Modified Universalism as Customary International Law*

Irit Mevorach**

Introduction

"Modified universalism" is to date the dominant approach for addressing cross-border insolvency.[1] Heavily influenced by the scholarship and advocacy of Professor Jay Westbrook,[2] it has evolved into a set of norms that can guide parties in actual cases. Adapted to the reality of a world divided into different legal systems and myriad business structures and insolvency scenarios, modified universalism seeks to achieve global collective processes with efficient levels of centralization of insolvency proceedings. It thus requires the identification of a home country where proceedings would be centralized, except where it is efficient to open additional proceedings elsewhere.[3] This outbound aspect of modified universalism is complemented by a choice-of-law norm that, in principle, refers to the *lex fori concursus* (the law of the forum) with limited exceptions.[4] Norms concerning

---

* This Article is adapted from IRIT MEVORACH, THE FUTURE OF CROSS-BORDER INSOLVENCY: OVERCOMING BIASES AND CLOSING GAPS 80–126 (2018), with permission from Oxford University Press.

** Professor of International Commercial Law, School of Law, Faculty of Social Sciences, University of Nottingham, U.K. I would like to thank Ian Fletcher, John Pottow, Janis Sarra, Adrian Walters, Dino Kritsiotis, Marko Milanovic, Sandesh Sivakumaran, and Tomer Broude for reading and providing invaluable comments on drafts of IRIT MEVORACH, THE FUTURE OF CROSS-BORDER INSOLVENCY: OVERCOMING BIASES AND CLOSING GAPS 80–126 (2018), which form the basis of this Article.

1. "Cross-border insolvency" (or international insolvency) means here any form of process or solution, including liquidation, reorganization, or restructuring processes, concerning commercial entities or financial institutions that have cross-border presence (e.g., assets, creditors, branches, or subsidiaries).

2. *See generally* Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000) (recognizing modified universalism as the best interim solution to addressing multinational insolvencies before movement to a "true universalism" approach).

3. *See, e.g.*, REINHARD BORK, PRINCIPLES OF CROSS-BORDER INSOLVENCY LAW 23 (2017) (discussing the circumstances under which it may be reasonable to permit the commencement of additional proceedings); IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 16–17 (2d ed. 2005); ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 786 (4th ed. 2011) ("But some leeway is also given to the concept of territoriality to accommodate the legitimate expectations of local creditors in relation to local assets. Thus the opening of territorial proceedings is permitted in a State where the debtor has an establishment or assets . . . ."); Jay L. Westbrook, *SIFIs and States*, 49 TEX. INT'L L.J. 329, 332 (2014) (advocating for the assignment of one jurisdiction as the *primer inter pares* to most effectively coordinate international financial crises).

4. *See, e.g.*, BORK, *supra* note 3, at 31 ("Second, the proceedings follow the law of the opening state (*lex fori concursus*), which not only boosts efficiency but also constitutes an aspect of universalism.") (citation omitted); Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care*

recognition, cooperation, and relief ensure that the global collective proceedings are given worldwide effect,[5] subject to specific safeguards where recognition or relief may be denied if universal standards of fairness, nondiscrimination, and due process are not respected.[6] Modified universalism has been quite prevalent in practice, including where key international instruments such as the UNCITRAL Model Law on Cross-Border Insolvency (Model Law)[7] and the EU Insolvency Regulation (EIR)[8] seem to generally follow its approach.[9] There are, however, still gaps in the cross-border insolvency system and in the available frameworks (even where instruments seem to generally embrace modified universalism), including in terms of the entities covered and the participating countries.[10] Generally, the

---

for Secured Creditors' Rights in Cross-Border Bankruptcies, 46 TEX. INT'L L.J. 513, 515 & n.7 (2011) ("The focus on which country would act as the home court was done in anticipation of that country applying its own laws, including choice of law rules."); Jay L. Westbrook, *Universalism and Choice of Law*, 23 PA. ST. INT'L L. REV. 625, 634 (2005). Professor Westbrook observes:

> The emerging international rule in multinational bankruptcy cases focuses on the center of the debtor's main interests. Up to now, that standard has been adopted primarily as a choice-of-forum rule rather than a choice-of-law rule, but it is necessary to use it for both purposes to achieve the goals of universalism.

Id.

5. *See, e.g.*, BORK, *supra* note 3, at 32 (explaining that, for universalism to function, states must cooperate and offer their assistance, especially by recognizing and enforcing foreign proceedings); GOODE, *supra* note 3, at 786 (describing the key universalist elements, including recognition in other countries of the forum state's judgments and assistance by local courts in asset recovery); Westbrook, *supra* note 3, at 345 (noting the necessity of international coordination and cooperation in the management of distressed financial institutions).

6. Such circumstances can be grouped under the notion of "public policy."

7. *See generally* U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014) (identifying as its four main features access to local courts for representatives of foreign proceedings; recognition of foreign proceedings; relief to assist foreign proceedings; and cooperation among courts and other competent authorities of the various states).

8. *See generally* Regulation 2015/848, of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19, 19, 59 (EU) (repealing and recasting Council Regulation 1346/2000); Council Regulation 1346/2000 of May 29, 2000, on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC). The Council Regulation observes:

> The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective . . . . [T]here is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

Id. The Recast EIR entered into force on June 26, 2017. *Id.* at 56. The regime applies directly to all EU member states except Denmark, which opted out. *Id.* at 29.

9. *See* GOODE, *supra* note 3, at 785–86 ("The current trend, as exemplified by the UNCITRAL Model Law on Cross-Border Insolvency and the EC Insolvency Regulation . . . is clearly in favour of a modified universalist approach . . . .").

10. For example, the Model Law has been adopted by only 45 jurisdictions. U.N. Comm'n on Int'l Trade Law, Status: UNCITRAL Model Law on Cross-Border Insolvency (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html [https://perma.cc/N7SN-V8UT]. It does not fully cover the cross-border insolvency and resolution

status of modified universalism is somewhat amorphous, and its norms are often perceived as broad principles or aspects of a general trend.[11]

This Article considers how modified universalism may be elevated from a broad approach to a recognized, international legal source that can be invoked and applied in a more concrete and consistent manner across legal systems in circumstances of international insolvencies alongside the application of written instruments where such instruments exist.[12] It draws from sources of international law, specifically the concept of customary international law (CIL), and shows that CIL is a key legal source that can fill gaps in international instruments, influence existing instruments, and regulate in areas not covered by instruments or regarding countries that are not parties to them. CIL is also useful in taking into account certain biases and territorial inclinations that can influence countries and implementing institutions' decisions and that can, therefore, impede movement towards the universal application of modified universalism.[13] CIL is a "debiasing" measure where its application does not require active action by all participants, such as entry into a treaty or enactment of model laws, as it operates as a default (opt-out) rule. It can thus overcome certain robust biases such as status quo and loss aversion.[14]

---

of financial institutions—indeed, the absence of a uniform framework for cross-border insolvency of such institutions is a major gap in the international system for cross-border insolvency and resolution, Irit Mevorach, *Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap*, 10 BROOK. J. CORP. FIN. & COM. L. 183, 184, 218 n.160 (2015), and it does not fully or expressly cover all aspects of cross-border insolvency (for example, it does not provide specific rules concerning choice of law).

11. See for example the references of the U.K. court in *In re HIH Cas. & Gen. Ins. Ltd.* [2008] UKHL 21, [2008] 1 WLR 852 (appeal taken from Eng.), to a "principle rather than a rule," an "aspiration," and a "thread" or the reference of the U.S. court in *In re Nortel Networks, Inc.*, 532 B.R. 494, 558 (Bankr. D. Del. 2015), to "terms such as 'universalism.'"

12. I address the question of instrument choice, particularly the choice between a treaty regime or a regime based on a model law for cross-border insolvency, in IRIT MEVORACH, THE FUTURE OF CROSS-BORDER INSOLVENCY: OVERCOMING BIASES AND CLOSING GAPS 127–68 (2018).

13. *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) (developing the "prospect theory" in decision-making scholarship); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE (n.s.) 1124 (1974) (showing how choices and decisions are strongly biased and often deviate in predictable ways from economically optimal behavior). "Behavioral international law" provides further theoretical grounds and indicative studies regarding the application of recognized biases in international law contexts. *See generally* Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421 (2014); Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015) (showing that bounds on decision-making may operate when actors in international law make decisions concerning international law issues).

14. *See generally* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006) (analyzing how "debiasing" through law could work to address a variety of legal questions). In the context of international law, see generally van Aaken, *supra* note 13, at 449. *See also infra* Part II.

The normative implication is a policy push towards the transformation of modified universalism into CIL so that it can become part of the international insolvency legal order. This Article thus explores to what extent CIL can be utilized in the field of cross-border insolvency and considers possible obstacles in this regard. It proceeds as follows. Part I overviews the notion of CIL, including how it is formed and applied, its limitations and its continued significance. Part II considers the advantages of CIL from a behavioral perspective as a debiasing mechanism. Part III explores the obstacles that might be in the way of formalizing modified universalism as CIL in view of possible narrow perceptions of private international law and cross-border insolvency, as well as the way modified universalism has been conceptualized as an interim approach. Part IV argues that such perceptions are no longer merited. Cross-border insolvency law has a significant international role, and modified universalism has the characteristics of a standalone norm. Part V suggests steps to transition modified universalism from a general trend to CIL and demonstrates the benefits of such development for future international insolvencies.

I. Customary International Law as a Key International Legal Source

A. *Establishing CIL*

CIL is one of the key sources of international law,[15] widely acknowledged, and applicable in different legal traditions.[16] It has a privileged position in the international law system and forms the backbone of many areas of international law.[17] CIL arises from the general and consistent practice of states, where that practice is based on a belief in the conformity of the practice with international law.[18] This is the classical

---

15. Statute of the International Court of Justice, art. 38 (San Francisco, 26 June 1945), 3 Bevans 1179, 59 Stat. 1055, T.S. No. 993, *entered into force* 24 Oct. 1945. CIL is considered one of the three primary sources of international law, the other two being treaties and general principles of law. *See* Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 89 (2011) (noting the centrality to the international order of both custom and treaty). "General principles of law" is a source close to CIL but one that refers to fundamental principles concerning substantive justice and procedural fairness and by which states are bound because of the universal understanding of basic legal concepts by all legal systems. Charles T. Kotuby Jr., *General Principles of Law, International Due Process, and the Modern Role of Private International Law*, 23 DUKE J. COMP. & INT'L L. 411, 412, 422 (2013).

