioning of bankruptcy systems.

B. Rule-Types and Prospects of Consensual Decisionmaking.

A simple tally of all rule-types used in the Insolvency Legislative Guide yields ninety-one substantive recommendations, twenty procedural recommendations, twenty-two conditional recommendations, forty baseline recommendations, thirty-nine permissive recommendations, fifty-eight architectural recommendations, twenty-six norms of disclosure, seven norms of minimalism and seven policy norms.[129] By this count, the

126. *Id.* Recommendation 185, at 275.

127. *Id.* Recommendation 186, at 275.

128. *Id.* Recommendation 187, at 275.

129. The arithmetically astute reader will have noted that this tally exceeds the 198 numbered recommendations specified in the Legislative Guide on Insolvency Law. We exceed 198 because some of the

overwhelming majority of the recommendations made in the Insolvency Guide are, thus, imperative recommendations. We found this count surprising, given that the Working Group consciously chose to frame this as a Legislative Guide rather than a model law or convention. Except in how they are framed, there is little difference between model law provisions and imperative recommendations. From this perspective, the Insolvency Guide appears a largely a harmonizing instrument.

We do not minimize the commercial importance of constraining and focusing recommendations, however. Both are critical to the goal of modernization. They each step more lightly than imperative recommendations on national sovereignty, and should in this way serve UNCITRAL's interest in not being seen to infringe unnecessarily on controversial issues of insolvency law. Moreover, even broadly stated norms serve important commercial purposes in the Guide. Delegates at the Working Group were often heard to extol the commercial benefits of transparency and predictability in an insolvency law. Norms of disclosure directly accomplish this more limited goal when delegates could not, for one reason or another, agree on the substance that an insolvency law should be recommended to follow. Not surprisingly, we observe that norms of disclosure are most likely to be employed where the subject involves insolvency law issues that infringe on subjects of social, cultural or political significance.

The array of linguistic forms in which recommendations can be expressed thereby gives UNCITRAL the flexibility in a Legislative Guide to adjust its level of prescription to the level of consensus among the most influential blocs of delegates. This flexibility provides UNCITRAL the room to raise and lower levels of prescriptive force between and within clusters of recommendations on substantive topics. Through the flexibility obtained by this range of technologies and rule-types, UNCITRAL avoids either extreme of enunciating norms that are effectively meaningless or are so precise as to engender a backlash through encroachment on sovereignty. It permits UNCITRAL to achieve as much harmonization as necessary to the task of modernizing the insolvency laws of national actors. The Legislative Guide on Insolvency Law, thus, wavers between a "unification over time" vision of harmonization and one that merely attempts a "reduction of differences over time."

III.

The flexibility needed to modernize an area of the law—and to accomplish law reform (especially law reform on a global level) in the face of divergencies in the law—comes at a price: flexibility may reduce the unifying influence of the law reform effort. In this section, we explain how a legislative guide containing both commentary and a range of recommendations afforded UNCITRAL the ability to both modernize and harmonize insolvency law.

A. Modernization

How did its use of a legislative guide permit UNCITRAL to "modernize" insolvency law, despite its need for consensual decisionmaking, despite enormous divergences among

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numbered recommendations contain more than one sentence; we count each sentence in the recommendations as constituting a separate recommendation. By this count, there are 310 distinct recommendations in the Guide. For a matrix identifying and characterizing each of the recommendations contained in the Guide, see [website created by Prof. Block-Lieb] Find Authority.

national laws on the topic of insolvency, and despite the propensity for insolvency laws to butt up against important social and political issues of national interest? In a companion piece, we argue that this range of rule types, nested in a wider formal script, provided UNCITRAL with needed flexibility to accomplish "out with the old" (and in some cases "in with the new") modernization in an area of commercial law on which there existed few global norms and great disagreements cross-nationally over the policy implications of bankruptcy law.[130] The Legislative Guide on Insolvency Law achieved this feat of diplomacy in two steps, with both moves highly dependent on the formal structure of the Guide.

