

Spring 2016

The Harmonizing Directive of Section 1508: Foreign Case Law's Role in Interpreting Chapter 15 of the U.S. Bankruptcy Code

Ginger Clements

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

Recommended Citation

Ginger Clements, *The Harmonizing Directive of Section 1508: Foreign Case Law's Role in Interpreting Chapter 15 of the U.S. Bankruptcy Code*, 36 *Nw. J. INT'L L. & BUS.* 435 (2016).
<http://scholarlycommons.law.northwestern.edu/njilb/vol36/iss2/4>

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

The Harmonizing Directive of Section 1508: Foreign Case Law's Role in Interpreting Chapter 15 of the U.S. Bankruptcy Code

*Ginger Clements**

Abstract: The number of insolvency cases with cross-border aspects continues to rise. In many of these cases, a country's adoption of the UNCITRAL Model Law on Cross-Border Insolvency governs. The United States adopted the Model Law into federal statute through Chapter 15 of the U.S. Bankruptcy Code. Section 1508 of the Bankruptcy Code requires U.S. courts to consider the international origin of the Model Law and the need to promote its uniform application in Chapter 15's interpretation. The legislative history of Chapter 15's adoption reveals that non-U.S. sources, including non-U.S. court decisions, facilitate this uniform application. Courts have recognized Section 1508's directive, but a method of interpretation that fully satisfies the directive, particularly with respect to the consideration of foreign case law, has yet to be articulated clearly. This Note addresses that issue and proposes the level of consideration U.S. courts should give the case law of other Model Law countries when interpreting Chapter 15 of the Bankruptcy Code.

* J.D., Northwestern University, 2016; M.B.A., Louisiana State University, 2010; B.S., Louisiana Tech University, 2008. I would like to thank Professor Bruce Markell for his invaluable guidance and feedback. This Note is lovingly dedicated to the memory of Renn Brasher, whose beautiful spirit is my greatest inspiration. Errors in this paper are my own.

TABLE OF CONTENTS

I. Introduction	437
II. The UNICTRAL Model Law on Cross-Border Insolvency and Chapter 15 of the U.S. Bankruptcy Code.....	440
A. The UNCITRAL Model Law on Cross-Border Insolvency	440
B. Chapter 15 of the U.S. Bankruptcy Code	441
III. Heightened Persuasive Authority and Case Law Under Section 1508.....	443
A. Understanding Heightened Persuasive Authority	443
1. Heightened Persuasive Authority—For Case Law Only	444
2. Two Tales of Heightened Persuasive Authority	447
B. The Insolvency Model Law and Chapter 15: Another Context for Heightened Persuasive Authority	449
1. The Insolvency Model Law Is a “Vehicle for the Harmonization of Laws”	449
2. Congress Elected Harmonization of Chapter 15 with the Insolvency Model Law Statutes of Other Implementing States	452
C. Proper Treatment of Foreign Case Law Under Section 1508....	454
IV. Limitations on the Use of Foreign Case Law in Interpreting Chapter 15	456
V. Analyzing <i>De Akers</i> ex rel. <i>Saad Investmens Co. Ltd. v. Deputy Comm’r</i>	459
VI. Practical Issues in the Use of Foreign Case Law	464
VII. Conclusion.....	468

I. INTRODUCTION

Economic globalization and technological innovation have fueled the substantial growth of business across national borders.¹ This exchange of goods, services, and capital has provoked an increasingly complex integration of financial, legal, and political spheres.² With this integration has come not only great wealth but also profound implications in the context of business failure.³ As the frequency of business insolvencies with international aspects⁴ has inevitably and dramatically increased,⁵ the insolvency laws of multiple countries have been forced to interact more and more.⁶ This has not been without issue; for although investment can cross borders fluidly, bankruptcy remains largely territorial.⁷ National insolvency laws are often ill-equipped to handle cross-border insolvency cases.⁸ This shortcoming results in insufficient and inharmonious legal approaches which inhibit fair and efficient administration of cross-border insolvency cases.⁹ This inefficiency impedes the rescue of financially distressed businesses, hampers the security of the assets of the debtor, and stymies the maximization of the debtor's asset value.¹⁰

¹ Aaron L. Hammer & Matthew E. McClintock, *Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know About Cross-Border Insolvency Legislation in the United States*, 14 LAW & BUS. REV. AM. 257, 258 (2008) (“Economic globalization . . . has vastly increased the number of companies that operate, own assets, or otherwise conduct business in multiple countries.”); Elizabeth Buckel, *Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15*, 44 GEO. J. INT’L L. 1281, 1282 (2013).

² Buckel, *supra* note 1, at 1283.

³ Hammer & McClintock, *supra* note 1, at 258.

⁴ This Note uses the terms “insolvency” and “insolvency proceeding” to describe all formal liquidation and reorganization proceedings. Cf. 11 U.S.C. § 101(32) (2012 & Supp. 2014) (defining “insolvent” in the U.S. Bankruptcy Code to mean, *inter alia*, “a financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation”). This Note uses the term “cross-border insolvency” to refer to an insolvency proceeding involving more than one country. For a comparative look at the usage of these and similar terms, see Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT’L ECON. L. 679, 680 n.2 (2000).

⁵ U.N. COMM’N ON INT’L TRADE LAW [UNCITRAL], UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, at 20, U.N. Sales No. E.14.V.2 (2014) [hereinafter MODEL LAW AND GUIDE TO ENACTMENT]; Hammer & McClintock, *supra* note 1, at 258 (“Where ten years ago, insolvencies and reorganizations with significant international connections were relatively rare, today, it is increasingly unusual to find a major case without at least some international aspects.”); DANIEL M. GLOS BAND ET AL., GUIDE TO CROSS-BORDER INSOLVENCY IN THE UNITED STATES 1 (2008).

⁶ See GLOS BAND ET AL., *supra* note 5, at 1.

⁷ See Alexandra C.C. Ragan, *COMI Strikes a Discordant Note: Why U.S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, 27 EMORY BANKR. DEV. J. 117, 118 (2010).

⁸ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 20.

⁹ *Id.* at 20–21.

¹⁰ *Id.*

To address the inadequacies of national insolvency laws, the United Nations Commission on International Trade (UNCITRAL) promulgated the Model Law on Cross-Border Insolvency (Insolvency Model Law) in 1997.¹¹ The Insolvency Model Law consists of procedural rules for enacting countries to follow in cross-border insolvency cases.¹² The United States incorporated the Insolvency Model Law into federal statute via Chapter 15 of the U.S. Bankruptcy Code (Code) and adopted its main provisions, including a directive to consider the Insolvency Model Law's "international origin" and the need to promote uniformity in its application.¹³ The legislative history of Chapter 15's adoption reveals that non-U.S. sources, including non-U.S. court decisions interpreting the Insolvency Model Law, facilitate its uniform application.¹⁴

However, the provision does not specify the degree of consideration or weight to be placed on the court decisions of implementing states¹⁵ when interpreting the Insolvency Model Law.¹⁶ Courts have recognized the Code's directive to interpret the Insolvency Model Law in light of its international origin and the need to promote its uniform application,¹⁷ but ultimately, courts have failed to articulate a method of interpretation that fully satisfies this directive, particularly with respect to the consideration of foreign case law.¹⁸

¹¹ *Id.* at 19–21.

¹² *Id.* at 19, 25.

¹³ 11 U.S.C. § 1508 (2012 & Supp. 2014); H.R. REP. NO. 109-31, pt. 1, at 309 (2005).

¹⁴ See H.R. REP. NO. 109-31, pt. 1, at 109–10 (2005).

¹⁵ This Note uses the term "implementing states" to describe those countries or jurisdictions, including the United States, which have enacted the Insolvency Model Law in some form. Those countries are as follows: Australia (2008), Benin (2015), Burkina Faso (2015), Cameroon (2015), Canada (2005), Central African Republic (2015), Chad (2015), Chile (2013), Colombia (2006), Comoros (2015), Congo (2015), Cote d'Ivoire (2015), Democratic Republic of the Congo (2015), Equatorial Guinea (2015), Gabon (2015), Greece (2010), Guinea (2015), Guinea-Bissau (2015), Japan (2000), Kenya (2015), Mali (2015), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Niger (2015), Philippines (2010), Poland (2003), Republic of Korea (2006), Romania (2002), Senegal (2015), Serbia (2004), Seychelles (2013), Slovenia (2007), South Africa (2000), Togo (2015), Uganda (2011), United Kingdom of Great Britain and Northern Ireland (including British Virgin Islands (2003) and Great Britain (2005)), United States (2005), and Vanuatu (2013). *Status: UNCITRAL Model Law on Cross-Border Insolvency*, UNCITRAL (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Oct. 29, 2015). The term implementing states may also be used to refer to countries or jurisdictions which have enacted other uniform acts or conventions. When used in that context, the relevant act or convention will be specified.

¹⁶ Although the exact weight to be placed on these cases is not explicitly stated, Congress provides much information to suggest its intention with respect to the matter. This information will be covered in greater detail throughout this Note.

¹⁷ Hammer & McClintock, *supra* note 1, at 259, 262 ("Early cases interpreting Chapter 15 have made a[n] . . . effort to consider foreign case law, including cases interpreting similar concepts under . . . EU Regulation.").

¹⁸ Cf. V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257 (1997) (explaining courts' difficulty in

As the Insolvency Model Law matures and is adopted by more countries, the occurrence of cases requiring Insolvency Model Law interpretation will only increase,¹⁹ and the recent Australian case, *De Akers ex rel. Saad Investments Co. Ltd. v. Deputy Commissioner of Taxation* (Saad Investments), provides a noteworthy example.²⁰ In *Akers*, the Australian appellate court interpreted particular provisions of the Insolvency Model Law to determine the local remedies available to a local Australian creditor whose rights to collect in the debtor's main proceeding were effectively extinguished.²¹ The case presents an Insolvency Model Law interpretation issue which is not difficult to imagine arising in a case under Chapter 15 in the United States where, for whatever reason, a U.S. creditor has no claim against a foreign debtor with assets in the United States under the insolvency proceedings of another country.²² Yet guidance on the proper weight a U.S. court should afford a case such as *Akers* is unclear; therefore, this Note proposes the level of consideration U.S. courts should give the case law of fellow implementing countries when interpreting the Insolvency Model Law.

This Note contends that Section 1508 directs U.S. courts to consider the case law of implementing states when facing a question of interpretation under Chapter 15 of the Code if that foreign case law interprets provisions of the Insolvency Model Law similar to those provisions contained in Chapter 15. Furthermore, if U.S. courts deviate from that case law, they should explain the departure. Part II discusses the general uniform approach of the Insolvency Model Law and details its adoption in the United States. Part III explains contexts in which case law is more than merely persuasive—it has a heightened persuasiveness—and describes the

approaching a similar provision of interpretation in the U.N. Convention on Contracts for the International Sale of Goods).