16. ALAN WATSON, THE EVOLUTION OF LAW 43–44 (1985).

17. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 116 (2005).

18. *See* J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 59–60 (Sir Humphrey Waldock ed., 6th ed. 1963) ("Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states . . . whether they recognize an obligation to adopt a certain course . . . [that] shows 'a general practice accepted as law.'"); VAUGHAN LOWE, INTERNATIONAL LAW 38 (2007) (describing the two

understanding of CIL, consistent with its description in the Statute of the International Court of Justice as "evidence of a general practice accepted as law."[19] It encompasses objective and subjective elements, which are complementary and intertwined.[20] The objective element of CIL requires sufficient evidence of state practice that follows the potential CIL.[21] Such evidence should show consistency and practice by various relevant actors, although not necessarily by all countries.[22] Additionally, the required recurrence of the practice may depend on the frequency of circumstances that require action pursuant to the CIL.[23] The subjective (psychological) element is what countries have accepted as law (*opinio juris*). Thus, evidence of state practice should be complemented by evidence that the practice is regarded as an expression of a rule of international law, a conviction that there was an obligation to follow the norm.

The primary and most direct evidence of the existence of CIL would be the actions of countries through the acts of their organs. Thus, when a country acts in a legally significant way or refrains from acting, it contributes to the development of state practice accepted as law. Countries' actions may be discerned, for example, from decisions to adopt certain legislation and from the decisions of national courts.[24] Additionally, treaties and conventions may point to the existence of CIL.[25] Various instruments that may be considered soft law may also provide evidence of an established CIL or contribute to the evolution of new CIL, being determinative of the *opinio juris* or of state practice.[26] Thus, a nonbinding instrument can have a legal effect on customary law. The wording in such an instrument is important because it

---

essential components of customary international law: a general practice of states and a belief in the conformity of the practice with international law); HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 53–91 (2014) ("It is in fact the consistency and repetition rather than the duration of the practice that carries the most weight.").

19. Statute of the International Court of Justice, art. 38(1)(b) (San Francisco, 26 June 1945), 3 Bevans 1179, 59 Stat. 1055, T.S. No. 993, *entered into force* 24 Oct. 1945.

20. THIRLWAY, *supra* note 18, at 62.

21. Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 91, 100–05 (Malcolm D. Evans ed., 2014).

22. *See* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 210 (2011) ("It is not clear how much state practice is required in order to generate a rule of CIL, although most commentators agree that [it] must be 'extensive' or 'widespread' . . . .") (citations omitted).

23. THIRLWAY, *supra* note 18, at 65, 67.

24. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 55 (Feb. 3).

25. Continental Shelf (Libya/Malta), Judgment, 1985 I.C.J. Rep. 13, ¶ 27 (June 3); *see* THIRLWAY, *supra* note 18, at 58–59 (describing the significance of the International Law Association's Report on the Formation of Customary International Law in studying the relationship between state practice and *opinio juris*).

26. Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L.Q. 901, 904 (1999).

must be "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[27] It would also be important to consider the level of support given to the instrument by countries and any statements accompanying such instrument that may be relevant to the assessment of countries' beliefs about the conformity of the practice with international law.[28]

B. *Effect of CIL*

Once CIL has become pervasive enough, countries are bound by it regardless of whether they have codified the laws domestically or through treaties. Unanimity among all countries is not required for it to have a universal effect. Likewise, if an obligation is included in a treaty but also amounts to CIL, it will also bind countries that are not parties to the treaty.[29] Countries in some cases, however, may be exempted from CIL. Under the doctrine of the "persistent objector,"[30] countries can consistently object to CIL (opt out) in its formative stages.[31] The threshold for being regarded a persistent objector is, however, very high, and the objection should be made widely known.[32] Persistent objections should also be made while the rule is still accumulating and before it becomes CIL. Thereafter, in principle, once the CIL is established, it is no longer possible to opt out of the rule except through specific bilateral agreements that establish a different rule.[33]

CIL may be invoked in domestic or international tribunals, yet the application of CIL does not depend on establishing international enforcement mechanisms. Application heavily relies on domestic enforcement structures. Thus, all nations seem to accept that CIL forms an integral part of national law[34] and that courts should take judicial notice of CIL.[35] When ascertaining

---

27. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 72 (Feb. 20); *see* Alan Boyle, *Soft Law in International Law-Making*, *in* INTERNATIONAL LAW 118, 130–33 (Malcolm D. Evans ed., 2014) (describing the importance of wording in nonbinding instruments that may create customary law).

28. Boyle, *supra* note 27, at 130–31.

29. THIRLWAY, *supra* note 18, at 35–36.

30. *See id.* at 86–88 (providing an overview of the persistent objector doctrine).

31. Bradley & Gulati, *supra* note 22, at 211; Guzman, *supra* note 17, at 164–65.

32. Dino Kritsiotis, *On the Possibilities of and for Persistent Objection*, 21 DUKE J. COMP. & INT'L L. 121, 129 (2010) (noting, for example, the circumstances in *Fisheries* (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116, 131 (Dec. 18), where it was ruled that "the ten-mile rule for the closing lines of bays 'would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast'").

33. THIRLWAY, *supra* note 18, at 88.

34. Eileen Denza, *The Relationship Between International and National Law*, *in* INTERNATIONAL LAW 412, 426 (Malcolm D. Evans ed., 2014).

35. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 99–100 (7th ed. 2014) (describing the doctrine of incorporation, which holds that customary international law is automatically part of the local law without any need for constitutional ratification).

the existence and nature of an alleged CIL, domestic courts may have recourse to various types of sources and authoritative material, including "international treaties and conventions, authoritative textbooks, practice and judicial decisions."[36] The actual implementation of CIL in national laws differs, however, to some extent, among jurisdictions.[37] In civil law jurisdictions, the general rule is that CIL takes precedence over inconsistent ordinary national legislation and directly creates rights and duties within the territory.[38] In common law jurisdictions, CIL is recognized as part and parcel of the legal system, and legislation is presumptively construed in a manner that would avoid a conflict with international law.[39]

C. Limitations and Critique

CIL tends to be vague, and the way it emerges is rather unclear.[40] Furthermore, because CIL is based on an evolving experience, it is evidently problematic to ascertain when rules have reached the stage where they can be applied as CIL.[41] There is also a circularity problem. For a rule to qualify as CIL, countries should feel obligated to follow it, but how would countries feel such legal obligation before the rule becomes customary?[42] This uncertainty, as well as CIL's reliance on domestic enforcement mechanisms, also makes CIL prone to nonobservance, especially when it attempts to address difficult cross-border conflicts.[43] There have also been challenges to CIL for lacking a coherent theory and doctrine.[44] It is arguably impossible to observe the universe of countries' practices to be able to ascertain whether references to CIL are made out of obligation.[45] It has also been argued that

---

36. The Cristina [1938] AC 485 (HL) 497 (appeal taken from Austl.).

37. *See* SHAW, *supra* note 35, at 99–127 (providing an overview of the implementation of CIL in national laws).

38. *See, e.g.*, Hans-Peter Folz, *Germany*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS 240, 245 (Dinah Shelton ed., 2011) (describing CIL's precedence over German statutes and its creation of rights and duties for Germans); Giuseppe Cataldi, *Italy*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS 328, 342–44 (Dinah Shelton ed., 2011) (describing Italy's practice of automatically incorporating CIL into its domestic legal system such that CIL assumes the force of constitutional law).

39. For example, CIL is part of the public policy of the UK and part of the domestic law and does not necessitate the interposition of a constitutional ratification procedure. SHAW, *supra* note 35, at 99–100.

40. *Id.* at 102.

41. THIRLWAY, *supra* note 18, at 54–55.

42. ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 53, 66 (1971).

43. *See* Barbara C. Matthews, *Emerging Public International Banking Law? Lessons from the Law of the Sea Experience*, 10 CHI. J. INT'L L. 539, 556–57 (2010) (describing the questionable level of domestic enforcement of CIL and detailing the difficulties of codifying the Law of the Sea).

44. *See* THIRLWAY, *supra* note 18, at 231 (noting that CIL is one of international law's "intellectual puzzles"); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW, at xiii (2d ed. 1993) (describing the ambiguity of the term "custom" with regard to international law).

45. *See* Guzman, *supra* note 17, at 150–53 (highlighting the numerous interpretations of state

CIL does not actually affect country behavior and has little impact in view of the lack of enforcement mechanisms on the international level.[46] Another uncertainty revolves around the question of whose practice and opinion should be considered when attempting to identify the existence of CIL, including the extent to which non-state actors' actions should be taken into account, which countries' actions or omissions should be considered, and whether only the actions of countries that are affected or that are capable of taking action regarding a certain matter are relevant.[47] There is also a risk that CIL is too sticky and fails to allow for developments to meet changing circumstances and new needs of countries and of the international business and financial community.[48]

D. *CIL's Continued Significance*

Notwithstanding the difficulties that CIL presents, it continues to hold a privileged position in the international legal system.[49] Furthermore, over time there has been some shift from relying only on induction from national practice in identifying CIL to deducing its emergence from broader data sets, including international pronouncements and activities of non-state actors.[50] Some scholars have also theorized CIL in functional terms, suggesting that CIL may be effective when countries interact repeatedly over time, and it may influence country behavior through reputational and direct sanctions.[51] It has also been considered that although the development of CIL might be a slow process, with technological changes, the rise of international institutions, and other developments, CIL may emerge more quickly than in the past.[52] The works of influential international committees of recent times

---

practice in discussions of CIL).

46. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 39 (2005); *see also* Guzman, *supra* note 17, at 128 (discussing the argument that because CIL lacks an enforcement mechanism, CIL does not affect state behavior).

47. THIRLWAY, *supra* note 18, at 59–61; *see also* Till Müller, *Customary Transnational Law: Attacking the Last Resort of State Sovereignty*, 15 IND. J. GLOBAL LEGAL STUD. 19, 28–30 (2008) (reviewing scholarship regarding non-state actors' influence on the formation of CIL).

48. THIRLWAY, *supra* note 18, at 68.

49. Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT'L L. REV. 275, 309 (2007) (arguing that such unwritten international law not only counts but "may even gain importance").