First, the Guide builds on an international consensus on the desirability of enabling the reorganization of a viable commercial entity.[131] The eight policy norms—those key objectives based on earlier work done by the IMF and World Bank and found in Part One of the Legislative Guide—were instrumental in identifying reorganization as a central component in any "modern" insolvency statute and in providing policy-oriented touchstones to which the Guide could return, time and again, to justify both the tenor and content of reorganization-friendly recommendations. Where an issue might affect the success of a reorganization proceeding, we find that the Guide is more likely to deviate from global norms and more likely to do so using an imperative recommendation. Thus, recommendations were crafted with an eye on whether they were central to promoting the reorganization of viable commercial entities. Where necessary to advance reorganization, the Working Group was more likely to reach for imperative recommendations. For example, despite global dissensus on the topics, the Guide contains imperative recommendations on: the breadth of property in an insolvency estate (including property subject to a security interest);[132] the scope of any stay upon commencement (including secured creditors' collection efforts);[133] the use of collateral during an insolvency proceeding;[134] the need for and contours of post-commencement finance of an insolvency estate;[135] the standards for confirmation of a plan of reorganization[136] and for expedited reorganization proceedings.[137]

In other places, the Guide steps back from adopting imperative recommendations in areas that might be viewed as important to a debtor-friendly reorganization proceeding. The Guide contains several permissive recommendations on topics central to U.S.-style reorganization. For example, it provides that an insolvency law "may" provide for a debtor-in-possession reorganization proceeding in which the debtor's management is not removed from its management of day-to-day operations and is entrusted with obligations ordinarily vested in an insolvency representative, such as the obligations to negotiate a plan of reorganization.[138] The Guide similarly "permits" [139] but does not require the creation of a creditors' committee, stating only that an insolvency law "should facilitate the active participation of creditors in insolvency proceedings such as through a creditor committee, a special representative or other mechanism for representation."[140]

130. Block-Lieb & Halliday, *supra* note 19.
131. *See id.*
132. *See* INSOLVENCY GUIDE, *supra* note 16, Recommendation 35, at 82.
133. *Id.* Recommendations 39(a), at 99-100, & 46(b)-(c), at 102.
134. *Id.* Recommendation 52, at 111.
135. *Id.* Recommendations 63-68, at 118-19.
136. *Id.* Recommendations 139-159, at 234-38.
137. *Id.* Recommendations 160-164, at 244-46.
138. INSOLVENCY GUIDE, *supra* note 16, Recommendation 112(a), at 173.
139. *Id.* Recommendation 130, at 204.
140. *Id.* Recommendation 129, at 203.

Second, the range of available rule-types permitted the Working Group to avoid issues on which consensus was unlikely and which were likely to stall or impede production of the Legislative Guide.[141] We find that the Working Group used softer, less constraining rule-types to minimize the likelihood that dissenting nations might abandon the central tendency of the Guide, particularly where cultural and social issues were at stake. In general, where issues of social, political or cultural overlapped with insolvency law, such as with questions of the priority to be accorded to workers' claims or the desirability of various exceptions to a stay or to the avoiding powers, the Guide spoke softly by employing norms of minimalism and norms of disclosure rather than imperative recommendations.[142] The Guide also avoided a hot-button that had divided the deliberations of the Working Group on Secured Transactions on its Legislative Guide—the characterization of retention of title transactions in insolvency proceedings—by deferring to the secured transactions or other non-insolvency law of the enacting State rather than articulating an insolvency law solution to the issue.[143] The Guide declined to decide whether a debtor's management should be liable for trading while insolvent, or the proper treatment of corporate groups in insolvency proceedings, by discussing these issues in commentary but not reaching any recommendation on the topic.[144] In each case, the Guide employs an approach that is a more nuanced one than could have been accomplished in a model law, where sidestepping an issue involves avoiding any discussion of it in the legal technology. The flexible range of rule-type available in the Legislative Guide permitted UNCITRAL to emphasize the important insolvency-law issues on these hot-button topics (i.e., minimize statutory priorities for otherwise unsecured creditors; keep socially constructed exceptions to a stay or to the avoiding powers to a minimum and disclose them in the insolvency law itself; refer to non-insolvency law to differentiate between a transactions as a retention of title transaction or a financing transaction), rather than remaining completely silent on the topic.

The flexibility inherent in the Guide—in its commentary and its range of rule types—permitted UNCITRAL to promulgate a Legislative Guide on Insolvency Law that accomplished "out with the old" modernization of an area of law on which there was disagreement, not only on the technical details of the law, but also on its social underpinnings. However, this accomplishment might have been subversive if flexibility undermined the "unification over time" effect of the Guide. Did modernization subvert harmonization?

B. Harmonization

On the face of it, the Legislative Guide on Insolvency Law is only half-heartedly harmonizing. After all, only 133 of its 310 recommendations are drafted as imperative recommendations. Thus, even if we were to assume (unrealistically) that all domestic legislatures would agree to implement all of the imperative recommendations in the Insolvency Guide, the Guide would harmonize with only slightly more than half of the recommendations.[145] If national actors similarly were assumed to follow the constraining[146]

141. *See* Block-Lieb & Halliday, *supra* note 19.

142. *Id.* (listing these hot buttons).