¹⁹ Thirty-two jurisdictions have enacted the Insolvency Model Law since the United States, including Canada and Great Britain in the same year as the United States. See *supra* note 15 for the complete list along with the year of enactment.

²⁰ *De Akers ex rel. Saad Inv. Co. Ltd. v Deputy Comm'r of Taxation* [2014] FCAFC 57 (Austl.).

²¹ *Id.*; *Cross-Border Insolvency*, HWL EBSWORTH LAWYERS (July 22, 2014), <http://www.hwlebsworth.com.au/latest-news-a-publications/publications/insolvency-and-securities-enforcement/item/1393-cross-border-insolvency.html>. The case will be discussed in more detail in Part III.

²² *De Akers* [2014] FCAFC 57, ¶ 115 (framing the facts in the case as but one iteration of the underlying issue. “The present particular circumstance involves a claimed revenue debt. Other examples of debts unenforceable in the centre of main interests, but enforceable in the forum of recognition, are not difficult to hypothesise. The debt may be an unenforceable penalty in the centre of main interests, but not locally. The jurisdiction of the centre of main interests may have a law discriminating against or refusing to recognise the commercial interests or rights of citizens or companies of a particular state, whether because of a state of affairs such as belligerency, or because of some other reason. The local (recognising) state may have no such attitude. Thus, whilst we are dealing here with revenue debt, the problem need not necessarily be so framed.”) (emphasis added).

treatment of such case law by other courts in those contexts.²³ Part III asserts that the uniform approach of the Insolvency Model Law and its aim to harmonize among implementing states renders case law which interprets it heightened persuasive authority. Thus, the case law of implementing states should be treated as heightened persuasive authority by U.S. courts; therefore, when interpreting Chapter 15 of the Code, U.S. courts must consider the case law of implementing states when that case law interprets provisions of the Insolvency Model Law similar to those provisions contained in Chapter 15. Also, if U.S. courts do not follow the case law, they should explain their departure. Part IV establishes that the heightened persuasive treatment of case law of implementing states must operate within limits. Part V returns to the *Akers* case and analyzes the court's decision under the framework established in previous sections of the Note. Part VI explores the practical issues inherent in the consideration of foreign case law. Part VII concludes by reinforcing the necessity of proper consideration for foreign case law in interpreting Chapter 15 of the Code.

II. THE UNICTRAL MODEL LAW ON CROSS-BORDER INSOLVENCY AND CHAPTER 15 OF THE U.S. BANKRUPTCY CODE

A. The UNCITRAL Model Law on Cross-Border Insolvency

Originally adopted by UNCITRAL in 1997, the Insolvency Model Law is a tool for countries to better handle cross-border insolvency proceedings.²⁴ By reflecting best practices in cross-border insolvency, the Insolvency Model Law assists implementing states in modernizing, harmonizing, and increasing the fairness of their insolvency laws.²⁵ The Insolvency Model Law addresses situations where the debtor has assets in more than one country or where creditors of the debtor exist in a country other than the seat of the main insolvency proceeding.²⁶ The Insolvency Model Law aims to (i) encourage cooperation between countries, (ii) provide legal certainty for trade and investment, (iii) protect and maximize the value of debtors' assets, (iv) fairly administer the interests of creditors

²³ The phrase "heightened persuasive authority" is used to connote a higher level of persuasive authority and is described in more detail in Part III.

²⁴ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 19. The Insolvency Model Law acknowledges that liquidation and reorganization in some jurisdictions might not be conducted under law that is labelled as insolvency law (e.g., company law) but that addresses insolvency or severe financial distress nonetheless. U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE, ¶ 79, U.N. Sales No. V.14-00242 (2013) [hereinafter JUDICIAL PERSPECTIVE].

²⁵ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 19.

²⁶ *Id.*

and other interested parties including the debtor, and (v) facilitate the rescue of financially troubled businesses to protect investment and preserve employment.²⁷

The Insolvency Model Law does not purport to be substantive insolvency law; rather, it acts as a procedural framework for increasing cooperation among jurisdictions.²⁸ The Insolvency Model Law, thus, provides rules concerning (1) the recognition and enforcement of foreign insolvency proceedings, (2) foreign representatives' access to courts of implementing states, (3) the rights of foreign creditors, (4) coordination of multiple insolvency proceedings, (5) cooperation among courts, (6) cooperation among representatives, and (7) cooperation between courts and representatives.²⁹

To date, legislation based on the Insolvency Model Law has been adopted in thirty-two jurisdictions.³⁰ In incorporating the text of the Insolvency Model Law into its body of law, an implementing state may modify or omit some of the provisions of the Insolvency Model Law.³¹ However, adopting the Insolvency Model Law into a country's existing legal system with "as few changes as possible" is recommended.³²

B. Chapter 15 of the U.S. Bankruptcy Code

The United States adopted the Insolvency Model Law into Chapter 15 of the Code under Title VIII of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.³³ Chapter 15 replaced former Section 304, which was enacted in 1978 and provided specific procedures for obtaining relief in U.S. courts by foreign representatives to facilitate a foreign insolvency proceeding.³⁴ Chapter 15 incorporates most of the

²⁷ *Id.* at 32.

²⁸ *Id.* at 19; see Andre J. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 321 (1998) ("The Model Law does not modify the existing material rules concerning insolvency proceedings in the enacting State.").

²⁹ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 20; Berends, *supra* note 28, at 312. The Insolvency Model Law is intended to apply to a number of situations arising in cross-border insolvency proceedings such as (1) an inward-bound request for recognition of a foreign proceeding, (2) an outward-bound request from a court or an administrator in the implementing state for recognition of an insolvency proceeding commenced under the laws of the implementing state, (3) coordination of concurrent proceedings in two or more countries, and (4) participation of foreign creditors in insolvency proceedings taking place in the implementing state. Buckel, *supra* note 1, at 1289 (citing BOB WESSELS ET AL., INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 240 (2009)).

³⁰ See *supra* note 15 for more information on enacting countries.

³¹ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 25.

³² *Id.*

³³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 801(a), 119 Stat. 23, 135-45 (2005).

³⁴ Alesia Ramney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, 82 AM. BANKR. L. J. 269, 269 (2008).

Insolvency Model Law with only minor changes to reflect U.S. references and vernacular³⁵ and thus aligns with the procedural law of most enacting countries.³⁶ Chapter 15's objectives are quite similar to those of the Insolvency Model Law but with greater specificity as to desired cooperation among U.S. and foreign representatives and authorities.³⁷ Chapter 15 primarily applies in four situations.³⁸ The first two situations involve assistance in connection with an insolvency proceeding. Either assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign insolvency proceeding, or assistance is sought in another country in connection with a case under the U.S. Bankruptcy Code.³⁹ The third scenario arises when a foreign insolvency proceeding and a U.S. bankruptcy proceeding involving the same debtor are concurrently pending.⁴⁰ Finally, the fourth situation concerns foreign creditors or other parties in another country that have an interest in requesting the commencement of a U.S. bankruptcy case or in participating in such a case.⁴¹ Thus, Chapter 15 is the sole avenue of access to an ancillary insolvency proceeding in the United States for a U.S. multinational corporation with an insolvency commenced elsewhere.⁴² It is also the only

³⁵ Buckel, *supra* note 1, at 1293 (citing Kevin J. Beckering, *United States Cross-Border Corporate Insolvency: The Impact of Chapter 15 on Comity and the New Legal Environment*, 14 L. & BUS. REV. AM. 281, 282 (2008)). For example, regarding Section 1501, the report states that "it largely tracks the language of the Model Law with appropriate United States references," and regarding Section 1503, the report states that "this section is taken exactly from the Model Law with only minor adaptations of terminology." H.R. REP. NO. 109-31, pt. 1, at 106, 107 (2005). Also, regarding Section 1508, the report states that "[c]hanges to the language were made to express the concepts more clearly in United States vernacular." *Id.* at 109.

³⁶ Buckel, *supra* note 1, at 1289 (citing Beckering, *supra* note 35, at 282).

³⁷ Compare the drafting of 11 U.S.C. § 1501(a) (2012 & Supp. 2014) (stating one of the objectives of the law is cooperation between (i) U.S. courts, U.S. Trustees, trustees, debtors and debtors-in-possession, and examiners and (ii) courts and other competent authorities of foreign countries involved in cross-border insolvency cases) with the drafting of MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 3 (stating one of the objectives of the law is "cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency"). Other objectives of Chapter 15 are to provide legal certainty for trade and investment, protect and maximize the value of debtors' assets, fairly administer the interests of creditors and other interested parties, including the debtor, and facilitate the rescue of financially troubled businesses to protect investment and preserve employment. 11 U.S.C. § 1501(a). Other objectives of the Insolvency Model Law are discussed in Part I of this Note.

³⁸ Hammer & McClintock, *supra* note 1, at 264.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward the Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 89 (2006); *see also* Ramney-Marinelli, *supra* note 34, at 271 (explaining Congress's intent to make Chapter 15 "the exclusive door to ancillary assistance to foreign proceedings.") (quoting H.R. REP. NO. 109-31, pt. 1, at 110 (2005)). "Generally, a chapter 15 case is ancillary to a primary proceeding brought in another country, typically the debtor's home country. As an alternative, the debtor or a creditor may commence a full chapter 7 or chapter 11 case in

means of access to an ancillary insolvency proceeding in the United States for a foreign corporation with assets or operations in the United States.⁴³

III. HEIGHTENED PERSUASIVE AUTHORITY AND CASE LAW UNDER SECTION 1508

As the use of Chapter 15 continues to increase, U.S. courts will be called upon to interpret its provisions more and more. Thus, the treatment of case law of implementing states must be addressed. This Part proposes the proper treatment of such case law by arguing that the case law is heightened persuasive authority. First, this Part explains heightened persuasive authority, explores contexts in which case law assumes heightened persuasiveness, and describes the treatment of case law in those contexts. Then the Part argues that the uniform approach of the Insolvency Model Law and its goal to harmonize among its implementing states is also a context for heightened persuasive authority. Finally, the Part concludes by setting forth the treatment case law of implementing states should receive by U.S. courts.

A. Understanding Heightened Persuasive Authority

In reaching their decisions, courts may consider the content as well as the source of ideas, arguments, and conclusions.⁴⁴ Persuasive authority⁴⁵ is a classification which includes those resources that a court may choose to follow if it finds the reasoning or conclusion convincing.⁴⁶ Treatises, law review articles, and decisions of courts in other jurisdictions are types of persuasive authority.⁴⁷ Persuasive authority is contrasted with mandatory or binding authority. Courts must follow binding authority.⁴⁸ Persuasive authority by its very nature is not binding; a court is not required to follow

the United States if the assets in the United States are sufficiently complex to merit a full-blown domestic bankruptcy case.” *Ancillary and Other Cross-Border Cases*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx> (citing 11 U.S.C. § 1520(c)) (last visited Feb. 15, 2015).

⁴³ See Chung, *supra* note 42, at 89; see also Ramney-Marinelli, *supra* note 34, at 271.