50. *See, e.g.*, Roozbeh B. Baker, *Customary International Law: A Reconceptualization*, 41 BROOK. J. INT'L L. 439, 446 (2016) (discussing the debate concerning "modern custom" and "traditional custom" viewpoints on customary international norms); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001) (describing the difference between traditional inductive and modern deductive methods of identifying custom).

51. *See, e.g.*, Guzman, *supra* note 17, at 134, 139 (noting the role that reputational and direct sanctions play in compliance with CIL).

52. *See, e.g.*, Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 513, 532 (Ronald MacDonald & Douglas

provide further guidance regarding the manner of CIL formation and identification.[53] Importantly, regarding the subjective acceptance of CIL, it is explained that it should be "distinguished from mere usage or habit"[54] and may be negated where it can be shown that participants, when acting in a particular way, were motivated by considerations such as courtesy, convenience, or tradition rather than by a conviction that their acts amounted to CIL.[55]

It is recognized that CIL is binding on all countries whether or not they participated in the relevant practice. Any country in theory can affect CIL, and the position of countries may be considered even where they could not in fact take or refrain from taking an action.[56] Surely, where countries do possess the capacity to engage and interact with other parties, such countries would be more influential and thus privileged regarding the formation and shaping of CIL. However, the reliance of international law on the practice of the more powerful countries can ensure fewer deviations from and violations of CIL where such countries formed the rules. Constraining violations by powerful countries is crucial for the stability of the system, as the impact of breach could be much more pronounced and widespread when committed by such jurisdictions. In addition, because powerful countries are less affected by CIL violations (as they are more resilient to the implications of a breach), they may be less deterred by them. Therefore, it is another advantage if these countries play an important role in shaping the rules.[57]

M. Johnston eds., 1983) ("[C]ustomary international law, instead of being sluggish and backward as a source of international law, is in fact dynamic, living, and ever-changing . . . .").

53. *See generally* Int'l Law Ass'n, *Statement of Principles Applicable to the Formation of General Customary International Law*, Final Report of the Committee, London Conference (2000) [hereinafter *Statement of Principles*] (attempting to create a practical guide with concise and clear guidelines for the application of customary international law principles); Int'l Law Comm'n, Rep. on the Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, U.N. Doc. A/CN.4/L.872 (May 30, 2016) [hereinafter Draft Conclusions] (describing the way in which the rules of customary international law are determined).

54. Draft Conclusions, *supra* note 53, at 3.

55. *See Statement of Principles*, *supra* note 53, at 35 (describing the practice of sending condolences on the death of a head of state as an example of a practice that, although frequently observed as a matter of comity, does not give rise to a legal obligation); *see also* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20). The court noted:

> The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

Id.

56. *See* THIRLWAY, *supra* note 18, at 59–60 (noting, as to the question of whether customary international law existed with respect to the use of nuclear weapons, the fact that a majority of states did not possess nuclear weapons and could therefore neither choose to use them nor refrain from using them).

57. Guzman, *supra* note 17, at 151.

Today, treaty law covers many areas of international law. There are also various other ways for countries to cooperate through soft-law instruments.[58] However, CIL remains binding on countries even outside the treaty framework. The two sources operate in parallel, and the codification of CIL in a treaty does not abrogate the rule as CIL.[59] CIL still plays an important role "regulating both within the gaps of treaties as well as the conduct of non-parties to the treaties"[60] because countries are bound by CIL even if they have not expressed explicit consent. The effect of CIL is also important regarding matters that are not regulated by treaties or by other instruments and for newly emerging issues not yet covered by a treaty.[61] In addition, CIL can serve to influence treaty regimes and may be important and relevant for treaty interpretation where, for example, the treaty refers to rules of CIL.[62] Thus, important areas of international law, including the law of state responsibility, foreign direct investment, diplomatic immunity, human rights, and state immunity,[63] are governed wholly or partially by CIL where treaties are not universal, where a treaty is absent, or where the treaty does not cover all issues. CIL is in use, for example, in international investment law where certain aspects of regulating foreign investment have become settled international law[64] and where CIL remains of fundamental importance despite the proliferation of bilateral investment agreements in this field.[65]

---

58. *See* Kal Raustiala, *Form and Substance in International Agreement*, 99 AM. J. INT'L L. 581, 614 (2005) (concluding that there has been a dramatic increase in international cooperation through contracts, unwritten understandings, and pledges).

59. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United States), Judgment, 1986 I.C.J. Rep. 14, ¶ 177 (June 27). The Court held:

> [E]ven if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm.

Id.

60. Bradley & Gulati, *supra* note 22, at 209.

61. Where both a treaty and CIL regulate the same situation, normally the treaty is the prevailing *lex specialis*, at least regarding rules that existed at the time of the conclusion of the treaty. *See* Thirlway, *supra* note 21, at 108–09 (observing that even in a situation where customary law exists alongside treaty law, no problem of theory is raised, since the latter is free to modify customary entitlements).

62. Guzman, *supra* note 17, at 120 & n.18 (noting the example of the United States Model Bilateral Investment Treaty art. II (Apr. 1994), which refers to "treatment less favorable than that required by [customary] international law").

63. *Id.* at 116 n.1.

64. *See* Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investments Law?*, 28 PA. ST. INT'L L. REV. 675, 676–78 (2010) (describing the role of custom as a source of international law in the regulation of foreign investment).

65. CIL in this field includes, *inter alia*, the requirement of nondiscrimination, the fair and equitable treatment of foreign investors, the entitlement of foreign investors to national treatment once admitted into the country, and the requirement regarding nondiscriminatory regulatory measures and obligations to respect human rights by multinational companies. For more detail, see

E. CIL's Relevance to the Cross-Border Insolvency System

The nature and characteristics of CIL make it an important legal source for a cross-border insolvency system based on modified universalism and a useful method to shape the international interactions in this subsystem of international law. CIL is responsive to emerging trends in practice. It is based on experience, and it can arise whether written instruments are applicable or not. It applies to all countries, whereby treaties or other instruments apply only to signatories or countries that adopted the instruments. Thus, if modified universalism is recognized as CIL, gaps in the cross-border insolvency system can be filled. Modified universalism is also sufficiently flexible—its emerging norms accommodate different types of business structures and different degrees of global or regional integration, and it can also adapt to changing conditions. Thus, it is akin to CIL, which as a legal source tends to be supple and adaptable. CIL is also not too rigid as a legal source, notwithstanding its universal application through general experience. It can develop gradually over time, and it is possible to change or create new CIL to meet the developing needs of nations.[66] Thus, conduct inconsistent with CIL may in relevant circumstances be a way to create new rules.[67] At the same time, where CIL represents an emerging, widespread, and normatively desirable practice, its tendency to stick is an important advantage.[68]

II. The Behavioral Force of CIL

A. CIL as a Debiasing Mechanism

CIL can also assist in overcoming territorial inclinations and biases.[69] Decision-makers, including actors making choices regarding issues of international law, may be inclined to avoid changes and cling to the status

---

Surya P. Subedi, *International Investment Law*, *in* INTERNATIONAL LAW 727, 740–41 (Malcolm D. Evans ed., 2014). These rules may apply in the absence of a bilateral agreement, where agreements make reference to CIL, or to fill gaps in treaties when treaties are silent on certain issues.

66. THIRLWAY, *supra* note 18, at 69; *cf. id.* at 102 (noting the permanent nature of general principles of law).

67. The ICJ explained in this regard that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 207 (June 27).

68. Rachel Brewster, *Withdrawing from Custom: Choosing Between Default Rules*, 21 DUKE J. COMP. & INT'L L. 47, 55 (2010) ("If customary international law already incorporates rules that are net welfare increasing for the international community, then a shift towards the [provision of more opt-out rights, including after formation,] may be welfare decreasing.").

69. For more detail on the possible operation of biases and bounds on decision-making in international law, and specifically in cross-border insolvency, see MEVORACH, *supra* note 12, at 49–79.

quo, especially where choices of certain options are perceived as resulting in a loss (e.g., loss of sovereignty or control over locally situated assets or entities), and more so if the choice requires active action.[70] Additionally, the way options are framed matter to people's choices. Specifically, cognitive psychology studies have shown the effect of legislative framing and the use of default options on choices between alternative options.[71] It has been shown, for example, that people favor agreements that are consistent with legal default rules or terms of trade that are conventional for the type of bargain at issue.[72] This may be due to the stress or sometimes physical effort involved in making changes, but it is also likely because defaults tend to be perceived as representing the existing status quo and the recommended, endorsed option.[73] Furthermore, switching from a default option may be perceived as a risk and a loss; thus, it may be weighed more heavily than the possible gains because of loss aversion.[74] Empirical research in international law concerning adherence to options in treaties has also shown the significant impact of default rules, which were likely perceived as the endorsed status quo position, on countries' (and their implementing institutions') choices.[75] More generally, behavioral international law studies have noted the

70. The existence of loss aversion, whereby losses are exaggerated and given greater weight than gains, and its link to a status quo bias and the endowment effect, has been observed in a wealth of empirical research, including neurobiological experiments, which showed that this pattern of behavior (responding differently to perceived losses as opposed to perceived gains, measured against a perceived status quo position) is tied to the brain's greater sensitivity to potential losses than to gains; experimental studies have also shown that loss aversion has a specific effect when considering *avoiding* an option verses *actively approaching* an option. *See generally* Nicholas D. Wright et al., *Approach-Avoidance Processes Contribute to Dissociable Impacts of Risk and Loss on Choice*, 32 J. NEUROSCIENCE 7009 (2012); Nicholas D. Wright et al., *Manipulating the Contribution of Approach-Avoidance to the Perturbation of Economic Choice by Valence*, 7 FRONTIERS IN NEUROSCIENCE 1 (2013).

71. *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 199 (1991) (pointing to studies showing the effect of such manipulation on a choice between alternative automobile insurance policies).

72. *See, e.g.*, Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 662 (2006) (explaining that a deviation from default terms can raise suspicion among parties); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1343–44 (1990) (concluding that participants' preferences were dependent upon their reference positions); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 646–47 (1998) (stating that participants of the experiment preferred whichever contract term was the default term given).

73. *See, e.g.*, John Beshears et al., *The Importance of Default Options for Retirement Savings Outcomes: Evidence from the United States*, *in* NAT'L BUREAU OF ECON. RES., SOCIAL SECURITY POLICY IN A CHANGING ENVIRONMENT 167, 184–87 (Jeffrey R. Brown et al. eds., 2009) (describing this phenomenon in the context of experiments studying individuals' investment decisions regarding their savings plans).

74. Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338, 1338 (2003).

75. Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309, 352 (2013).

importance of default mechanisms in choice architecture in international law.[76] Thus, a rule can be set up as an opt-out rule or an opt-in rule. An opt-in rule means that the default is nonadherence to the rule. In an opt-out scheme, the default is adherence. If people tend not to deviate from default rules, there is an advantage in setting up opt-out rules, especially where universality of the application of the rule is critical. Thus, if sources of international law that provide an opt-out system are used, higher participation can be expected in comparison to opt-in systems.

CIL can be particularly advantageous as a debiasing mechanism of international law because CIL is an opt-out system where countries are bound by such CIL that has developed through the general practice of nations. Although CIL emerges from the consistent practice of countries, it is not a consensual mechanism. It does not require that countries agree to or enact the rule and as such does not represent a deviation from the status quo. The existence of CIL is based on an understanding that it is a norm of the international community. This does not necessarily mean, though, that a given country consents to the norm. Rather, the acceptance of the binding rule must be felt by countries generally.[77] Critically, to not be bound by the rule, a country needs to actively object to it.[78] As such, CIL is a mechanism of international cooperation that can promote universal application of the norm because opt-out rules are expected to increase participation, particularly on the global level, in the absence of mechanisms to impose regulation directly on countries' legal systems. It might be harder to ensure universal application through, for example, treaties, as treaties require an active opt-in. The fact that CIL requires adherence (or objection) to the rule in its entirety also promotes integrity in its application.[79] Thus, with no room for cherry-picking, it is more likely that the norm will remain uniform and coherent.

B. *CIL: Shifting the Reference Point*

Outcomes are perceived as gains or losses usually relative to a reference point that people denote during the decision-making process, "rather than as

76. *See* Broude, *supra* note 13, at 1140–41 (noting how individuals have a tendency to adopt default rules even when they are inefficient); van Aaken, *supra* note 13, at 450–52 (explaining how choice architecture, through default rules' opt-in/opt-out mechanisms, provides a framework through which to view international law). Choice architecture is the study of how the ways in which options are presented affect decision-making. *See* RICHARD H. THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3 (2009) (defining a choice architect as someone responsible for organizing the context of decision-making).

77. Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 776 (2012).

78. The emergence of the persistent objector doctrine, see *supra* note 30 and accompanying text, may have been part of an effort to make international law less consensual. Bradley & Gulati, *supra* note 22, at 240.

79. Van Aaken, *supra* note 13, at 452.

final states of wealth or welfare."[80] The reference point usually corresponds to the current asset position (status quo) whereby gains/losses are deviations from the reference point.[81] Thus, a negative perception of modified universalism outcomes is expected particularly where the country's reference point is a regime generally based on territorialism, namely if the country does not have an established internationalist approach in its domestic methods for addressing cross-border insolvency. A modified universalist CIL can, in addition to applying directly in areas not covered by treaties or other instruments, also indirectly promote the adoption of instruments (such as the Model Law) where these instruments reflect modified universalism. A strong leading norm, elevated from a trend to CIL, may gradually affect the reference points of countries and implementing institutions and level the playing field. When recognized as CIL, countries may feel more obliged to follow modified universalism and, over time, assimilate it into the legal system. Thus, adherence to instruments that are premised on modified universalism would less likely be perceived as a change and as a loss.

III. Conceptual Impediments

A. *Public and Private International Law as Distinct Disciplines*

Notwithstanding the rather widespread adherence to modified universalism, it has not been invoked or applied as CIL. Modified universalism is not explicitly embraced in the global instruments for cross-border insolvency. Courts in common law jurisdictions often apply common law notions akin to a universalist/cooperative approach, noting that modified universalism is recognized as a broad principle under common law, or they apply the notion of comity. Yet, comity entails different interpretations and is not universal.[82] Modified universalism that could be applied as a universal and uniform norm has usually been considered a broad concept within the constraints of domestic, private international law to the extent that if we were to try identifying it now as CIL, it would be difficult to show consistent practice that is based on belief in the conformity of the practice with international law, and therefore CIL might be disproved. The problem could lie in a narrow perception of cross-border insolvency law as a legal field addressing procedures and technicalities. Because cross-border insolvency law primarily regulates the private international law of insolvency, it can be

---

80. Kahneman & Tversky, *supra* note 13, at 274. Values are attached to changes rather than to final states, and the perception of changes is also affected by past and present context of experience. *Id.* at 274, 277.

81. *Id.* at 274.

82. It generally refers to the tradition among judges within the common law camp to cooperate and assist foreign jurisdictions. *See* FLETCHER, *supra* note 3, at 17 (contrasting comity with insularity). But its precise meaning is quite elusive.

understood as a field disconnected from public international law and public international law sources. As such, cross-border insolvency law might not be sufficiently influenced by international laws and might not engage in creating CIL.

The relation between private and public international law has been a subject of much debate and considerable theoretical development.[83] In the early nineteenth century, private international law was perceived as a category and an integral part of public international law pursuant to the idea of a unitary international law based on the traditions of *Roman jus gentium*, the *Statutists*, and the natural law; in the latter half of that century, it evolved and crystallized as a separate field with a distinct role.[84] Pursuant to this (modern) traditional separation of roles, public international law governs the relations between nations, provides a legal framework for organized international relations, and addresses the rights and obligations of countries with respect to other countries or individuals. Private international law, on the other hand, deals with the domestic laws of countries that govern conflicts between private persons. Against this backdrop, it has been doubted that rules that are fundamental to private international law (e.g., the rule that rights in rem as applied to immovable and movable property are governed by the *lex situs*, or that form is governed by the *lex loci actus*) could and have generated customary (public) international law.[85]

Generally, the traditional division between private and public international law and the evolution of private international law as a domestic legal order regulating in the domain of private interests contributed to the gradual isolation of private international law from public international law and the general exclusion of a role for international sources.[86] This model has resulted in a private international law system that does not contribute much

83. *See, e.g.*, K. LIPSTEIN, PRINCIPLES OF THE CONFLICT OF LAWS, NATIONAL AND INTERNATIONAL 63–64 (1981) (examining the influence of public international law on its private counterpart); Kotuby, *supra* note 15, at 411–12, 433 (2013) (noting the increasingly global discourse surrounding private international law); Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 4 J. PRIV. INT'L L. 121, 121–22 (2008) (describing scholars' different perspectives on public and private international law depending on their geographical and historical context); Ole Spiermann, *Twentieth Century Internationalism in Law*, 18 EUR. J. INT'L L. 785, 788–89, 792 (2007) (providing an historical overview of public and private international law); John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 564–67 (1952) (analyzing the diverse views of scholars regarding the proper relationship between public and private international law).

84. *See generally* Stevenson, *supra* note 83 (describing the historical relationship between private and public international law).

85. PAVEL KALENSKY, TRENDS OF PRIVATE INTERNATIONAL LAW 17–18 (1971); LIPSTEIN, *supra* note 83, at 64–65.

86. *See* Alex Mills, *The Private History of International Law*, 55 INT'L & COMP. L.Q. 1, 44–45 (2006) ("By defining private international law as part of domestic law, it defines private international lawyers as domestic, not international; it emphasizes their attachment to a sovereign territory.").

to the ordering of international private relations but instead often adds to the complexity of international transactions—as private international laws of different systems often conflict or operate with broad exceptions, creating uncertainty and costs.[87] This division of roles between private and public international law also arguably constrains the ability to regulate the important domain of private international interaction in view of the operation of private power in the global economy.[88]

B. *Cross-Border Insolvency as a System of Procedural Private International Law*

That cross-border insolvency is a body of specific and narrow rules concerning insolvency procedures has been a common understanding and description of this area of the law.[89] Often, international insolvency does not exist as a "systematically elaborated legal framework" and the domestic private international laws apply.[90] Cross-border insolvency has been generally regarded as "an arcane and rarified area of specialization."[91] Narrow assumptions concerning the role of cross-border insolvency have been notable in the practice and observed in the Eighties and early Nineties. It has been noted that countries have generally presumed that international insolvency is an aspect of private law.[92] Such views resulted in limited interest of countries in the field of cross-border insolvency where countries have confined their role to the regulation of procedure concerning international insolvency. This peripheral interest of governments has also arguably constrained negotiations on insolvency treaties and could explain the general failure in concluding treaties in this field.[93]

The approach to cross-border insolvency has evolved over time, and importantly, there has been growing recognition of the difficulty to control cross-border insolvencies efficiently by relying on the domestic private international laws of national systems. It has been acknowledged that domestic private international laws related to insolvency have preserved the problem of diversity and conflicts between national laws.[94] Consequently,

---

87. *Id.* at 45–46.

88. A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT'L POL. ECON. 261, 279 (1997); Mills, *supra* note 86, at 46.

89. BOB WESSELS, INTERNATIONAL INSOLVENCY LAW 1 (4th ed. 2015).

90. *Id.* at 4.

91. FLETCHER, *supra* note 3, at 6–7.

92. *Id.* at 5.

93. Thomas M. Gaa, *Harmonization of International Bankruptcy Law and Practice: Is It Necessary? Is It Possible?*, 27 INT'L LAW. 881, 897 (1993); John Honsberger, *The Negotiation of a Bankruptcy Treaty* (1985), *reprinted in* MEREDITH MEMORIAL LECTURES: BANKRUPTCY—PRESENT PROBLEMS AND FUTURE PERSPECTIVES 287, 291 (1986).

94. FLETCHER, *supra* note 3, at 6–7.

hugely influential uniform frameworks have emerged, notably the Model Law. Yet, as international instruments that attempt to regulate the specialized field of cross-border insolvency, they, too, can be understood as merely providing certain tools to address private international procedures more efficiently but not as creating general norms that intend to influence substantive results.[95] The important framework for cross-border insolvency applicable in Europe (the EIR) has also evolved as an aspect of the European Community private international law system.[96] It has been observed that the European insolvency framework has not provided a uniform and comprehensive legal framework.[97] In all, the important advance of cross-border insolvency regimes has been tempered by a modest approach concerning the role of cross-border insolvency law and of the frameworks that are being devised to govern cross-border insolvency cases.