143. *Id.*

144. *Id.*

145. By their nature, imperative recommendations have the greatest potential for achieving harmonization: if, on a global basis, domestic legislatures were to adopt each of the these imperative recommendations as a part of their insolvency laws, the world's insolvency laws would harmonize on the legislative topics covered by the imperative recommendations.

and focusing[147] recommendations and policy norms in the Guide,[148] we would not expect to see much reduction in the "divergencies arising from the laws of different States,"[149] at least not for some time. But it would be a mistake not to view the Legislative Guide on Insolvency Law potentially as a harmonizing technology. While a guide is not as homogenizing as a convention, or even as a model law, it nevertheless presses countries towards global statutory norms where they will find differing levels of global consensus.

First, nearly half of the Guide's recommendations (133 of 310) *are* framed as imperative recommendations. And another forty baseline and thirty-nine permissive recommendations offer domestic legislatures concrete and detailed recommendations on the substance of an insolvency law. That a range in rule-types was employed does not, on its own, create tension with the goal of harmonization since many, if not most, of the recommendations in the Insolvency Guide provide detailed substantive rules for a domestic legislature to adopt.

Moreover, where UNCITRAL viewed an issue as important, it employed imperative recommendations to express the tenor and nature of its support. This is especially true with recommendations touching on the desirability of reorganization or viewed as essential to a reorganization-friendly insolvency regime.[150] In addition, there are more than several conditional and permissive recommendations important (but not central) to an insolvency law intended to facilitate reorganization proceedings, such as a recommendation providing that an insolvency law "may" provide for a debtor-in-possession regime and "may" institute a system in which a "committee of creditors" provides a check on the powers of a debtor in

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146. By definition, constraining recommendations identify a limited range of permissible variation among domestic insolvency laws; as a result, we would expect that convergence, a form of harmonization, would result if domestic legislatures were to follow the recommendation. But the strength of this conclusion varies depending on the nature of the constraining recommendation at issue. Baseline recommendations unequivocally lead to greater convergence, regardless of the level of dissensus among national law. Where the baseline recommendation excludes a standard approach in existence around the globe, the convergence effect is likely to be substantial. Norms of minimalism, which contain only broad statements that exceptions should be kept to a minimum, might also slowly lead to convergence. As legislatures "keep exceptions to a minimum," they may converge around a global consensus regarding the bare minimum, essential exceptions. But a norm of minimalism does not, on its face, require this result. Permissive recommendations are even less likely to result in harmonization. Permissive recommendations may not lead to greater convergence, because, unlike baseline recommendations that identify a limited range of acceptable possibilities, permissive recommendations open up rather than constrain substantive choices. This is especially true if the permissive recommendation indicates that an insolvency law "may" provide for a rule that is inconsistent with global norms.

Where the recommendation "permits" results that fly in the face of global consensus, however, the Guide may have modernized insolvency law but has, at the same time, produced less uniformity in the law. In some instances, permissive recommendations state that an insolvency law "may" adopt a rule that the commentary identifies as out of step with the global consensus (and generally does so in order to promote the goal of promoting reorganization); in others, the permissive recommendation reflects the Working Groups' reluctance to "choose" among approaches. In the first case, the permissive recommendation is de-harmonizing; in the second, the permissive recommendation simply permits a disharmonious status quo to persist. If a permissive recommendation identifies an otherwise controversial legislative position as one among several possible approaches that UNCITRAL approves, the Guide moves away from convergence around the status quo; it may, at the same time, however, serve as a hard push toward convergence at a new global equilibrium—stirring the pot may eventually push the global standard toward a newly convergent position over time, but only in the long run.

147. The harmonizing influence of architectural recommendations in the Guide is unclear, since they provide no substantive direction to domestic legislatures. Similarly, norms of disclosure will have not converging influence, on their own, unless we also assume that simply by requiring a legislature to place its insolvency laws "on the books" it will discourage non-convergent rules from being adopted.

148. Like focusing recommendations, the harmonizing influence of policy norms is unclear since they, too, offer little in the way of content.

149. G.A. Res. 2205 (XXI), *supra* note 1.

150. *See supra* notes 119-121 and accompanying text.

possession.[151] These permissive recommendations may not "require" a domestic legislature to adopt implementing statutory language, but where a legislature is so inclined the Guide provides detailed guidance on how to achieve such a result.