⁴⁴ See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1934, 1940 (2008).

⁴⁵ From this point forward in this Note, the term persuasive authority and persuasive source will be used interchangeably. Furthermore, if the Note refers to courts as persuasive authority, the decisions of those courts are implicated as persuasive authority too since they embody the reasoning and status of the authoring court. The significance of reasoning and status will be explored further in this Part.

⁴⁶ Schauer, *supra* note 44, at 1940.

⁴⁷ Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 63–64 (2009).

⁴⁸ Schauer, *supra* note 44, at 1940 (“Mandatory authorities, according to the standard account drummed into the minds of lawyers from their first year of law school on, are ones that bind a court to follow them.”).

it.⁴⁹

However, there are certain contexts in which a court, though not bound to follow a persuasive authority, may nonetheless have a strong, overarching reason to do so.⁵⁰ Namely, courts in these contexts are trying to make their decisions consistent with the conclusion of the persuasive authority.⁵¹ Indeed, a great concern for uniformity in the law pervades many of the most visible contexts⁵² in which this desire for consistency exists.⁵³ In these situations, the persuasive authority assumes a heightened persuasiveness, a persuasiveness greater than that of other persuasive sources.⁵⁴

1. Heightened Persuasive Authority—For Case Law Only

A source's heightened persuasiveness relates to its status, particularly with respect to concerns for uniformity in the law.⁵⁵ That is to say, only those persuasive authorities whose conclusions affect uniformity in the law

⁴⁹ Brian D. Lepard, *Is the United States Obligated to Drive on the Right? A Multidisciplinary Inquiry into the Normative Authority of Contemporary International Law Using the Arm's Length Standard as a Case Study*, 10 DUKE J. COMP & INT'L L. 43, 91 (1999); see Schauer, *supra* note 44, at 1940. ("[M]andatory (or binding) authorities are commonly distinguished from persuasive authorities. Mandatory authorities . . . are ones that bind a court to follow them. . . . [T]his binding obligation . . . is in contrast . . . with a court's discretion to choose whether to follow a persuasive authority . . .").

⁵⁰ Mayo Moran, *Influential Authority and the Estoppel-Like Effect of International Law* 5 (U. Toronto, Legal Studies Research Paper No. 03-05, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=785545 ("Judges often feel constrained to pay heed to what are best described as mandatory values. These values exert a kind of demand . . . [such that] they do not simply persuade, they compel."); see, e.g., Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 832, 838 (2014) ("Citing the value of 'uniformity,' federal courts are often reluctant to create a circuit split.").

⁵¹ Flanders, *supra* note 47, at 75.

⁵² Two of the most visible of these contexts will be explored later in this Part. To preview them here, they are (i) when U.S. circuit courts cite other circuit courts, not merely for the informational or persuasive value, but because they seek to avoid a circuit split, and (ii) when U.S. state courts aim to harmonize their interpretation of state "uniform acts" with other states based on the fact that those states have adopted the same uniform act.

⁵³ Flanders, *supra* note 47, at 75.

⁵⁴ Authorities with this heightened persuasiveness have been referred to as "super-persuasive" authorities. Flanders, *supra* note 47, at 74 ("[T]hese . . . 'super-persuasive' authorities . . . have an additional weight, beyond their persuasiveness . . ."); see Lepard, *supra* note 49, at 91 (explaining that certain persuasive authority imposes an obligation to afford it "great weight in decision making") (internal quotes omitted); Alice Osman, *Demanding Attention: The Roles of Unincorporated International Instruments in Judicial Reasoning*, 12 N.Z. J. PUB. & INT'L L. 345, 350 (2014) (explaining that "some sources of persuasive authority . . . are only persuasive," but "[o]ther sources, however, seem to demand attention" and referring to these other sources as "influential authority"); see Flanders, *supra* note 47, at 75–76.

⁵⁵ Flanders, *supra* note 47, at 75.

can carry heightened persuasiveness.⁵⁶ Thus, heightened persuasive authority is limited to court decisions because courts have decision-making power (unlike other forms of persuasive authority such as treatises, law review articles, and Internet sources).⁵⁷ While sources like law review articles may influence uniformity in the law, they do not have the power to make legal decisions that affect it; courts do.⁵⁸

Decision-making power is necessary for heightened persuasiveness, but it is not sufficient.⁵⁹ Not all courts are heightened persuasive authorities despite their ability to make decisions.⁶⁰ Rather, heightened persuasive authorities share the distinction of making decisions that have some harmonizing value.⁶¹ In other words, what brings a court decision with heightened persuasiveness into the “territory outside of conventional persuasive authorities” is another court’s citation to that decision in order to make its own decision consistent with it.⁶² “The desire to create an actual uniformity in the law transforms some authorities” into heightened persuasive ones.⁶³ The extra weight of heightened persuasive authorities, thus, derives from their virtue of being a court that decides law in a context where uniformity or consistency is valued.⁶⁴ They are heightened persuasive authorities by virtue of what they *are* (courts that decide issues under similar law⁶⁵) and not just by virtue of what they *say*.⁶⁶ Therefore,

⁵⁶ See *id.*

⁵⁷ *Id.* at 58 (“[D]ecisions from other courts outside the jurisdiction of the deciding court are treated as having more weight than other authorities—such as law review articles or treatises.”); see Schauer, *supra* note 44, at 1935 (“The force of an authoritative directive [such as a court decision] comes not from its content, but from its source.”).

⁵⁸ See *Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises*, HARV. L. SCH., <http://guides.library.harvard.edu/content.php?pid=103327&sid=1030214> (last visited Mar. 31, 2015) (explaining that law review articles are “valuable for the depth in which they analyze and critique legal topics” on which courts have ruled or will rule).

⁵⁹ See Flanders, *supra* note 47, at 74–76. Flanders gives examples of courts acting as heightened-persuasive authorities and suggests that not all courts fit the bill of heightened-persuasive authority. *Id.*

⁶⁰ See *id.*

⁶¹ *Id.* at 75; see Rene David, *The Methods of Unification*, 16 AM. J. COMP. L. 13, 15 (1968) (describing that harmonization of laws entails “effectuating an understanding about the significance of certain concepts” including “the recognition of authoritative sources”).

⁶² Flanders, *supra* note 47, at 75; see Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1201 (2006) (“For a persuasive precedent to be authoritative . . . it involves some degree of ceding decisionmaking to another because of the authority of the other.”).

⁶³ Flanders, *supra* note 47, at 79.

⁶⁴ *Id.* at 74.

⁶⁵ Primarily, contexts where uniformity or consistency is valued involve deciding issues under similar law. This concept will be explored in this Part below.

⁶⁶ See Moyer, *supra* note 50, at 839 (discussing in the case of federal circuit courts, “it is the very existence of . . . the ‘other circuit’ authority that becomes substantively determinative in the federal court’s reasoning and, ultimately, its disposition of the issue of law.”); Flanders, *supra* note 47, at 75; see also Schauer, *supra* note 44, at 1943 (“Many—perhaps even most—judicial uses of so-called persuasive authority seem to stem from authority rather than persuasion.”).

when looking at the decisions of these courts, other courts consider not only the reasoning of their conclusion (as they would with any persuasive source), but also the courts' status as a decision-making body with which to harmonize.⁶⁷

Heightened persuasive authority, then, refers to a grade of persuasive authority.⁶⁸ In a hierarchy of persuasive authority, it ranks at the top, being the most persuasive.⁶⁹ “The norms of judge craft require that persuasive authorities be dealt with appropriately.”⁷⁰ This means that heightened persuasive authorities must be confronted by courts in making their decisions precisely because of the heightened persuasive authority's status.⁷¹ Essentially, the power of heightened persuasive authorities closely resembles the role of past decisions of the same court or higher courts, both binding sources of law.⁷² As heightened persuasive authority is more akin to binding than persuasive authority, courts cannot simply ignore it.⁷³ The heightened persuasive authority must be acknowledged.⁷⁴ Additionally, if a court determines that the heightened persuasive authority should not be followed, there should at least be a clear explanation why.⁷⁵ The heightened persuasive authority should receive an acknowledgement and rebuttal, showing why the court decided not to follow the decision, particularly given its heightened persuasiveness.⁷⁶ Despite this, authority with

⁶⁷ Flanders, *supra* note 47, at 74.

⁶⁸ Sullivan, *supra* note 62, at 1201 (“The notion of authority being ‘persuasive’ beyond its inherent power to persuade . . . explains what is otherwise mysterious—the phenomenon that might be called ‘graded persuasiveness.’”); *see* Flanders, *supra* note 47, at 63.

⁶⁹ *See* Flanders, *supra* note 47, at 63. In his ordering, Flanders ranks other courts outside the deciding court's own jurisdiction at the top of the ordering. *Id.* Yet, Flanders goes on to point out that even within this top ordering some authority can be more persuasive than others. *Id.* at 74–75.

⁷⁰ Sullivan, *supra* note 62, at 1206.

⁷¹ *Id.* at 1205 (arguing that “at least those [sources] that grade high enough on the scale of persuasion, must be confronted precisely because the authority is an authority,” in other words, a court that makes decisions).

⁷² Flanders, *supra* note 47, at 74.

⁷³ Sullivan, *supra* note 62, at 1206 (“In short, persuasive precedents can be rejected, but they cannot be ignored.”).

⁷⁴ *See* Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) (stating “we would consider it bad form to ignore . . . authority by failing even to acknowledge its existence”).

⁷⁵ *Id.* (“[I]t is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. *So long as the earlier authority is acknowledged and considered*, courts are deemed to have complied with their . . . responsibilities.”) (emphasis added); *Cf.* Flanders, *supra* note 47, at 61 (describing that binding authority cannot simply be noted and then departed from. It must receive an acknowledgement and a rebuttal, showing why the decision no longer has any force.).