C. Modified Universalism as a Transitory Approach

A tendency to underrate the role of cross-border insolvency is exacerbated where modified universalism is perceived as an interim solution, inextricably linked to the aspiration to achieve pure universalism.[98] At least in theory, pure universalism is often considered the ultimate ideal for regulating cross-border insolvency and modified universalism the best solution pending movement to true universalism.[99] Modified universalism is thought to provide a pragmatic transitory approach whilst country laws still differ and could foster the smoothest transition to true universalism.[100]

It is inevitable, however, that whilst modified universalism remains conceptually transitory, its ability to solidify and become CIL is undermined. CIL must represent settled obligatory practice;[101] therefore, a transitory doctrine would be an oxymoron. True, rules or principles of a temporary character may stay in such an interim state for a long time and until a new regime develops. CIL can change, and new CIL can emerge when conduct inconsistent with it may in relevant circumstances show the appearance of new rules. CIL does not have to stay still. Yet, for CIL to emerge in the first place, it should be demonstrated that it is followed consistently based on the belief about the conformity of the practice with international law. It may be difficult to form such a type of law, however, where modified universalism

---

95. *See, e.g.*, Bank of W. Austl. v. David Stewart Henderson [No. 3] [2011] FMCA 840, ¶ 43 (Austl.) ("[The Model Law] was promoted as having a procedural effect as opposed to a substantive effect that might have included automatic recognition and enforcement or effects.").

96. WESSELS, *supra* note 89, at 6.

97. *Id.* at 7.

98. For discussion of the proposition that cross-border insolvencies should always be unitary and universal, see BORK, *supra* note 3, at 28–29; FLETCHER, *supra* note 3, at 11.

99. Westbrook, *supra* note 2, at 2277.

100. *Id.*

101. *See supra* subpart I(A).

is in this midpoint between an interim solution and a fundamental norm and is conceptually linked to another presumably better approach, thus representing a transitory stage in the development of more ideal rules.

IV. Reconceptualization: The International Role of Cross-Border Insolvency

A. *Internationalization of Private International Law*

Gradually since the twentieth century, and more so in recent decades, the division between private and public international law has become uncertain and blurred.[102] The traditional separation of roles of the two fields no longer fits with the current state of globalization or with modern intervention by countries in terms of regulating private market activities, adding a public component or public-interest component to private business law.[103] The conceptualization of the relationship between private and public international law and of the role of private international law is in a state of evolution, too, because of these changes in world realities. It is becoming clear that private international law of a narrow character cannot properly address modern challenges in an increasingly interconnected world.[104] It has been noted that while international disputes in the past were largely limited to regional relations among close legal systems, the discourse has become truly global in recent decades.[105] Therefore, private international law should not be perceived as a mere system of technical rules regarding the proper forum, law, and the facilitation of recognition and enforcement of foreign judgments.[106] Furthermore, private international law should not insulate itself and attempt to regulate private interactions separately from the broader international order, as such isolation obscures the operation of private power in the global political economy.[107]

---

102. *See, e.g.*, Michaels, *supra* note 83, at 121–22 (discussing the recent trend toward merging the fields of private and public international law); Spiermann, *supra* note 83, at 793–94 ("The 'internationalist' school according to which private international law was part and parcel of public international law still claimed many followers in early 20th century theory."). *See generally* ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW (2009) (challenging the distinction normally drawn between public and private international law by exploring the ways in which the former shapes, and is given effect by, the latter).

103. *See, e.g.*, Michaels, *supra* note 83, at 122–23 (discussing how the distinction between private and public international law has become less clear).

104. Kotuby, *supra* note 15, at 411–12.

105. *Id.*

106. *See id.* at 412 (arguing that private international law should have an interest and a meaningful role to play in identifying and ensuring compliance with general international principles regarding the way transnational disputes are resolved).

107. *See* Cutler, *supra* note 88, at 279 ("[T]he public/private distinction operates ideologically to obscure the operation of private power in the global political economy.").

There are also growing overlaps and intersections of the roles of each field in practice. Thus, public international law shows a rising interest in economic relations, and multinational corporations and individuals are no longer outside its remit.[108] It has also been noted that public international law is becoming domesticated and more technical.[109] Importantly, the result of increasing intersections and overlaps between private and public international law has been a gradual expansion of the role and scope of private international law.[110] Thus, many of the tasks of private international law, for example, its dealing with recent problems of sovereign state insolvency, might have previously been viewed as belonging to public international law.[111]

Movement towards the internationalization of private international law has been apparent for some time with the conclusion of treaties and other international instruments in recent years on matters of jurisdiction, choice of law, and recognition and enforcement of foreign judgments.[112] This trend has coincided with the internationalization of national economies and their increased interdependence. Internationalization can also be seen in the rise of international commercial law and its development from the early stages of the Merchant Law to modern legal orders on a transnational scale.[113] International organizations have been playing a significant part. For example, UNCITRAL has been charged with the task of coordinating global law reform to support international trade.[114] In this gradual reunification of private and public international law, private international law is not

108. *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1826 (2002) (discussing the need for a coherent theory of compliance given international law's increased pertinence to global economic and business relations).

109. Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 327 (2006).

110. Michaels, *supra* note 83, at 123.

111. *Id.* at 137.

112. *See generally* Regulation 2015/848, 2015 O.J. (L 141) 19 (EU) (recognizing that an international agreement is necessary to effectuate cross-border insolvency proceedings); Council Regulation 1215/2012, 2012 O.J. (L 351) 1, 3 (EU) (promulgating rules and principles for jurisdictional issues and for the recognition and enforcement of judgments in international civil and commercial matters); U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014) (identifying as its purpose the provision of "effective mechanisms for dealing with cases of cross-border insolvency"); THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://www.hcch.net/ [https://perma.cc/7RG9-42PS].

113. Harold J. Berman, *The Law of International Commercial Transactions*, 2 EMORY J. INT'L DISP. RESOL. 235, 243 (1988). For a summary of these developments, see Rosalind Mason, *Cross-Border Insolvency and Legal Transnationalisation*, 21 INT'L INSOLV. REV. 105, 108–12 (2012).

114. *See* G.A. Res. 2205 (XXI), at ¶ 8 (Dec. 16, 1966) (directing UNCITRAL to engage in a variety of tasks to "further the progressive harmonization and unification of the law of international trade").

swallowed by or fully merged with public international law. Rather, its role and scope are augmented.[115]

B. *Substantive and International Impact of Cross-Border Insolvency*

The increased role of private international law and the relevance of public-international-law sources to the mission of private international law should be highlighted more in the context of cross-border insolvency. A broad internationalist approach assigned to private international law is particularly justified in the field of insolvency where private and public interests intersect: insolvency law is considered "meta-law."[116] Insolvency principles are closely linked to fundamental public policy and social goals, and insolvency outcomes can impact the economy and the wider public.[117] Cross-border insolvency law is not merely procedural but also affects substantive rights, even where it is mainly confined to the harmonization of private international laws pertaining to insolvency.[118] Through a cross-border insolvency framework, it is possible to enforce a collective insolvency process on the global level, including by requiring the transfer of assets to the central proceedings and imposing additional duties and requirements regarding the conduct of such proceedings with the important substantive result of equitable treatment of creditors wherever located. Cross-border insolvency can also do more than connect national legal systems. It can engage in the identification of best practices and in the formulation of international standards, and it can prevent financial collapse.[119]

Cross-border insolvency is of a true international nature, as many cases of general default involve multinational enterprises with branches and subsidiaries spanning multiple countries. The way a court or authority in one country handles international insolvency cases often has significant implications across borders in numerous jurisdictions, affecting a broad range of stakeholders. As aforementioned, the administration of cross-border

---

115. Michaels, *supra* note 83, at 137–38; *see also* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 219–20 (2002) (describing the doctrinal reforms in private international law).

116. Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 486 (1996).

117. The claim that insolvency law's role is merely procedural and should be confined to the respect of pre-acquired rights through orderly distribution of the estate has been strongly rejected by proponents of the "traditionalist" approach. *See generally* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987). *Cf.* Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73, 75 (1985) (contending that the traditional approach to bankruptcy distributes assets in a suboptimal way that is different from how a sole owner would have them distributed).

118. *See* BORK, *supra* note 3, at 17–18, 113–14 (setting out the various procedural and substantive aspects of insolvency law).

119. WESSELS, *supra* note 89, at 2–3.

insolvencies can also have an impact on the public and the economy at large.[120] Indeed, international insolvencies and, to an even larger extent, multinational defaults of financial institutions often not only affect the private business community but might influence wider public interests and even threaten the economic and political stability of nation-states.[121] The collapse of Lehman Brothers and other institutions during the global financial crisis are notable examples.[122] The insolvency of Hanjin Shipping in 2016, as well, is an example of how the filing of bankruptcy in one jurisdiction can present paramount global challenges. There, it was a matter of public interest that the South Korean proceedings be swiftly recognized so that cargo worth millions of dollars could resume moving to its various destinations.[123]

The international insolvency regime is a critical component of the international economic framework. The effective resolution of cross-border insolvency contributes to international trade and investment, as the United Nations General Assembly acknowledged when initiating the work in this field.[124] Cross-border insolvency of banks and other financial institutions is also an integral aspect of the global financial system and the architecture of international financial law.[125] Already, and for several decades now, transnational actors have been engaged in the creation of standards in insolvency and the development of frameworks for cross-border insolvency. Against the backdrop of the general evolution of private international law,

---

120. *See* Douglass G. Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931, 935 (1994) (commenting that "[b]ankruptcy law has become so important to the national economy that reform no longer can be left to a few academics and insolvency practitioners").

121. Gaa, *supra* note 93, at 909.

122. The collapse of Lehman Brothers nearly brought down the world's financial system in 2008. Mevorach, *supra* note 10, at 194.

123. The former General Counsel for Hanjin Shipping America noted:

> When Hanjin Shipping, once the seventh largest container carrier in the world and the fourth largest container carriers in the transpacific (Asia – U.S. & Canada) trade, filed for bankruptcy, few believed that a 'too big to fail' organization like Hanjin would not be given a government bail-out. So, naturally, no one really appreciated the kind of disruption and losses that would subsequently affect the global supply chain.

Wook Chung, *Hanjin Shipping: From the Eye of the Storm and Back*, MARINE LOG (Mar. 8, 2017), http://www.marinelog.com/index.php?option=com_k2&view=item&id=25323:hanjin-shipping-from-the-eye-of-the-storm-and-back&Itemid=230 [https://perma.cc/5J2F-S46U].