The Legislative Guide, thus, simultaneously accomplishes different levels of harmonization. The 119 imperative recommendations provide "unification over time" with the specificity and range that closely resemble model legal provisions coupled with a guide to enactment. The remaining recommendations – those that constrain, focus and set policy norms – may not lead to a single international standard, even when considered in light of long stretches of time, because they sit comfortably within a range of national variation. Nonetheless, these more flexible recommendations nearly all "reduce differences over time," and so "harmonize" consistent with the goal of modernization. Even the recommendations that are devoid of content, such as the architectural recommendations, and the norms of minimalism and disclosure, "harmonize" in the broadest sense of the term "as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions."[152]

The Guide makes a persuasive case for the modernization of insolvency law, but only time will tell which recommendations nations will implement and, thus, whether it will have a harmonizing effect. Regardless of whether the Guide should be viewed as an instrument of "unification over time" or "reduction of differences over time"—and it is both—the harmonizing effect of the Legislative Guide on Insolvency Law will only be felt "over time." To assess the harmonizing effect of the Guide, we will need to wait to judge the influence of the Guide "on the ground;" we will need to study the legislation it inspires and the implementation of that legislation by courts, insolvency representatives and insolvency professionals.

IV.

We have argued that over the forty years since its inception, UNCITRAL both broadened and shifted its mission. While created to promote the "progressive harmonization and unification" of the law of trade, it now also views itself as an agent for the "modernization and harmonization" of trade law. The goals are not disconnected. Both follow from an interest in promoting an expansion of international trade, particularly trade with developing and under-developed nations. At its inception, UNCITRAL was conceived around the notion that "divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade."[153] It now understands that these "divergencies" constitute only one "obstacle to the development of world trade" and perhaps a relatively unimportant obstacle at that. By embracing "modernization," UNCITRAL looks to tackle obstacles that go beyond divergencies among national laws. It has taken on the charge of law reform writ large.

In order to execute its expanded shift in mission, UNCITRAL found it necessary to invent new legal technologies. Table 1 demonstrates that UNCITRAL has employed, not only conventions, model laws and model legal provisions, but also recommendations, guides to enactment, legal guides and legislative guides. We have shown that the Legislative Guide on Insolvency Law is a skillfully crafted set of norms that enabled UNCITRAL concomitantly to push towards an overarching global norm—the value of corporate

151. *See supra* note 123 and accompanying text.

152. FAQ – Origin, Mandate and Composition of UNCITRAL, *supra* note 5.

153. G.A. Res. 2205 (XXI), *supra* note 1.

reorganization as a complement to corporate liquidation—while allowing significant flexibility for national lawmakers to modernize their own laws in ways appropriately adapted to variations in legal families, economic circumstances, and policy preferences, among others. As a result, this explicitly modernizing Legislative Guide also aspires to some measure of harmonization, thus, enabling UNCITRAL to lean towards the current primacy it accords modernization without losing touch with its original mandate.

Nevertheless, one or two puzzles remain that warrant further comment. For the most part, we have explained UNCITRAL's shift in mission as an adaptation to changes in the world of commerce. However, another story might be told that is consistent with the experience of many organizations. UNCITRAL is nested within at least three organizational contexts. It is a very small entity within the United Nations system. To justify its own existence, to expand its budget, and to enable the UN itself to demonstrate its responsiveness in a changing world, UNCITRAL may have been compelled to show its relevance to a world where transitions from command to market economies required new law, or where financial crises required legal institution-building, or where the legal infrastructure of markets goes far beyond the substantive domains of its founding. If this could not be managed within the constraints of its founding mandate, then its senior management was pressed to reinvent its mission and technologies. To the extent that UNCITRAL could show itself responsive to demands upon the United Nations that it be more proactive in the legal construction of markets, then UNCITRAL would ensure its viability and perhaps even expansion within the UN.

UNCITRAL also exists in a field of organizations concerned with law reform. Since the Asian financial crisis, a variety of international organizations—international financial institutions such as the World Bank and IMF, regional development banks such as the Asian Development Bank, clubs of nations such as the G-7, G-22 and OECD—together with expert professional associations (in the insolvency field these prominently include INSOL, IBA, and ABA) all moved into fields of law reform thought to be salient to developing countries and transitional economies. Insolvency and secured transactions featured prominently among these. In the insolvency field, for a short period it seemed as if UNCITRAL would be marginalized by initiatives of the World Bank, IMF and Asian Development Bank. But perception was short lived. UNCITRAL's flexible technology, coupled with its legitimate deliberative process, gave it an edge that no other organization could match. "Modernization" provided the substantive reach to treat national bankruptcy law. Reliance on a legislative guide format gave it the flexibility to be salient to the entire world, while also integrating constructively—perhaps even transcending—the previous efforts of potential rivals. The flexibility of a legislative guide enabled UNCITRAL to be competitive with other international organizations and ultimately to emerge with a global standard to which its potential rivals acceded.