⁷⁶ *See* Flanders, *supra* note 47, at 78 (“[T]here is a pull towards conformity with other courts, and courts who drift from that pull are usually thought to have to explain why, or at least to acknowledge the disagreement.”). “The decisions of other courts [even if not very persuasive in their reasoning] may deserve recognition and even consideration if the cases are very closely related or on point, and there are strong reasons for uniformity or consistency in that area of law.” *See id.* at 84; *see also* Sullivan, *supra*

heightened persuasiveness, like traditionally persuasive authority, ultimately is not binding.⁷⁷ Courts are not in legal error if they do not choose to follow authorities with heightened persuasiveness.⁷⁸

2. Two Tales of Heightened Persuasive Authority

As mentioned earlier, a significant concern for uniformity in the law infuses many of the most apparent contexts in which heightened persuasiveness dwells.⁷⁹ Two primary contexts for heightened persuasiveness are as follows:

- (1) When U.S. circuit courts cite other circuit courts, not merely for informational or persuasive value, but because they seek to avoid a circuit split, and⁸⁰
- (2) When U.S. state courts aim to harmonize their interpretation of state uniform acts with other states based on the fact that those states have adopted the same uniform act.⁸¹

A clear example of heightened persuasiveness is found within the U.S. Courts of Appeals.⁸² Circuit courts consider the decisions of other circuit courts on a similar issue before making a decision.⁸³ The courts are under no obligation to adhere to the decisions of “sister courts,”⁸⁴ yet the courts maintain that those decisions deserve “great weight and precedential value.”⁸⁵ Further, judges express a reluctance to create a circuit split,⁸⁶

note 62, at 1205–06 (“A court facing such a high-value persuasive precedent will often go to great lengths to distinguish it . . . [a]nd, when such prior authority cannot be distinguished (at least in a way that is intellectually satisfying to the court), it will usually feel compelled to explain why it has reached a different result.”). Compare the notion that heightened persuasive authority, which is not followed, should “receive an acknowledgement and rebuttal, *showing why the court decides not to follow the decision*” with the point that binding authority, which is not followed, “must receive an acknowledgement and rebuttal, *showing why the decision no longer has any force. To fail to do so would . . . be a legal error.*” Flanders, *supra* note 47, at 61 (emphasis added). This Note’s assertion that heightened persuasive authority, which is not followed, should receive an acknowledgement and rebuttal does not hinge on any legal error in the absence of such acknowledgement. Rather, it centers on the idea that authority with heightened persuasiveness gains its status from certain values, including harmonization. *See* Flanders, *supra* note 47, at 75.

⁷⁷ Flanders, *supra* note 47, at 74.

⁷⁸ *Id.*

⁷⁹ *Id.* at 75.

⁸⁰ Amelia H. Boss, *The Uniform Electronic Transactions Act in a Global Environment*, 37 IDAHO L. REV. 275, 280 (2001); Flanders, *supra* note 47, at 75–76; Moyer, *supra* note 50, at 838.

⁸¹ Boss, *supra* note 80, at 280; Flanders, *supra* note 47, at 75–76.

⁸² Flanders, *supra* note 47, at 76.

⁸³ *Id.*

⁸⁴ Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1578 (2008).

⁸⁵ *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979).

⁸⁶ *See, e.g., Alfaro v. Comm’r*, 349 F.3d 225, 229 (5th Cir. 2003) (“We are always chary to create

citing the importance of uniformity.⁸⁷ Thus, the decisions of other appellate courts are considered not only because of their content but also because of the court's status as a court which makes decisions with harmonizing value.⁸⁸

Heightened persuasiveness can also be observed in the interpretation of uniform statutory texts across states in the United States.⁸⁹ Through the enactment of uniform legislation—chiefly the Uniform Commercial Code (UCC)—state legislators have adopted statutes that encourage state courts to duly consider the interpretations of similar statutes in other states.⁹⁰ State courts are not bound by other states' court decisions which interpret such uniform acts like the UCC; however, the interpretations provided by other state court decisions are “extremely persuasive.”⁹¹ Judges express a “healthy respect” for the decisions of other states' courts construing the UCC.⁹² An appreciation for the importance of uniformity in a national system of sales laws informs the judges' approach.⁹³ Other states' court decisions are considered not merely due to the value of their reasoning, but also because of the courts' status as courts which decide cases under a similar statute, that state's adoption of the UCC.⁹⁴

a circuit split.” “[S]ome [circuit courts] go so far as to create a presumption against creating a conflict, claiming that they must avoid generating circuit splits unless they have a ‘compelling’ reason to do so.” Moyer, *supra* note 50, at 838 (citing Frost, *supra* note 84, at 1578). *See, e.g.*, Frost, *supra* note 84, at 1579 n.30 (quoting *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 31 (1st Cir. 2004) (“A court of appeals should always be reluctant to create a circuit split without a compelling reason”); *Kelton Arms Condo. Owners Ass’n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) (“[W]e decline to create a circuit split unless there is a compelling reason to do so.”); *Wagner v. Pennwest Farm Credit, ACA*, 109 F.3d 909, 912 (3d Cir. 1997) (same)).

⁸⁷ *Aldens, Inc.*, 610 F.2d at 541 (“As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow Unless our . . . courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system.”); Moyer, *supra* note 50, at 838.

⁸⁸ Flanders, *supra* note 47, at 76.

⁸⁹ Boss, *supra* note 80, at 280 (“The concept of ‘uniform’ interpretation of statutory texts across jurisdictional boundaries is not a new one in the United States.”).

⁹⁰ *Id.*

⁹¹ Philip T. Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473, 479 (2001).

⁹² Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations, and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 215 (1998).

⁹³ *ABM Escrow Closing & Consulting, Inc. v. Matanuska Maid, Inc.*, 659 P.2d 1170, 1172 (Alaska 1983) (“Although precedent from other jurisdictions is, of course, not binding upon us, we nonetheless are mindful of the fact that a basic objective of the Uniform Commercial Code is to promote national uniformity in the commercial arena and that this objective would be undermined should we decline to follow the stated intent of the Code’s drafters and the reasoned decisions of a number of other jurisdictions.”); Flechtner, *supra* note 92, at 215.

⁹⁴ Flanders, *supra* note 47, at 80.

B. The Insolvency Model Law and Chapter 15: Another Context for Heightened Persuasive Authority

1. *The Insolvency Model Law Is a “Vehicle for the Harmonization of Laws”*⁹⁵

Like case law of the U.S. Courts of Appeals or the UCC, uniformity, or harmonization, is highly important when interpreting the Insolvency Model Law. The Insolvency Model Law is a uniform act by design, inherently urging harmonization and consistent application.⁹⁶ The Insolvency Model Law emphasizes “a uniform approach to its interpretation based on its international origins.”⁹⁷ The uniform approach to the Insolvency Model Law’s interpretation is encoded in Article 8.⁹⁸ Article 8, titled “Interpretation,” reads: “In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”⁹⁹ The provision’s purpose is to create an interest in its harmonized interpretation in implementing states.¹⁰⁰

Article 8 is modeled after Article 3 of the UNCITRAL Model Law on Electronic Commerce (E-Commerce Model Law).¹⁰¹ The Guide to Enactment for the E-Commerce Model Law reinforces the harmonizing purpose behind Article 8. Indeed, the expected effect of Article 3—on which Article 8 is based—is “to limit the extent to which a uniform text,

⁹⁵ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 24.

⁹⁶ *Id.*

⁹⁷ JUDICIAL PERSPECTIVE, *supra* note 24, at 7.

⁹⁸ *See* MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 5.

⁹⁹ *Id.*

¹⁰⁰ *See id.* at 54; Comm’n on Int’l Trade Law, Rep. on Its 30th Session, May 12–30, 1997, ¶ 174, U.N. Doc. A/52/17 (July 4, 1997) [hereinafter General Assembly 30th Session Report] (explaining the adoption of Article 8 to the Model Law); Comm’n on Int’l Trade Law, Working Grp. V (Insolvency Law), Rep. on Its 39th Session, Dec. 6–10, 2010, ¶ 39, U.N. Doc. A/CN.9/WG.V/WP.95 (Dec. 20, 2010) [hereinafter Insolvency Working Group 39th Session Report] (“The importance of Article 8 to interpretation is noted in the decisions of a number of courts.”).

¹⁰¹ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 54. (“Article 8 has been modelled on article 3, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce.”). Article 3 of the Model Law on E-Commerce reads in relevant part: “In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.” U.N. COMM’N ON INT’L TRADE LAW [UNCITRAL], UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT, at 4, U.N. Sales No. E.99.V.4 (1998) [hereinafter E-COMMERCE MODEL LAW AND GUIDE]. Article 8 of the Model Law on Cross-Border Insolvency reads verbatim. *See* MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 5. *Cf.* U.N. CONVENTION ON CONTRACTS FOR THE INT’L SALE OF GOODS, at 3, U.N. Sales No. E.10.V.14 (2010) (“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”) [hereinafter CISG]; E-COMMERCE MODEL LAW AND GUIDE, *supra* note 101, at 29.

once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.”¹⁰² The commentary to Article 3 goes on to state that the article serves the purpose of:

[D]raw[ing] the attention of courts and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation . . . should be interpreted with reference to its international origin *in order to ensure uniformity in the interpretation of the Model Law in various countries*.¹⁰³

Article 3 of the E-Commerce Model Law is in turn based on Article 7 of the U.N. Convention on Contracts for the International Sale of Goods (CISG or Convention).¹⁰⁴ The Explanatory Note to the CISG explains that the Convention will “better fulfil[] its purpose if it is interpreted in a consistent manner in all legal systems.”¹⁰⁵

As many legal writers have pointed out, this means, above all, that one should not read the Convention through the lenses of domestic law. . . . Thus, when interpreting the CISG one should not resort to the meaning generally attached to certain expressions within the ambit of a particular legal system¹⁰⁶ [I]n order to achieve the CISG’s ultimate goal of uniform application, it is necessary to consider the practice of other jurisdictions, i.e., ‘what others have already done.’¹⁰⁷

Therefore, the intent of harmonized interpretation of the Insolvency Model Law, derived from a rich history of such intention in international uniform acts, is clearly embodied in Article 8.¹⁰⁸

Facilitating this harmonized interpretation, the Insolvency Model Law’s Guide to Enactment provides information on sources to be consulted

¹⁰² E-COMMERCE MODEL LAW AND GUIDE, *supra* note 101, at 29.

¹⁰³ *Id.* at 30 (emphasis added).

¹⁰⁴ *Id.* at 29. Other uniform law instruments contain a similar provision concerning international character and uniform interpretation. *See, e.g.*, Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1, art. 18, (EC); Int’l Inst. for the Unification of Private Law [UNIDROIT], Convention on International Factoring, art. 4, May 28, 1988, 27 I.L.M. 943; Int’l Inst. for the Unification of Private Law [UNIDROIT], Convention on International Financial Leasing, art. 6, May 28, 1988, 27 I.L.M. 931.

¹⁰⁵ CISG, *supra* note 101, at 36.

¹⁰⁶ Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 246 (1998).

¹⁰⁷ *Id.* at 247.

¹⁰⁸ *See* MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 54 (“A provision similar to the one contained in article 8 appears in a number of private law treaties More recently, it has been recognized that such a provision would also be useful in a non-treaty text such as a model law on the basis that a State enacting a model law would have an interest in its harmonized interpretation.”).

in the Law's interpretation.¹⁰⁹ As a primary source, case law on the Insolvency Model Law is important for uniform interpretation under Article 8.¹¹⁰ The Guide states that "harmonized interpretation" of the Insolvency Model Law is facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system.¹¹¹ The CLOUT system compiles abstracts of judicial decisions that interpret model laws created by UNCITRAL.¹¹² The system's purpose is to facilitate the uniform interpretation and application of model laws developed by UNCITRAL.¹¹³

In addition to CLOUT, a digest of case law was developed to contend with the growing body of decisions interpreting and applying the various provisions of the Insolvency Model Law.¹¹⁴ The digest is maintained by UNCITRAL in an easily accessible form and provides greater access to these court decisions.¹¹⁵ Its goal is to facilitate uniformity and predictability with respect to the Insolvency Model Law's interpretation.¹¹⁶ The digest of case law also serves as a supplement to the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (Judicial Perspective).¹¹⁷ Furthermore, jurisprudence on the Insolvency Model Law also includes references to the European Community's Insolvency Regulation.¹¹⁸

The intent of the Insolvency Model Law to be a uniform act and the importance of the role of jurisprudence in facilitating that intent is clear from the legislative history of the Model Law and Article 8 specifically.¹¹⁹ Therefore, a strong pull toward uniformity is inherent in the Insolvency

¹⁰⁹ *Id.*

¹¹⁰ Insolvency Working Group 39th Session Report, *supra* note 100, ¶ 24.