124. *See* G.A. Res. 52/158, ¶ 6 (Dec. 15, 1997) (resolving that the UN is "convinced that fair and internationally harmonized legislation on cross-border insolvency that respects the national procedural and judicial systems and is acceptable to States with different legal, social and economic systems would contribute to the development of international trade and investment").

125. *See* CHRIS BRUMMER, SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY 233–34, 319–24 (2015) ("Cross-Border bankruptcy has been largely operationalized as an outgrowth of domestic (national policy). . . . [and] authorities have begun to coordinate . . . how cooperation would arise between jurisdictions should a multinational bank or firm fail.").

such work on international frameworks for insolvency should continue to develop within their broader international context.

C. Separation of Modified Universalism from the Pure Theory of Universalism

In accordance with its international role, the cross-border insolvency system should strive to transform modified universalism to an established, binding CIL. Conceptually, this requires that modified universalism is no longer regarded as a transitory doctrine linked to pure universalism but rather a standalone norm. Such conceptual separation is also justified where it is *modified* universalism that provides concrete rules fitting with business and legal realities, thus guiding parties in actual cases. Pure universalism offers the most viable theoretical model for cross-border insolvency when it envisages a collective process on the global level encompassing all stakeholders whose interests are implicated and all assets wherever located. Yet modified universalism translates the model to a practical approach.[126]

Would such conceptual separation risk, however, the further spread and application of universalism? Arguably, formalizing modified universalism might make participants more reluctant to follow it. It might be that it is this humility and modesty attached to modified universalism that allowed it to grow through "incrementalism."[127] It may be conceived that rather than making explicit proclamations about the intentions of frameworks and pointing to concrete international laws, it is better to provide tools that achieve the same intentions without "scaring off" countries from participating in the regime.

Yet if modified universalism is eventually transformed to CIL, it can benefit from the additional advantage that it can operate as a debiasing mechanism: namely, it can, at least to some extent, address countries' aversions and reluctance to adhere to modified universalist instruments. Furthermore, by concealing the justificatory basis (the source) of certain solutions and focusing on technical results, there is a risk that both the frameworks' design and the application of the rules they prescribe would be inconsistent. It is also more difficult to fill in gaps in the system in the absence of a general, settled norm. Finally, it was perhaps the case in the earlier stages of development of the cross-border insolvency system that some obscurity regarding its norms was merited so that frameworks could gain the initial traction and expand. Yet the cross-border insolvency system has gone

---

126. *See* MEVORACH, *supra* note 12, at 1–48, for a discussion of the evolution of modified universalism from the theory of pure universalism.

127. John A.E. Pottow, *Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law*, 9 BROOK. J. CORP. FIN. & COM. L. 197, 198 (2014) (suggesting, however, an *independent* normative theory for choice of law based on modified universalism); John A.E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 939 (2005).

through significant development, and the main cross-border insolvency instrument (the Model Law) has been adopted in a significant number of countries. It is now, therefore, time to stabilize the system further, including through greater clarity about its underlying norms and their legal status.

Such separation and the use of CIL as a source for cross-border insolvency, while requiring that modified universalism is understood and used as a stand-alone norm, should not cause concern to proponents of incremental developments in this field. The use of CIL does not preclude developments. Because it is a source that is flexible and changeable, it can evolve over time, and it is possible to change or create new CIL to meet the developing needs of nations.

V. Transformation: Modified Universalism Becoming CIL

A. *Evidence of a General Practice Accepted as Law*

Modified universalist approaches are already widespread in practice. Modified universalism seems to have generally guided the key existing frameworks for cross-border insolvency. These frameworks, in particular the Model Law, have been applied quite successfully by participating countries.[128] This practice is also not confined to a few specific jurisdictions, although it is undoubtedly more paramount in certain countries and regions. It is also not limited to specific entities, though a modified universalist practice is less established with regard to multinational enterprise groups and financial institutions.[129] The usage of cross-border insolvency protocols and the increased cooperation between courts and between insolvency representatives in cross-border insolvencies are also demonstrations of a modified universalist practice.[130]

---

128. *See* Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 EUR. BUS. ORG. L. REV. 517, 550 (2011) (showing that the Model Law has been implemented and applied by countries in quite a universalist manner); *see also* Jay L. Westbrook, *An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency*, 87 AM. BANKR. L.J. 247, 268 (2013) (showing the success of the Model Law's application in the United States).

129. *See, e.g.*, Mevorach, *supra* note 10, at 184 (noting that the Model Law does not specifically address international financial institutions); *see also* Barbara C. Matthews, *Prospects for Coordination and Competition in Global Finance*, 104 AM. SOC'Y INT'L L. PROC. 289, 291–92 (2010) (identifying some convergence of key rules pertaining to the resolution of banks that may amount to CIL but also noting the gap in the cross-border resolution system).

130. It was already suggested in the Nineties that cross-border insolvency Concordats and cross-border insolvency agreements, which aim to create close cooperation and the centralization of the process in a lead forum, are likely to become evidence of an international customary norm. David H. Culmer, *The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?*, 14 CONN. J. INT'L L. 563, 564 (1999); *see also* Gaa, *supra* note 93, at 882 (asking whether developments in the area should continue by way of the evolving international common law of

Yet for modified universalism to finally transform from an emerging to an established CIL, it is crucial that its application by relevant actors is generally pervasive and consistent. Hesitancy, contradiction, or fluctuation in invoking and applying the norm can undermine and ultimately negate the identification of CIL. Furthermore, the norm should be accepted as law. Thus, CIL might be disproved where it can be shown that participants who followed modified universalism were not motivated by a legal duty and acted in the belief that their acts amount to customary law. It has been argued, for example, regarding the concept of international comity, that "[a]t best, it is only incidental that some civil-law systems arrive at results comparable to the decisions of U.S. courts."[131] Regarding cross-border insolvency, it can be argued that because decisions or actions taken in this field are often either not explicitly based on modified universalism or are based on modified universalism as a broad approach linked to independent domestic common law developments,[132] its usage is in fact a demonstration of a tradition—but not of CIL.

To establish modified universalism as autonomous CIL and make the identification of CIL more plausible, clear pronouncements are needed that can show a consistent acceptance of modified universalism and the application of the norm in accordance with international law. Of primary importance is how countries address cross-border insolvency, especially influential countries (including emerging cross-border insolvency "hubs"[133]) that are more often affected by the norm and have the chance to interact with other state-actors and shape the norm in the process. State-actors' actions matter also when they proclaim intentions and act in international fora, including when deliberating on international instruments or other mechanisms in the form of hard or soft law, as such actions can demonstrate a crystallization of CIL. Existing international frameworks for cross-border

bankruptcy or whether states should take the initiative to negotiate treaties identifying the applicable law).

131. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 35 (1991). Comity may be described as "the deference of one nation to the legislative, executive, and judicial acts of another—not as an obligation, but as a courtesy serving international duty and convenience." David Farmer, *Chapter 15: Ancillary and Other Cross-Border Cases*, 18 HAW. BAR J., Oct. 2015, at 14, 16.

132. See, for example, the restrictive application of modified universalism by the U.K. Supreme Court in *Rubin v. Eurofinance SA* [2012] UKSC 46 [16], [2013] 1 AC 236 (appeal taken from Eng.) ("[T]here has been a trend, but only a trend, to what is called universalism . . . ."), and the Court's narrow interpretation in *Hooley Ltd. v. Victoria Jute Co.* [2016] CSOH 141 [36] (Scot.) (holding that the Scottish court would refuse to defer to India's insolvency process).

133. Notably, Singapore is "a key hub for cross-border restructuring and insolvency." Kannan Ramesh, Jud. Comm'r, Sup. Ct. of Sing., Speech at the INSOL International Group of 36 Meeting: The Cross-Border Project – A "Dual-Track" Approach 10 (Nov. 30, 2015), http://www.supremecourt.gov.sg/Data/Editor/Documents/In-sol%2036_Speech_khb_upload%20 version.pdf [https://perma.cc/ZZL4-KCT9].

insolvency have been somewhat obscure regarding the approach they are following,[134] and thus there is room for clearer pronunciations in instruments of the universal application of modified universalism, intended for general adherence.

How the key players of cross-border insolvency (bankruptcy courts and other implementing institutions, especially in countries most influential in this field) refer to and apply norms of modified universalism is also crucial and could matter beyond the creation of precedent within the jurisdiction, as it can influence and form CIL. Such actors when reaching decisions in line with modified universalism could proclaim the intention of following its prescribed solutions more explicitly and as a matter of obligation. Especially where provisions in instruments are insufficient to address all aspects of a given issue or where the country is not a party to an international framework, modified universalism norms become most relevant. In such cases, instead of, for example, solely relying on inherent discretionary powers in the legal system to assist foreign courts, or grounding decisions on notions such as comity that are often vague and confined to specific countries,[135] courts could explicitly refer to modified universalism as the guiding international law and, in the process, establish the acceptance of modified universalism as CIL.

At various times, American courts have reached universalist decisions based primarily on the Model Law, but also on the principle of international comity enshrined in chapter 15 of the Bankruptcy Code (the American version of the Model Law). In the case of *In re Daebo*,[136] for example, the bankruptcy judge, referring also to *In re Atlas Shipping A/S*,[137] noted that "Chapter 15 'contemplates that the court should be guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief.'"[138] Relying on the comity principle, the court then granted certain relief to the foreign Korean rehabilitation proceedings and vacated attachments pursuant to the Korean

134. For example, the preamble to the Model Law states that its purpose is to "provide effective mechanisms for dealing with cases of cross-border insolvency," but there is no specific reference to modified universalism, namely to a regime that aims to provide a global approach to multinational default, modified to fit business structures. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014).

135. *See* Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 LAW & BUS. REV. AM. 281, 281 (2008) (describing comity as an "impediment" to attaining unification in the area of cross-border insolvency); John J. Chung, In re Qimonda AG*: The Conflict Between Comity and the Public Policy Exception in Chapter 15 of the Bankruptcy Code*, 32 B.U. INT'L L.J. 89, 96, 104 (2014) (describing comity as an "amorphous concept" that courts have struggled to define).

136. *In re* Daebo Int'l Shipping Co., 543 B.R. 47 (Bankr. S.D.N.Y. 2015).

137. 404 B.R. 726 (Bankr. S.D.N.Y. 2009).