By the same logic, the matching of a flexible technology to an expansive goal permitted UNCITRAL's leadership to take onto its agenda issues at the heart of the ideological consensus about law and markets. Both the Washington Consensus and post-Washington Consensus champion the regulatory import of law for the liberalization of national markets as well as the integration of global markets. Once bankruptcy law became part of the agreed-upon bundle of a "modern" regulatory apparatus, then UNCITRAL's expanded mission gave it a legitimate claim to enter the field of global lawmakers with a technology that would balance convergence towards the ideological center with national variation at the global periphery. By this means, UNCITRAL's organizational adaptations justified its position at the table of global agents for market regulation. At the same time, it could hold itself out as responsive to sovereign interests that would likely not subscribe to all convergent provisions in a set of global norms.

Nevertheless, it is not only the legal technology that displays UNCITRAL's adroitness in adapting to its various organizational contexts, but also the choice of "modernization" as a goal. A notion of the "modern" is a social construction. As a concept, it appears self-validating. Inherent in its meaning are the notions of progress and development, of advancement and maturity. Paradoxically, part of its power lies precisely in its vacuity; it is relatively empty of meaning and may, thereby, be infused with content as circumstances require. For instance, it could mean something temporal (i.e., it is modern simply because it is different from something older or pre-modern); it could mean something comparative (i.e., this country claims to be "modern" in comparison to that country which is not); or it could be functional (i.e., it achieves a function hitherto missing in a legal or economic system). We have seen that in practice UNCITRAL uses it in two ways—"modern" means filling a gap in the law with contemporaneous content ("in with the new") or replacing former law ("out with the old").

Something of this adeptness in mobilization of the term can be seen within the Legislative Guide on Insolvency itself. The Guide shows itself to be substantively modern by adopting an approach to bankruptcy in its policy norms that is consistent with the world's most powerful economy and perhaps most "modern" nation—the primacy of reorganization. That the IMF and World Bank—themselves close to the policy preferences of Washington—also adopt this norm merely reinforces UNCITRAL's modernizing credentials. Furthermore, we have seen that the Guide engages in rhetorical gestures that seem intended to underline its "modern" auspices. Frequently the commentary suggests choices based on "modern developments and trends." Repeatedly the Guide encourages a path of action that would be consistent with a "modern economy," a "modern insolvency regime," a "modern commercial law framework," and a "modern, interconnected world." In all these ways a very small international organization legitimates itself and its product through links to powerful nations that label themselves "advanced" and to the international organizations that urge other nations towards the modernity inherent in an advanced status.

But it should also be clear that the label of "modernity" relates to power. It is powerful countries that can adopt the label for themselves and then project their definition of modernity onto countries they label as not modern. In this sense, UNCITRAL's adoption of the label may be viewed as the appropriation of claims made by powerful nations and institutions that they stand at the vanguard of development and, indeed, have the responsibility or even the right to make those claims pervasive throughout the "unmodern" world. This symbolic alignment of UNCITRAL with economic and political power thereby earns it an increased capacity to set global agendas and to earn the respect of global actors for the "modern" norms it produces.

The very ambiguity in the term "modern" may also serve a useful pragmatic function. We have argued that UNCITRAL has long recognized the improbability of far-reaching unification of laws, particularly in contentious policy areas. If widely adopted, the Legislative Guide on Insolvency is also likely to be harmonizing at least in its convergence on reorganization as a policy goal. Beyond this, the vagueness of "modernization" as a goal allows global convergences around a set of variations on the global theme such that "modern" insolvency systems might variously approximate those of the United States, Great Britain, Australia, Germany, or France, among others—all nations indisputably modern by their own claims and yet with perceptibly different choices on the options presented by the Legislative Guide.

As a rhetorical strategy and form of organizational adaptation, therefore, UNCITRAL's shift away from the goal of unification towards that of modernization simultaneously solves a number of problems. Insofar as it is conducive to harmonization,

then modernization keeps UNCITRAL faithful to the spirit of its original mission to facilitate global trade by reducing the divergence of national laws. Insofar as it seeks to remain a player in the world of global normmaking institutions, modernization provides UNCITRAL the maneuverability to adjust to changing global agendas. Insofar as UNCITRAL seeks to demonstrate its own relevance, and that of its parent organization, then modernization gives it reach. And insofar as it tolerates national diversity around overarching policy objectives, UNCITRAL can balance its deference to the global center with responsiveness to the global periphery. All these moves are enabled by the technological inventiveness of the Legislative Guide on Insolvency.