¹¹¹ Model Law and Guide to Enactment, *supra* note 5, at 54; U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group V (Insolvency Law), Secretariat Interpretation and Application of Selected Concepts of the UNCITRAL Model Law on Cross-Border Insolvency Relating to Centre of Main Interests (COMI), ¶ 92, U.N. Doc. A/CN.9/WG.V/WP.103 (Feb. 28, 2012). More information on CLOUT and the other sources of case law interpreting the Insolvency Model Law will be discussed Part VI.

¹¹² MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 54.

¹¹³ *Id.* at 108.

¹¹⁴ U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group V (Insolvency Law), Rep. on Its 41st Session, Apr. 30–May 4, 2012, ¶¶ 37–38, U.N. Doc. A/CN.9/742 (May 8, 2012) [hereinafter Insolvency Working Group 41st Session Report]; U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group V (Insolvency Law), Proposal for Its 41st Session, Apr. 30–May 4, 2012, ¶¶ 14–17, U.N. Doc. A/CN.9/WG.V/WP.105 (Mar. 28, 2012) [hereinafter Insolvency Working Group 41st Session Proposal].

¹¹⁵ Insolvency Working Group 41st Session Report, *supra* note 114, ¶¶ 37–38; Insolvency Working Group 41st Session Proposal, *supra* note 114, ¶¶ 14–17.

¹¹⁶ Insolvency Working Group 41st Session Report, *supra* note 114, ¶¶ 37–38; Insolvency Working Group 41st Session Proposal, *supra* note 114, ¶¶ 14–17.

¹¹⁷ Insolvency Working Group 41st Session Report, *supra* note 114, ¶ 38.

¹¹⁸ Insolvency Working Group 39th Session Report, *supra* note 100, ¶ 24.

¹¹⁹ JUDICIAL PERSPECTIVE, *supra* note 24, at 7 (“[A]ny court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.”).

Model Law.¹²⁰ This desire to effect uniformity in the law forms a context for courts of implementing states, and their decisions,¹²¹ to be heightened persuasive authorities.¹²² And the desire for uniformity is present in Congress' adoption of the Insolvency Model Law through Chapter 15 of the Code.

2. Congress Elected Harmonization of Chapter 15 with the Insolvency Model Law Statutes of Other Implementing States

Congress adopted the Insolvency Model Law through Chapter 15 of the Code,¹²³ and in doing so, Congress chose that the United States should be an implementing state.¹²⁴ As such, the United States is a participant in the harmonization goals of the Insolvency Model Law.¹²⁵ Indeed, Congress adopted Section 1508, a directive to consider the need for uniformity between the application of Chapter 15 and the application of the Insolvency Model Law as implemented in other countries. Section 1508 reads: "In interpreting this chapter [11 USCS §§ 1501 et seq.], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."¹²⁶ Section 1508 of the Code is the U.S.-equivalent of Article 8 of the Insolvency Model Law¹²⁷ and commands U.S. courts to refer to non-U.S. sources when interpreting Chapter 15.¹²⁸ The legislative history of Section 1508 points to a number of sources that can shed light on the intent behind the directive of the provision and provide a stepping stone in determining the authority to be placed on the decisions of fellow enacting courts that interpret the Insolvency Model Law. These non-U.S. sources include decisions rendered by implementing states that construe the Insolvency Model Law, the Guide to Enactment and Interpretation of the

¹²⁰ Additional evidence of the Model Law's emphasis on a uniform approach is found in the Guide to Enactment which instructs implementing states on ways to avoid "compromise[ing] the goal of achieving uniformity and facilitating cross-border insolvency matters." MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 48.

¹²¹ See *supra* note 45.

¹²² Flanders, *supra* note 47, at 79.

¹²³ H.R. REP. NO. 109-31, pt. 1, at 105 (2005); see Part II, *supra* p. 10.

¹²⁴ See H.R. REP. NO. 109-31, pt. 1, at 105-196, 106 n.101 (2005).

¹²⁵ This point will be explored more below.

¹²⁶ 11 U.S.C. § 1508 (2012 & Supp. 2014).

¹²⁷ Ramney-Marinelli, *supra* note 34, at 273 (2008); Ragan, *supra* note 7, at 134 ("[Section 1508] specifically commands U.S. courts interpreting chapter 15 to consult foreign sources.").

¹²⁸ Compare 11 U.S.C. § 1508 ("In interpreting this chapter [11 USCS §§ 1501 et seq.], the court shall consider its international origin, and the need to promote an application of this chapter [11 USCS §§ 1501 et seq.] that is consistent with the application of similar statutes adopted by foreign jurisdictions."), with MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 5 ("In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.").

UNCITRAL Model Law on Cross-Border Insolvency (Guide to Enactment), and the reports of UNCITRAL (to which the Guide to Enactment cites).¹²⁹

As explored in Part III.B.1 above, the Guide to Enactment explains that Article 8's purpose is to create an interest in its harmonized interpretation in enacting countries.¹³⁰ Since the legislative history points to the Guide to Enactment, then the Guide's commentary on Article 8 can illuminate the reasoning behind a country's legislature that chooses to enact that particular provision.¹³¹ This is just what Congress instructs: the Guide to Enactment should be turned to for guidance on the meaning and purpose of Chapter 15's provisions.¹³²

It follows that when Congress enacted the Insolvency Model Law it understood Article 8's purpose and selected to enact it in order to create an interest in its harmonized interpretation in the United States.¹³³ This point is particularly powerful when considering the nature of the Insolvency Model Law and its flexibility in adaptation into the legal systems of enacting countries.¹³⁴ Congress had the choice to modify Article 8 of the Insolvency Model Law, but opted not to and adopted Article 8's directive through Section 1508.¹³⁵

Through Section 1508, Congress instructs U.S. courts to refer to the court decisions of fellow Insolvency Model Law countries that interpret the Insolvency Model Law in order to promote uniform interpretation.¹³⁶ In other words, U.S. courts should aim to harmonize rulings on the interpretation of the Insolvency Model Law with relevant rulings of fellow

¹²⁹ H.R. REP. NO. 109-31, pt. 1, at 109–10 (2005) (“Interpretation of this chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well. Uniform interpretation will also be aided by reference to CLOUT, the UNCITRAL Case Law on Uniform Texts, which is a service of UNCITRAL. CLOUT receives reports from national reporters all over the world concerning court decisions interpreting treaties, model laws, and other text promulgated by UNCITRAL.”).

¹³⁰ See MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 54; General Assembly 30th Session Report, *supra* note 100, ¶ 174 (explaining the adoption of Article 8 to the Model Law); Insolvency Working Group 39th Session Report, *supra* note 100, ¶ 39 (“The importance of Article 8 to interpretation is noted in the decisions of a number of courts.”).

¹³¹ See MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 24 (informing that the Guide to Enactment is directed at legislators to assist in their preparation of enacting legislation).

¹³² H.R. REP. NO. 109-31, pt. 1, at 106 n.101 (2005).

¹³³ See *id.*; MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 5.

¹³⁴ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 25; JUDICIAL PERSPECTIVE, *supra* note 24, at 7 (“While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins, the domestic law of most States is likely to require interpretation in accordance with national law; *unless* the enacting State has endorsed the ‘international’ approach in its own legislation.”) (emphasis added).

¹³⁵ MODEL LAW AND GUIDE TO ENACTMENT, *supra* note 5, at 25 (“In incorporating the text of a model law into its system, a State may modify or leave out some of its provisions.”).

¹³⁶ H.R. REP. NO. 109-31, pt. 1, at 109–10 (2005).

Insolvency Model Law countries.¹³⁷ It is this very goal—uniformity in interpretation—that exalts the interpretative decisions of fellow Insolvency Model Law countries to heightened persuasive authority.¹³⁸ When uniformity is sought and reference is made to other courts to determine what uniformity should look like, those other courts are serving a capacity that “goes beyond being merely ‘persuasive.’”¹³⁹ They are being treated “as authorities by virtue of what they are, not only by what they say, and hence as [heightened] persuasive [authorities].”¹⁴⁰ To put it another way, the “fact of convergence” will drive a court confronted with a question for the first time to reach the same decision and to come to a different conclusion only if it has “strong contrary feelings.”¹⁴¹ Congress alludes to this driving force—the pull of uniformity—in remarking that the decisions of U.S. courts will “more likely be regarded as persuasive elsewhere” to the extent that they rely on the case law of implementing states.¹⁴² To achieve this consideration for harmonization, U.S. courts are aided by a number of non-U.S. sources when interpreting Chapter 15.¹⁴³ These sources include the Guide to Enactment and the reports of UNCITRAL’s Working Group on Insolvency Laws, which are referenced in the Guide to Enactment as well as in decisions rendered by foreign courts construing the Insolvency Model Law.¹⁴⁴ Congress labeled these sources as not just persuasive, but also as advancing the “crucial goal of uniformity of interpretation.”¹⁴⁵

C. Proper Treatment of Foreign Case Law Under Section 1508

Since the case law of implementing states holds heightened persuasive authority, then such case law should receive treatment commensurate with this authority in the form of acknowledgement and rebuttal, if applicable, by U.S. courts.¹⁴⁶ The first step is the consideration of this case law by U.S.

¹³⁷ *Id.*

¹³⁸ See Flanders, *supra* note 47, at 82.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (quoting RICHARD A. POSNER, HOW JUDGES THINK 349 (2008)).

¹⁴² H.R. REP. NO. 109-31, pt. 1, at 110 (2005).

¹⁴³ *Id.* at 109 (explaining that “[i]nterpretation of this chapter [15] will be aided by reference [to several categories of non-U.S. sources]”); Ramney-Marinelli, *supra* note 34, at 273.

¹⁴⁴ H.R. REP. NO. 109-31, pt. 1, at 109–10 (2005); Ramney-Marinelli, *supra* note 34, at 273.

¹⁴⁵ H.R. REP. NO. 109-31, pt. 1, at 110 (2005); *cf.* Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 6 (Austral.) (“It is expected that international jurisprudence on key concepts in the Model Law will assist Australian courts with any interpretative tasks that may arise in relation to the Cross-Border Insolvency Bill.”).