138. *In re Daebo*, 543 B.R. at 53 (quoting *In re* Atlas, 404 B.R. at 738). Chapter 15 of the U.S. Bankruptcy Code refers to the principle of comity in §§ 1507(b) and 1509.

stay of actions concerning the company's assets. This decision was in line with modified universalism norms regarding recognition, cooperation, and relief, yet modified universalism was not mentioned explicitly as the applicable norm.

In future cases of this kind, judges could, in addition to applying domestic concepts of international comity, and especially where technical statutory rules require reinforcement or a separate justificatory force, refer explicitly to modified universalist norms that require uniform adherence, thus contributing to the transformation of them into CIL. The fact that powerful nations such as the United States have adopted international instruments, especially the Model Law, should not be a factor working against modified universalism becoming CIL; rather, this development should be a catalyst for making the norms that such instruments pursue more widespread. The inclination could be to just rely on provisions of instruments as adopted locally and refrain from considering norms beyond the instruments,[139] thus impeding the use of modified universalism as an international norm. Yet by appreciating the role of key actors as creators of international law and the potential of modified universalism to become universal, international law that transcends local differences can help overcome such tendencies.

Decisions of international tribunals could contribute to entrenching modified universalism as CIL as well, if they pronounce modified universalism norms more explicitly. In a case that reached the Court of Justice of the European Union (CJEU), *MG Probud Gdynia*,[140] for example, it was not clear whether the German authorities could order enforcement measures regarding assets of the company situated in Germany (where a Polish company had a branch), in circumstances where the main proceedings were taking place in Poland.[141] The CJEU concluded that the German authorities erred in their attempt to impose such local enforcement measures.[142] The court noted the universality of the main Polish proceedings based on the provisions of the EIR.[143] It further stated, also citing *Eurofood*,[144] that pursuant to the EIR provisions and recitals, proceedings opened in a member state must be recognized and be given effect in all other member states.[145] This rule, the court explained, "is based on the principle of

139. *See*, *e.g.*, *In re* Bear Stearns High-Grade Structured Credit, 374 B.R. 122, 132 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) (holding that there is no residual common law discretion under chapter 15).

140. Case C-444/07, 2010 E.C.R. I-0417.

141. *Id.* at ¶¶ 16–20.

142. *Id.* at ¶ 44.

143. *Id.* at ¶ 43.

144. Case C-341/04, 2006 E.C.R. I-3813.

145. Case C-444/07, MG Probud Gdynia, 2010 E.C.R. I-0417, ¶ 27 (citing Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813).

mutual trust."[146] Mutual trust is certainly a core notion that facilitated the establishment of the compulsory cross-border insolvency system within the EU.[147] The premise of mutual trust in the administration of justice in the EU requires giving full faith and credit to courts of other member states.[148] Like comity, however, mutual trust is a vague concept,[149] and its justificatory force is limited.[150] It is also confined in the EIR context to relationships between states within the region.[151] Conversely, a reference to modified universalism could both provide concrete justification for the decision to require that full effect be given to the foreign main proceedings and contribute to the transformation of modified universalism to CIL.

The transformation of modified universalism to CIL may not take too long in view of the already existing widespread practice in this direction and the extensive traction that norms of modified universalism have gained in recent years. What is required is not taking a big leap to pure universalism but settling on the norms of modified universalism. Certainly, to develop the norms into CIL requires that countries and implementing institutions have opportunities to interact. Yet cross-border insolvency cases are not a rare phenomenon. Changes in political powers and shifts of economic centers also mean that country interaction is likely to spread more, creating a critical mass and concentration of activity conducive to CIL. It is important to note, however, the evolutionary nature of CIL and hence the fact that the work on its transformation and further development is a process: "The customary process is in fact a continuous one, which does not stop when the rule has emerged . . . . Even after the rule has 'emerged,' every act of compliance will strengthen it, and every violation, if acquiesced in, will help to undermine it."[152] Furthermore, the notion of elevating modified universalism to the status of CIL should not be understood as a replacement of international

---

146. *Id.*

147. Regulation 2015/848, of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings, 2015 O.J. (L 141) 19, 26 (EU) ("The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust."); Case C-444/07, MG Probud Gdynia, 2010 E.C.R. I-0417, ¶ 28; Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813, ¶ 39.

148. *See also* Matthias Weller, *Mutual Trust: In Search of the Future of European Union Private International Law*, 11 J. OF PRIV. INT'L L. 64, 68 (2015) (referring to mutual trust as a "rather opaque, yet almost omnipresent buzzword . . .").

149. WESSELS, *supra* note 89, at 46.

150. Weller, *supra* note 148, at 101 ("The justificatory force of mutual trust is limited. Using mutual trust as legal fiction does not work, at least not beyond the point reached in the system.").

151. *See* Christoph G. Paulus, *The ECJ's Understanding of the Universality Principle*, 27 INSOLVENCY INTELLIGENCE 70, 71 (2014) ("[T]he European legislator's power to regulate issues of insolvency is confined to membership relationships within the EU . . . .").

152. Maurice H. Mendelson, *The Formation of Customary International Law*, *in* 272 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 155, 175 (1998).

negotiations and deliberations that attempt to improve the written instruments.[153] To the contrary, creating and guarding modified universalism as an international custom should facilitate such negotiations because of the behavioral force of CIL and its ability to shift the reference point of actors regarding universalism. Vice versa, the development of regional and international frameworks can further define and develop the CIL rules.

B. *Use of CIL in Future Cross-Border Insolvencies*

Modified universalism established as CIL can promote a wider coverage and a more consistent application of the norms. As noted above, there are still important gaps in the cross-border insolvency system, including participation in the main international framework for cross-border insolvency (the Model Law) and the entities and issues covered by international instruments.[154] Modified universalism, standing on its own two feet, emerging as CIL, can assist in closing such gaps in the complex international system.[155] The pervasiveness of CIL as an international legal source is an important advantage where modified universalism requires universality and full coverage of the market (market symmetry[156]). Once CIL has become prevalent, countries are bound by it regardless of whether they have codified the laws domestically or through treaties unless they have actively objected to it. Thus, while more action through the recognition of the international role of cross-border insolvency is important, it is enough that modified universalism is practiced generally and especially by influential economies and transnational actors. Countries (and their implementing institutions) that are more averse to change will still become party to a system based on modified universalism.

In practical terms, this means, for example, that in future cases involving countries that have not (1) taken action to adopt the Model Law, (2) ensured that the Model Law, where enacted, actually becomes effective in the jurisdiction, (3) become a party to any other international instrument that

153. For example, see the ongoing deliberations of UNCITRAL Working Group V on the design of model laws on recognition and enforcement of insolvency-related judgments and on the cross-border insolvency of multinational enterprise groups. U.N. Comm'n on Int'l Trade Law, Rep. of Working Group V (Insolvency Law) on the Work of Its Fifty-Second Session, U.N. Doc. A/CN.9/931 (Jan. 15, 2018), http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html [https://perma.cc/B43H-K2VZ].

154. *See supra* note 10 and accompanying text.

155. *Cf.* Guzman, *supra* note 17, at 119 n.17 (explaining that, even though bilateral treaties dominate the foreign investments legal regime, many investments are not covered by these treaties, yet the legal rules included in the treaties seem to have become CIL and, therefore, are generally more universally binding).

156. *See* Westbrook, *supra* note 2, at 2283 (explaining the importance of market symmetry—the idea that bankruptcy systems in a legal regime cover all transactions and stakeholders within that market—to cross-border insolvency).

follow modified universalism, or (4) enacted rules that otherwise facilitate global collective insolvencies, such countries will still be expected to follow modified universalism. It will also be possible to rely on uniform norms of cross-border insolvency rather than invoke domestic mechanisms when, for example, recognition, relief, or assistance is sought in a foreign jurisdiction. Such norms may be invoked by foreign actors[157] in the court or other body presiding over the process. If the norms are rejected by the relevant institution, the rejection may be regarded as a breach of international law. Provisions in international instruments, too, would apply to countries not party to the framework to the extent that the framework reflects the rules of CIL. Thus, even where a framework does not bind certain countries, its provisions may form part of the global legal order of insolvency.

The use of CIL can overcome outdated notions of comity and reciprocity and equalize the treatment of foreign proceedings and the approach to foreign requests—for example, in a country such as South Africa, which has adopted the Model Law but has not given effect to its provisions.[158] CIL can also assist when taking actions in cross-border insolvencies in countries such as China, which has not adopted the Model Law. Recognition and enforcement in China of foreign insolvency proceedings are conditioned on the existence of a relevant international treaty, in addition to other requirements such as that the insolvency proceeding shall not jeopardize the sovereignty and security of the state or public interests.[159] This specific domestic cross-border insolvency regime that was introduced in China in 2006 was still an obstacle to the smooth administration of cross-border insolvencies. For example, in litigation in the context of the cross-border insolvency of Lehman Brothers, a Chinese court considered that proceedings opened in the UK should not be given effect in China (with regard to property situated in China) because of a lack of reciprocity, as China did not have a relevant arrangement with the UK.[160] Going forward, where modified universalism is applied as CIL,

---

157. Foreign actors may be state as well as non-state actors. Indeed, both may be subject to the rights and obligations of international law as the scope of international law has been expanded. Specifically, CIL is increasingly invoked by non-state actors. For a discussion of the increasing role of non-state actors in the realm of international law, see Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 112–25 (2012).

158. South Africa included a reciprocity condition requiring it to designate relevant countries that could invoke the Model Law's provisions, yet such designation never took place. Cross-Border Insolvency Act 42 of 2000 § 2 (S. Afr.); *see also* RH Zulman, *Cross-Border Insolvency in South African Law*, 21 S. AFR. MERCANTILE L.J. 804, 816–17 (2009) (noting that comity and reciprocity enshrined in the South African version of the Model Law are outmoded and not in conformity with modern thinking on the subject).

159. Zhong hua ren min gong he guo qi ye po chan fa (中华人民共和国企业破产法) [Enterprise Bankruptcy Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007), art. 5.

160. Xinyi Gong, *To Recognise or Not To Recognise? Comparative Study of Lehman Brothers*

foreign insolvency representatives should be able to invoke it and attempt recognition and enforcement to promote a collective global approach in the foreign main forum, including in such circumstances where the relevant country is not a party to uniform frameworks and so long as it is not a persistent objector to the CIL regime.