¹⁴⁶ *Cf.* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 512–13 (2003) (“Given that the intention of such [international] treaties [like the U.N. Convention of Contracts for the International Sale of Goods] is to provide for uniform rules, the failure of courts to consider how sister signatories have interpreted the treaty undermines the very purpose of the treaty regime. Accordingly, an antiparochial, prodialogic rule that would foster international cooperation and

courts. The second step is to explain why such case law is not followed if the U.S. court deviates from it.

In fact, where a goal of uniformity in the law exists—as in the context of heightened persuasive authority—case law from other jurisdictions cannot be ignored.¹⁴⁷ “[U]niformity can only be achieved if . . . foreign case law [is considered].”¹⁴⁸ Indeed, the concept of harmonization itself, when based on a model law, necessarily dictates a review of the case law of other countries.¹⁴⁹ This point is reinforced when considering Section 1508’s predecessor in Article 7 of the CISG.¹⁵⁰ Numerous scholars agree that Article 7 requires U.S. courts to consider foreign case law on the CISG.¹⁵¹

compliance with international law would be that national courts interpreting international law should consider relevant decisions of foreign courts interpreting the same treaty of principle of customary international law and should not depart from those precedents without articulating clear reasons for doing so.”)

¹⁴⁷ Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1112 (1990) (“[C]ourts . . . faced with issues of statutory construction are obliged to consult international sources, culling norms from aspirations and interpreting a variety of texts and state practices.”); see Sullivan, *supra* note 62, at 1201 (“[J]udicial decisions, even if not binding, should be looked to simply because they are judicial decisions. Judges are expected to look to precedents—even merely persuasive ones. . . . [F]ailure to take even nonbinding precedent into account is “bad form.”); see also James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 560 (1995) (“The case for a transnational approach to [legal problems] is clearest when jurists of different nations are *not only confronting the same problem but their codes or case law give them the same guidance or lack of guidance as to how to solve it.*”) (emphasis added). In this case, both the U.S. and foreign jurisdictions will be interpreting the Insolvency Model Law.

¹⁴⁸ Ferrari, *supra* note 106, at 254 (“The interpreter must consider decisions rendered by judicial bodies of foreign jurisdictions, because it is possible that the same or similar questions have already been examined by other States’ courts.”); see Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 732–33 (1998) (“Implicit in the required deference to uniformity is an instruction to adjudicators to give mutual deference to prior interpretive decisions by courts of other member states.”).

¹⁴⁹ Hammer & McClintock, *supra* note 1, at 259 (“Chapter 15 instructs U.S. courts that, to the extent possible, they should harmonize their rulings with relevant prior decisions of foreign courts. This mandate is contained in section 1508”). Indeed, the U.S. Courts’ “Bankruptcy Basics” online publication clearly expresses this thought in the context of Chapter 15: “Because of the UNCITRAL source for chapter 15, the U.S. interpretation must be coordinated with the interpretation given by other countries that have adopted it as internal law to promote a uniform and coordinated legal regime for cross-border insolvency cases.” *Ancillary and Other Cross-Border Cases*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx> (citing 11 U.S.C. § 1520(c)) (last visited Feb. 16, 2015).

¹⁵⁰ See *supra* Part III.B.1.

¹⁵¹ See, e.g., Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 LA. L. REV. 677, 747 (2005) (“Many scholars conclude that Article 7(1)’s requirement for international interpretation necessitates that domestic courts at least consider foreign CISG decisions.”); Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1, 7 (1993) (“Article 7(1) requires at the very least that tribunals in one contracting state consider the opinions of tribunals in other contracting states.”); John Honnold, *The Sales Convention in Action—Uniform International*

Similarly, Section 1508 requires U.S. courts to consider the case law of countries that have implemented the Insolvency Model Law.¹⁵² As with other heightened persuasive authority, U.S. courts are not required to follow heightened persuasive authorities, but if a U.S. court determines that the case law of an implementing state should not be followed, then the court must clearly explain when it deviated from the foreign case law.¹⁵³

IV. LIMITATIONS ON THE USE OF FOREIGN CASE LAW IN INTERPRETING CHAPTER 15

Although Section 1508 provides for the treatment of the case law of implementing states as heightened persuasive authority and thus requires consulting such case law, one can anticipate that such treatment of implementing states' case law will face opposition.¹⁵⁴ However, limitations on the use of implementing states' case law address this potential opposition as is discussed further in this Part. For the purposes of this Note, the arguments will be limited in scope to those that remain in light of a statutory mandate to consult foreign sources.¹⁵⁵ The scope is limited as such because many commentators agree that consideration of foreign sources is appropriate if a statute directs it¹⁵⁶ and because doing so keeps the arguments' focus out of the debate over the use of foreign law in the constitutional realm.¹⁵⁷

Words: Uniform Application?, 8 J.L. & COM. 207, 211 (1988) ("In view of the mandate in Article 7(1) for interpretation with regard to the Convention's 'international character' and 'the need to promote uniformity in its application,' courts in States that adopt the Sales Convention should have no doubt as to their responsibility to consider interpretations in other countries.").

¹⁵² See *supra* Part III.A.1 for a more detailed explanation of the heightened persuasive treatment of case law.

¹⁵³ *Id.*; see Ferrari, *supra* note 106, at 260 ("Foreign case law should be used as a source from which to draw *either arguments or counterarguments*. Thus, it can be helpful in solving a specific problem.") (emphasis added).

¹⁵⁴ Ragan, *supra* note 7, at 162.

¹⁵⁵ See generally 11 U.S.C. § 1508 (2012 & Supp. 2014) (directing courts to consider non-U.S. sources).

¹⁵⁶ See, e.g., Antonin Scalia, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004) (stating that one cannot say the use of foreign law in determining the meaning of U.S. statutes is never appropriate and outlining three contexts in which it is appropriate, including a statute designed to implement the obligations of the U.S. under a treaty and a statute which directly or indirectly refers to foreign law).

¹⁵⁷ See generally Roger P. Alford, "Outsourcing Authority?" *Citation to Foreign Court Precedent in Domestic Jurisprudence: Four Mistakes in the Debate on "Outsourcing Authority,"* 69 ALB. L. REV. 653 (2006); Zachary Larsen, *Discounting Foreign Imports: Foreign Authority in Constitutional Interpretation & the Curb of Popular Sovereignty*, 45 WILLAMETTE L. REV. 767 (2009); Diarmuid F. O'Scannlain, *Speech: What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893 (2005); Viad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167; Ganesh Sitaraman, *The Use and Abuse of Foreign Law*

Perhaps, some might argue, the immediate issue of a heightened persuasive-authority approach to foreign case law is relinquishing the primacy of American law.¹⁵⁸ But “this drastically overstates the situation.”¹⁵⁹ Viewing foreign case law interpreting the Insolvency Model Law as heightened persuasive authority under Section 1508 does not allow other countries to establish laws for domestic application; rule-making power is not abdicated.¹⁶⁰ Rather, the approach “recognizes the [strong] persuasive value that exists in [fellow enacting courts’] interpretations of the same (or similar) statutory texts.”¹⁶¹

This last phrase—“same or similar”—holds particular importance in the heightened persuasive-authority approach to foreign case law under Section 1508. To argue that all foreign case law that interprets the Insolvency Model Law should be afforded the weight of heightened persuasive authority would be over-reaching.¹⁶² A more nuanced analysis is required. Section 1508 directs courts to consider “the need to promote an application of [Chapter 15] that is consistent with the application of *similar* statutes adopted by foreign jurisdictions” in interpreting the Code.¹⁶³ To that end, courts must first determine whether the provisions of Chapter 15 under interpretative question are similar to those in the corresponding statute of the fellow Insolvency Model Law country whose case law is under consideration.¹⁶⁴ Only those cases in which both the U.S. and foreign provisions are based on the Insolvency Model Law should be considered “similar statutes adopted by foreign jurisdictions” for purposes of Section 1508.

The analysis does not end there, however. Even when both provisions are adopted from the Model Law, they may contain differences in language. If that is the case, the court must determine whether the differences are merely grammatical or linguistic as opposed to substantive.¹⁶⁵ Also, the court should consider whether the change in language reflects a disciplined rejection of the Insolvency Model Law for policy reasons.¹⁶⁶ Only if the

in *Constitutional Interpretation*, 32 HARV. L. REV. 653 (2009); Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319 (1957).

¹⁵⁸ See Chung, *supra* note 42, at 104 (arguing that “Section 1508 opens the door wide for the introduction of foreign law and moves the courts away from the primacy of American law”).

¹⁵⁹ Boss, *supra* note 80, at 279.

¹⁶⁰ Ragan, *supra* note 7, at 163.

¹⁶¹ See *id.* at 163; see also Boss, *supra* note 80, at 279–80 (explaining the notion that the Uniform Electronic Transactions Act “should be interpreted with due deference to its origin in the Model Law and that weight should be given to interpretation of the Model Law and its progeny in other nation-states”).

¹⁶² See Boss, *supra* note 80, at 288.

¹⁶³ 11 U.S.C. § 1508 (2012 & Supp. 2014) (emphasis added).

¹⁶⁴ See Boss, *supra* note 80, at 288.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; see, e.g., H.R. REP. NO. 109-31, pt. 1, at 110 (2005) (explaining both language changes

changes are merely grammatical, and are not substantive nor reflective of a policy-based rejection, are the provisions similar for the purposes of Section 1508.¹⁶⁷ Only then is uniform interpretation crucial,¹⁶⁸ and only then can the case law interpreting the similar provisions be heightened persuasive authority.

Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.) provides a look at a court engaging in the task of determining whether statutes are similar for the purposes of Section 1508.¹⁶⁹ The issue in *Morning Mist Holdings* was where the debtor had its “center of main interests” within the meaning of Section 1517(b)(1) of the Code.¹⁷⁰ The answer to the question determined whether the debtor was eligible to receive the protection of Chapter 15, in which event U.S. proceedings against the debtor would be stayed.¹⁷¹ The Second Circuit noted that the UNCITRAL Guide to Enactment for the Model Law on Cross-Border Insolvency does not define the center of main interests.¹⁷² The absence of this definition led the court to consider the European Union Convention on Insolvency Proceedings, from which the Insolvency Model Law drew the concept.¹⁷³

Ultimately, however, the court concluded that EU Regulation does not operate as an analog to Chapter 15 due to procedural differences; therefore, the court did not find the EU’s definition of center of main interests a suitable source of authority, persuasive or otherwise.¹⁷⁴ The court also looked at relevant European case law from England and Wales but found the case law of these jurisdictions lacking as well.¹⁷⁵

and procedural changes to align the Model Law with the U.S. federal system. “This section implements the purpose of article 9 of the Model Law It varies the language to fit United States procedural requirements and it imposes recognition of the foreign proceeding as a condition to further rights and duties of the foreign representative. The goal is to concentrate control of these questions in one court. That goal is important in a Federal system like that of the United States with many different courts, state and federal, that may have pending actions involving the debtor or the debtor’s property.”)

¹⁶⁷ The *Judicial Perspective* recognizes this concept in its introduction: “Recognizing that some enacting States have amended the Model Law to suit local circumstances, different approaches might be required if a judge concludes that the omission or modification of a particular article from the text as enacted necessitates such a course.” JUDICIAL PERSPECTIVE, *supra* note 24, at 1. This statement concerns deviating from the published course of action contained in the *Judicial Perspective*, but the same idea holds for deviating from the case law of a fellow Model Law country when the provisions being interpreted by the case law are similar to those in Chapter 15.

¹⁶⁸ See Boss, *supra* note 80, at 288.

¹⁶⁹ See generally *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013).

¹⁷⁰ *Id.* at 129.

¹⁷¹ *Id.*

¹⁷² *Id.* at 136 (quoting Council Regulation 1346/2000, pmb. ¶ 13, O.J. (L 160)).

¹⁷³ *Id.*

¹⁷⁴ *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 136 (2d Cir. 2013) (stating that “[the EU Regulation] is not a fit for construing Chapter 15”).

¹⁷⁵ *Id.* at 136–37 (stating that the European case law focuses on those elements of the EU

As the *Morning Mist Holdings* case illustrates, employing a heightened persuasive-authority approach to foreign case law under Section 1508 does not relinquish the primacy of U.S. law. In *Morning Mist Holdings*, the court declined to find foreign case law persuasive due to a lack of similarity between Chapter 15 and its counterparts in the EU, England, and Wales. Although a heightened persuasive-authority approach to foreign case law under Section 1508 obliges courts who do not follow the case law of fellow enacting countries with similar statutes to provide an acknowledgement of the case law and to explain why they did not follow it, ultimately, U.S. courts are free to do just that.¹⁷⁶ Heightened persuasive authority is not binding, and courts can choose not to follow it.

V. ANALYZING *DE AKERS EX REL. SAAD INVESTMENTS CO. LTD. V. DEPUTY COMM'R*

Akers presents an Insolvency Model Law interpretation issue which is could easily arise in the United States.¹⁷⁷ The case is presented here as a type of case study, aimed at highlighting case law of a fellow enacting jurisdiction which interprets provisions of the Insolvency Model Law.

In *Akers*, the Federal Court of Australia confronted on appeal the issue of whether to allow a local creditor, the Tax Commissioner, to pursue a claim for a debt unenforceable in the Cayman Islands, the debtor's center of main interests and the jurisdiction of the main insolvency proceeding.¹⁷⁸ The claim was enforceable in Australia, the forum of recognition and the jurisdiction applying the Insolvency Model Law.¹⁷⁹ The crux of the issue was that the Tax Commissioner's claim would not be accepted under the Cayman Islands wind-up law¹⁸⁰ because to do so would be to enforce foreign revenue laws in the Cayman Islands.¹⁸¹

Essentially, the question was whether the court, in its 2013 decision to modify recognition orders, properly granted relief from the stay under Article 22 of the CBI.¹⁸² That relief allowed the Tax Commission to recover

Regulation's definition of center of main interests).

¹⁷⁶ Compare this line of reasoning with the U.S. Circuit Courts of Appeal. *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1184 (9th Cir. 1999) ("We realize that our decision creates an inter-circuit split of authority. We are hesitant to create such a split, and we do so only after the most painstaking inquiry.").

¹⁷⁷ See *De Akers ex rel. Saad Invs. Co. Ltd. v Deputy Comm'r of Taxation* [2014] FCAFC 57, ¶ 115 (Austl.) (musing that "other examples of debt [under these circumstances] are not difficult to hypothesise." The particular circumstances are those in which a claim is enforceable under the forum of recognition applying the Model Law yet unenforceable in the foreign main proceeding.).

¹⁷⁸ *De Akers* [2014] FCAFC ¶ 3.

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* note 4 for an explanation of the relation of wind-up law to insolvency law.

¹⁸¹ *De Akers* [2014] FCAFC ¶ 3.

¹⁸² *Id.* ¶ 79.

its tax debt from the debtor's Australian assets.¹⁸³ The issue centered on the relationship between Article 20 and Article 22 of the Cross-Border Insolvency Act (CBI), Australia's adoption of the Model Law,¹⁸⁴ and whether Article 22 could vary the automatic stay granted by Article 20 through recognition of the foreign proceeding by the Australian courts.¹⁸⁵ The Court found that Article 22, specifically provision 22(3), applies only to relief under Articles 19 or 21; yet, the Court found that a provision of Article 20 itself, 20(2), permitted modification to relief under Article 20, and the Court determined that the court below considered this provision in its 2013 decision to modify the recognition orders.¹⁸⁶ Thus, the Court held that the Insolvency Model Law permitted modification and termination of the mandatory effects of foreign recognition granted under it.¹⁸⁷ This ruling essentially favors a local creditor who considers that its position is disadvantaged in the forum of the main proceeding.¹⁸⁸ The Court went on to state in dicta that "it is fundamental in any society that its government is able to require its citizens and others who operate a business or reside within that society, to pay taxation so as to maintain the State."¹⁸⁹

The way the Australian court ruled on this could have substantial implications for U.S. courts confronting a similar scenario.¹⁹⁰ Specifically, if a local tax creditor in the United States cannot collect under a foreign main proceeding, this case potentially opens a line of reasoning for U.S. courts to provide relief for that creditor to levy against the debtor's assets in the United States.¹⁹¹ This follows because Australia has adopted the Insolvency Model Law through its CBI Act, which makes it a fellow

¹⁸³ Scott Atkins, *First Appellate Decision on Model Law Reduces Certainty*, HENRY DAVIS YORK (May 2014), <https://www.hdy.com.au/our-insights/insights/first-appellate-decision-on-model-law-reduces-cert>.

¹⁸⁴ *Cross-Border Insolvency Act 2008* (Cth) pt 1 (Austl.).

¹⁸⁵ *De Akers* [2014] FCAFC ¶ 79. Article 20 reads in relevant part: "Paragraph 1 (a) of the present article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor." *Cross-Border Insolvency Act 2008* (Cth) sch 1 ch 3 art 20(3) (Austl.). Article 22 reads in relevant part: (1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of the present article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. (2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate. (3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief. *Id.* sch 1 ch 3 art 22.

¹⁸⁶ *De Akers* [2014] FCAFC ¶¶ 80, 86–87.

¹⁸⁷ Atkins, *supra* note 183.

¹⁸⁸ *Id.*

¹⁸⁹ *De Akers* [2014] FCAFC ¶ 77.

¹⁹⁰ See Stefano Calabretta, *Federal Court of Australia Upholds Landmark Cross Border Insolvency Decision*, PIPER ALDERMAN (Sept. 30, 2014), <http://www.lexology.com/library/detail.aspx?g=1d09fe75-873e-4194-aec4-d7c036d2ede2> (commenting that "[i]t will be interesting to observe how Courts approach similar applications in the future . . ."); Atkins, *supra* note 183.

¹⁹¹ See Atkins, *supra* note 183.

Insolvency Model Law country;¹⁹² therefore, the provisions of the Insolvency Model Law, which the Australian court interpreted, implicate provisions of Chapter 15 of the Code.¹⁹³ Article 20 of the CBI coincides with Section 1520 of the Code, and Article 22 of the CBI coincides with Section 1522 of the Code.¹⁹⁴ Therefore, the *Akers* case presents the situation of a fellow enacting country interpreting sections of the Insolvency Model Law. If, and when, such sections of the Insolvency Model Law via Chapter 15 of the Code come under questions of interpretation in the United States, courts must be prepared to determine what weight to place on the *Akers* decision in order to comply with Section 1508's directive for consistent application.

If differences between Sections 1520 and 1522 of the Code and Articles 20 and 22 of the CBI are not substantive or policy-based rejections, then the provisions are similar for the purposes of Section 1508. In that event, *Akers* is to be treated as heightened persuasive authority by U.S. courts interpreting Sections 1520 and 1522 of the Code.

Article 20 under the CBI reads exactly as Article 20 of the Model Law.¹⁹⁵ Article 20 provides in relevant part:

Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding:

- a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- b) Execution against the debtor's assets is stayed;
- c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

¹⁹² See *supra* note 15.

The UNCITRAL Model Law provides for adopting states to modify or omit existing provisions, or include new provisions. UNCITRAL recommends that an adopting state make as few changes as possible to the text of the UNCITRAL Model Law when enacting it. Australia has followed this approach, with the anticipated advantage that international jurisprudence and experience in interpreting and dealing with the UNCITRAL Model Law will assist Australian courts to interpret the provisions of the [Insolvency Model Law].

Ian Walker & Minter Ellison, *Australia Adopts UNCITRAL Model Law on Cross-Border Insolvency*, MONDAQ (Oct. 6, 2008), <http://www.mondaq.com/australia/x/67154/Insolvency+Bankruptcy/Australia+Adopts+UNCITRAL+Model+Law+On+CrossBorder+Insolvency>.

¹⁹³ See Buckel, *supra* note 1, at 1293 ("Chapter 15 incorporates the majority of the Model Law verbatim, thus 'parallel[ing] the procedural law of all adopting nations.'") (citing Beckering, *supra* note 35, at 300).

¹⁹⁴ See H.R. REP. NO. 109-31, pt. 1, at 114–16 (2005) (describing the relationship of Section 1520 to Article 20 of the Model Law and Section 1522 to Article 22 of the Model Law); Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 6 (Austl.) ("The Bill adopts the Model Law will as few changes as are necessary to adapt it to the Australian context.").

¹⁹⁵ Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 26–27 (Austl.).

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of the present article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of the present article*].¹⁹⁶

Article 20's mandatory relief is limited by paragraph 2 of Article 20, which incorporates domestic law into the Model Law.¹⁹⁷ In Australia, Chapter 5 of the Corporations Act and the Bankruptcy Act are the relevant sources of domestic law.¹⁹⁸

Section 1520 of the Code provides in relevant part as follows:

Effects of recognition of a foreign main proceeding

- a) Upon recognition of a foreign proceeding that is a foreign main proceeding—
 - 1) Section 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
 - 2) Sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
 - 3) Unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the same extent provided by sections 363 and 552; and
 - 4) Section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.¹⁹⁹

As Article 20 of the CBI and Section 1520 of the Code are not word-for-word copies of each other, the differences must be understood before a determination as to the similarity of the provisions can be made. Since Article 20 mirrors the language of the Model Law, the language of Section 1520 must be examined. The legislative history of Section 1520 informs that the mandatory relief of Article 20 of the Model Law is brought into

¹⁹⁶ *Cross-Border Insolvency Act 2008* (Cth) sch 1 ch 3 art 20 (Austl.).

¹⁹⁷ Cf. Explanatory Memorandum, *Cross-Border Insolvency Bill 2008* (Cth) 11 (Austl.). (“Paragraph 2 of article 20 of the Model Law allows for the scope, and the modification or termination, of the stay that comes into effect upon recognition of a foreign proceeding to be made subject to provisions of the law of the enacting State.”).