As aforementioned, CIL also plays a role regulating within the gaps of treaties or other instruments. For example, based on modified universalism's norm of cooperation, courts and other authorities would have the authority and the duty to cooperate and communicate, including where the debtor is an entity that is not explicitly covered under existing instruments. The case of *Lehman Brothers*[161] is illustrative. In this case, cooperation was achieved because of the participants' initiative and voluntary will, yet this cooperation was constrained.[162] The enterprise type and structure (i.e., the fact that Lehman Brothers was a multinational financial institution/enterprise group) resulted in aspects of the case falling outside the scope of existing instruments.[163] Where modified universalism is recognized as CIL, cooperation would become a universal legal requirement, including for the purpose of reaching efficient centralized solutions for more complicated enterprise structures.[164]

As modified universalism established as CIL is flexible enough to accommodate changing conditions, it can also be invoked regarding newer types of processes and procedures that may not be covered in written instruments. The shift in the focus of insolvency procedures from formal

---

Cases in Mainland China and Taiwan, 10 INT'L CORP. RESCUE 240, 241 (2013). The court reached this conclusion even though the UK has adopted the Model Law and therefore would be required to recognize foreign insolvencies pursuant to the terms of the instrument. *See id.* at 242 (asserting that Article 5 of the Enterprise Bankruptcy Law grants outbound universal effect to insolvency proceedings initiated in China and that this might be recognized in the UK pursuant to the Model Law, which does not condition recognition by reciprocity).

161. *In re* Lehman Bros. Int'l (Eur.) [2011] EWHC (Ch) 2022, [2011] All ER 273 (Eng.).

162. *See* Paul L. Davies, *Resolution of Cross-Border Groups*, *in* RESEARCH HANDBOOK ON CRISIS MANAGEMENT IN THE BANKING SECTOR 261, 263–64 (Matthias Haentjens & Bob Wessels eds., 2015) (discussing how both the U.S. and the U.K. took unilateral action in the bailouts of non-national entities, including Lehman Brothers, in order to protect national interests); James M. Peck, *Cross-Border Observations Derived from My Lehman Judicial Experience*, 30 BUTTERWORTHS J. INT'L BANKING & FIN. L. 131, 132 (2015) (explaining that cross-border conflicts and self-interested behaviors in the context of the Lehman insolvencies were unavoidable).

163. Mevorach, *supra* note 10, at 191 (explaining that the general cross-border Model Law for insolvency lacked sufficient measures to address the Lehman insolvency and that no specific cross-border framework exists for international financial institutions).

164. Since the fall of Lehman Brothers, UNCITRAL has been developing model provisions concerning enterprise groups (deliberations were ongoing at the time this Article went to print). U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Draft Legislative Provisions, U.N. Doc. A/CN.9/WG/V/WP.158 (Feb. 26, 2018). Thus, going forward, CIL may address gaps in the new regime including in terms of its universal application pending wide enactment by countries.

liquidations to rescue-oriented and various informal processes, including in the time approaching insolvency where there is likelihood of insolvency or financial difficulties, is an example of such changes in the practice of insolvency that instruments may be slow to capture.[165] However, modified universalism norms can be invoked regarding interim, out-of-court, or pre-insolvency procedures even where they are not covered within the scope of cross-border domestic laws or international instruments. An example of such an approach is the decision of the Singapore court in the *Gulf Pacific Shipping* case.[166] In this case, the court, based on "internationalist concerns," decided to recognize the appointment of liquidators over Hong Kong shipping company Gulf Pacific and grant the requested assistance, despite the debtor being in out-of-court proceedings regarding which the domestic powers of assistance were constrained.[167]

Furthermore, to the extent that CIL does not contradict special treaty law, it can override conflicting laws in civil law countries and will be considered part and parcel of the public policy in common law jurisdictions where legislation is to be construed in a manner that would avoid a conflict with the international norm. Thus, modified universalism understood as CIL can provide the separate, *sui generis* basis and justification for the uniform private international laws based on global collectivity. Any ordinary domestic private international laws could sit alongside the cross-border insolvency CIL regime rather than be considered in conflict with it in the given circumstances. Thus, in future cases with circumstances of the type arising, for example, in *Rubin*—where the existing cross-border insolvency instrument might not provide a clear answer (in that case, regarding the question of enforcement of insolvency-related judgments of the main insolvency forum)[168]—the foreign insolvency representative would be able to rely on modified universalism as an international norm.[169] Such an

---

165. *See, e.g.*, *Proposal for a Directive of the European Parliament and of the Council on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and Amending Directive 2012/30/EU*, at 28, COM (2016) 723 final (Nov. 22, 2016) (attempting to harmonize aspects related to preventive restructuring proceedings in EU member states).

166. [2016] SGHC 287 at [6] [(HC, S'pore)] (unreported) (recognizing the foreign proceedings and allowing the liquidators to obtain information regarding a closed bank account of the company).

167. *Id.* at [10].

168. Rubin v. Eurofinance SA [2012] UKSC 46 [91], [2013] 1 AC 236 (appeal taken from Eng.).

169. Since *Rubin*, UNCITRAL has been developing a model law on the enforcement of insolvency-related judgments (deliberations were ongoing at the time this Article went to print). U.N. Comm'n on Int'l Trade Law, Rep. on the Work of Working Group V (Insolvency Law) on its Fifty-Second Session, U.N. Doc. A/CN.9/931, Annex, Draft Model Law on Cross-Border Recognition and Enforcement of Insolvency-Related Judgments at 16 (Jan. 15, 2018); U.N. Comm'n on Int'l Trade Law, Working Group V (Insolvency Law), Recognition and Enforcement of Insolvency-Related Judgments: Draft Model Law, U.N. Doc. A/CN.9/WG/V/WP.156

outcome was unattainable in the *Rubin* case, and the request to enforce the judgment of the central foreign court was denied because modified universalism was applied as a general principle of common law subject to the domestic private international law regime.[170] In other circumstances, courts may be asked, for example, to give full effect to a foreign stay on actions concerning the assets of the enterprise, instead of (as happened in *Pan Ocean*[171]) apply domestic *ipso facto* rules that allow them to terminate contracts, thus undermining the collectivity of the cross-border insolvency process.[172] Similarly, courts could be asked to recognize transactions already approved by foreign main reorganization proceedings, instead of (as happened, e.g., in *Elpida*[173]) applying the domestic rules concerning asset sales.[174] The application of the domestic rule can undeniably delay the process, as well as provide local creditors an unjustified chance to challenge the sale, undermining the norm of a global, nondiscriminatory approach prescribed by modified universalism.

Modified universalism based on CIL could also serve to influence international instruments. It could reinforce technical rules where the instrument refers to the rules of CIL. Currently, requirements in cross-border insolvency frameworks, for example, cooperation "to the maximum extent possible,"[175] could be understood in different ways. They could be interpreted in a universalist manner, suggesting obligatory cooperation to achieve universality within the parameters of modified universalism. Yet they could also be understood as suggesting cooperative territorialism, namely self-serving cooperation, that promotes local interests in the case at hand while still allowing, for example, ring-fencing of assets if that appears to be in the interests of national stakeholders. The lack of clear statements concerning the level of universalism that should be followed also renders proclamations of objectives—such as effectiveness, efficiency, or fairness, stated as the aims of cross-border insolvency systems[176]—open to interpretation and variation

---

(Feb. 19, 2018). Thus, going forward, CIL may assist in closing gaps in the new regime, including in terms of its universal application pending wide enactment by countries.

170. Rubin v. Eurofinance SA [2012] UKSC 46 [177], [2013] 1 AC 236 (appeal taken from Eng.).

171. Pan Ocean Co. v. Fibria Celulose S/A [2014] EWHC (Civ) 2124, [2014] All ER 03 (Eng.).

172. *Id.*

173. *In re* Elpida Memory, Inc., No. 12-10947, 2012 WL 6090194 (Bankr. D. Del. Nov. 16, 2012).

174. *Id.* at *8–9.

175. U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION 13, U.N. Sales No. E.14.V.2 (2014).

176. *Id.* at 3. The Model Law on Cross-Border Insolvency promotes several objectives:

> Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; [g]reater legal certainty for trade and investment; [f]air and efficient administration of cross-border

in the cross-border context. Thus, fairness and efficiency may be viewed from a vested-rights, territorial perspective or from a global, universalist perspective. Going forward, CIL can be used to ensure a consistent application of objectives and requirements enshrined in frameworks in line with modified universalism. Modified universalism based on CIL can also provide specific substance to requirements to interpret instruments by having regard to their "international origin."[177]

Conclusion

Lessons from international law, as well as insights from cognitive psychology of decision-making, highlight the advantages that can be gained from modified universalism conceptualized and formed as CIL. Modified universalism recognized as CIL could fill gaps and promote consistency in the application of regional and international frameworks. Furthermore, a modified universalist CIL can assist in the areas where biases impede movement to more optimal solutions. If the rules of modified universalism are generally conceived as CIL, modified universalism will be the default universal rule, embraced as an opt-out regime, and adherence to it would not require positive action from all participants. Such use of legislative framing can affect the consequences of inaction and can result in higher participation, with greater universality and integrity, in the application of modified universalism. In this respect, it is important that the role of cross-border insolvency is reinforced. Indeed, as a private international law system, it has international objectives to pursue. Private international law generally is increasingly being reunited with the international law system, and its role is augmenting. The international nature of cross-border insolvency and the fact that insolvency addresses both private and public interests further justify the solidification of its international role. Thus, cross-border insolvency law should engage in international norm creation and, in that regard, could rely on modified universalism where it provides concrete and practical rules that can be followed consistently. Key actors, importantly courts and other authorities presiding over cross-border insolvency cases—as well as regulators, policy makers, and international organizations engaged in international insolvency law making—should be less context-dependent and

> insolvencies that protects the interests of all creditors and other interested persons, including the debtor; [p]rotection and maximization of the value of the debtor's assets; and [f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Id.

177. *See, e.g.*, *id.* at 5 ("[R]egard is to be had to [this law's] international origin and to the need to promote uniformity in its application and the observance of good faith."); *see also* Jay L. Westbrook, *Interpretation Internationale*, 87 TEMP. L. REV. 739, 750–51 (2015) (arguing that "system" texts that establish an international framework require an international rather than an insular interpretation).

should perceive their roles more broadly, considering public international law sources and mechanisms for creating and enhancing international obligations.