¹⁹⁸ *Id.*

¹⁹⁹ 11 U.S.C. § 1520(a) (2012 & Supp. 2014).

Chapter 15 of the Code through the Code's other provisions.²⁰⁰ Indeed, Section 1520(a)(1) incorporates Article 20(1)(a) and (b) because Section 362 of the Code imposes the "restrictions required by those two subsections."²⁰¹ Sections 1520(a)(2) and (4) apply the Code provision "that impose the restrictions" required by Article 20(1)(c) of the Model Law.²⁰² Also, by incorporating Sections 362 and 363 of the Code, Section 1520(a) accomplishes Article 20(2)'s inclusion of domestic law to limit the mandatory relief of Article 20.²⁰³

Article 22 of the CBI provides as follows:

Protection of creditors and other interested persons

- 1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of the present article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
- 2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
- 3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.²⁰⁴

Section 1522 of the Code reads in relevant part as follows:

Protection of creditors and other interested persons

- a) The court may grant relief under section 1519 or 1521, or may modify or terminate relief under subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.
- b) The court may subject relief granted under section 1519 or 1521, or the operation of the debtor's business under section 1520(a)(3), to conditions it considers appropriate, including the giving of security or the filing of a bond.
- c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521, or at its own motion, modify or terminate such relief.²⁰⁵

Again, since the language of the CBI in Article 22 mirrors the

²⁰⁰ H.R. REP. NO. 109-31, pt. 1, at 114 (2005).

²⁰¹ *Id.*

²⁰² *Id.* ("In both cases, the provisions are broader and more compete than those contemplated by the Model Law, but include all the restrictions the Model Law provisions would impose.").

²⁰³ *Id.*

²⁰⁴ *Cross-Border Insolvency Act 2008* (Cth) sch 1 ch 3 art 22 (Austl.).

²⁰⁵ 11 U.S.C. § 1522(a)-(c) (2012 & Supp. 2014).

language of the Model Law, the language of Section 1522 must be examined. The legislative history explains that Section 1522 “follows article 22 of the Model Law with changes for U.S. usage and references to relevant Bankruptcy Code sections.”²⁰⁶ However, a difference in word choice exists with respect to Section 1522’s adoption of Article 22(1)—the use of “sufficiently”²⁰⁷ rather than “adequately.”²⁰⁸ Section 1522’s legislative history reveals that the change in wording was intentionally and done so “to avoid confusion with a very specialized legal term in U.S. bankruptcy, ‘adequate protection.’”²⁰⁹ Therefore, it does not seem that the change in wording was done to change the substance of the provision or for a policy reason.

Although the relevant provisions of the CBI and the Code contain grammatical differences and differences in language, these differences do not reflect substantive changes nor policy-oriented decisions to depart from the Model Law. Indeed, the legislative history of Sections 1520 and 1522 indicates that the provisions are meant to reflect the requirements of Articles 20 and 22 of the Model Law, and Articles 20 and 22 of the CBI adopts the Articles 20 and 22 of the Model Law verbatim.²¹⁰ Therefore, the Australian provisions are similar for the purposes of Section 1508.

Thus, when interpreting Section 1520 or 1522, a U.S. court should look to the *Akers*’ decision as heightened persuasive authority. This does not mean the decision is binding; rather, the U.S. court is free to choose whether to follow the interpretative rulings of the Australian court. However, if the U.S. court decides not to follow *Akers*, it should acknowledge the case and offer a rebuttal, showing why it decided not to follow the decision of a fellow enacting court whose authority is of heightened persuasiveness.

VI. PRACTICAL ISSUES IN THE USE OF FOREIGN CASE LAW

Because implementing states’ case law should be considered by U.S. courts in issues of interpretation under Chapter 15, “[a]ccess to information about the application of the [Insolvency Model Law] in jurisdictions around the world is thus of key importance.”²¹¹ While judges of U.S. courts may be wary of practical issues in the use of foreign case law, particularly relating

²⁰⁶ H.R. REP. NO. 109-31, pt. 1, at 116 (2005).

²⁰⁷ 11 U.S.C. § 1522(a).

²⁰⁸ *Cross-Border Insolvency Act 2008* (Cth) sch 1 ch 3 art 22(1) (Austl.).

²⁰⁹ H.R. REP. NO. 109-31, pt. 1, at 115 (2005).

²¹⁰ *See id.* at 114–16; *Cross-Border Insolvency Act 2008* (Cth) sch 1 ch 3 arts 20–22 (Austl.).

²¹¹ U.N. COMM’N ON INT’L TRADE LAW [UNCITRAL], FACTS ABOUT CLOUT: CASE LAW ON UNCITRAL TEXTS (2013), http://www.uncitral.org/pdf/english/clout/brochure/Facts_about_Clout_eng_Ebook.pdf [hereinafter CLOUT FACTS].

to accessibility,²¹² these hurdles can be overcome through smart use of technology and the zealous representation of attorneys and foreign representatives in insolvency proceedings.

Understanding the importance of access to the case law of implementing states, the United Nations established the CLOUT system (Case Law on UNCITRAL Texts) in 1988 to facilitate uniform interpretation and application of UNCITRAL texts by collecting information on relevant court decisions in countries applying those texts.²¹³ The CLOUT system is designed to enable and encourage users to consider the decisions of courts in other countries.²¹⁴ The database includes case law on the Insolvency Model Law.²¹⁵ Access to CLOUT is online, free, unlimited, and open to the public.²¹⁶

Central to CLOUT is its compilation and organization of case abstracts, which highlight key issues in the application and interpretation of UNCITRAL texts.²¹⁷ Abstracts are available in each of the United Nations' six official languages, including English.²¹⁸ The abstracts are designed to present enough information for users to discern whether examination of the complete case is useful.²¹⁹ The abstracts usually contain the following information:

- (1) the reasons for applying or interpreting the provision of the UNCITRAL text in the way that it is interpreted, including any specific reliance on a principle or other provision of that text, on previous case law, or on relevant contract clauses and particular facts;
- (2) the claim or relief sought by the claimant and any other fact describing the procedural context within which the case was decided;
- (3) the countries of the parties; and
- (4) the type of trade or other

²¹² See Ferrari, *supra* note 106, at 254 (“[R]equiring interpreters to consider foreign decisions creates practical difficulties, for two main reasons: (1) foreign case law is not readily available, i.e., it cannot easily be retrieved; and (2) even where it can be retrieved, it is often written in a language unknown to the interpreter.”).

²¹³ *Id.*; U. N. Comm. on Int’l Trade Law [UNCITRAL], Case Law on UNCITRAL Texts (CLOUT) User Guide, ¶ 1, U.N. Doc. A/CN.9/SER.C/GUIDE/1/Rev.2 (June 2, 2010) [hereinafter CLOUT User Guide].

²¹⁴ CLOUT User Guide, *supra* note 213, ¶ 2.

²¹⁵ CLOUT FACTS, *supra* note 211. As of August 26, 2015, CLOUT contains eighty-nine cases which interpret the Insolvency Model Law from eight implementing states. *Id.*

²¹⁶ See *id.*; Case Law on UNCITRAL Texts (CLOUT), U.N. COMM. ON INT’L TRADE LAW [UNCITRAL], http://www.uncitral.org/uncitral/en/case_law.html (last visited Aug. 26, 2015).

²¹⁷ CLOUT FACTS, *supra* note 211.

²¹⁸ CLOUT User Guide, *supra* note 213, ¶ 5.

²¹⁹ *Id.* ¶ 17 (“In view of the necessity for brevity, the substantive part of the abstract is ordinarily not a complete summary of the full decision or award but should suffice as a ‘pointer’ to the specific issues concerning the application and interpretation of the relevant UNCITRAL text in a given decision or arbitral award.”).

transactions involved.²²⁰

Additionally, the case abstract indicates if a translation of the case into a language other than its original is available and if notes or commentaries on the case exist.²²¹

New abstracts are generally added to CLOUT every month.²²² CLOUT relies on a network of national correspondents who are designated by their respective implementing states.²²³ National correspondents monitor and collect court decisions and prepare abstracts of relevant cases, which the U.N. Secretariat translates into the five other U.N. languages.²²⁴

Cases relevant for inclusion on CLOUT are those that interpret or apply a particular provision of the text and those cases that relate to the text in general, such as decisions that hold that a text is not applicable.²²⁵ In compiling cases for publication on CLOUT, priority is given to final court decisions, but if the courts' reasoning at the lower and appellate levels is relevant to the interpretation of an UNCITRAL text, then abstracts for both decisions may be included in CLOUT.²²⁶ However, if a decision on CLOUT is subject to further review or appeal, its status as such is indicated in the system.²²⁷

Through CLOUT, judges, law clerks, and practitioners (including attorneys and foreign representatives in insolvency proceedings) along with other interested parties and the public have access to the most relevant case law which interprets the Insolvency Model Law.²²⁸ Parties can use CLOUT to search for cases which interpret a particular provision of the Insolvency Model Law. Searches can be conducted by article of the Insolvency Model Law, keyword, and country among others.²²⁹ Reviewing the abstracts on cases related to the issue at question can uncover those case which require a full review.²³⁰ The citations of cases are provided with the abstracts for reference, or decisions are made available individual use by the U.N.

²²⁰ *Id.* ¶ 18.

²²¹ *Id.* ¶ 16.

²²² CLOUT FACTS, *supra* note 211.

²²³ CLOUT User Guide, *supra* note 213, ¶ 4. As of August 13, 2015, the United States has three national correspondents, all law professors. U. N. Comm. on Int'l Trade Law, List of CLOUT National Correspondents – July 2015, U.N. Doc. A/CN.9/SER.C/Correspondents/1/ (2015) (on file with author).

²²⁴ CLOUT User Guide, *supra* note 213, ¶ 5.

²²⁵ *Id.* ¶ 8.

²²⁶ *Id.* ¶ 9.

²²⁷ *Id.*

²²⁸ *Id.* ¶ 2 (“The purpose of the system is to promote international awareness of such legal texts . . . to enable judges, arbitrators, lawyers, parties to commercial transactions and other interested persons to take decisions and awards relating to those texts into account in dealing with matters within their responsibilities and to promote the uniform interpretation and application of those texts.”) (emphasis added).

²²⁹ See U. N. COMM. ON INT'L TRADE LAW [UNCITRAL], *supra* note 216.

²³⁰ See CLOUT User Guide, *supra* note 213, ¶ 17.

Secretariat upon request.

Thus, when confronted by an issue of interpretation under Chapter 15, judges have options for ensuring their proper consideration of relevant case law of implementing states as Section 1508 directs. First, judges and their law clerks can use CLOUT to search for cases which interpret a particular provision of the Insolvency Model Law. Also, attorneys representing the debtor or other interested parties in a Chapter 15 case can also use CLOUT to find case law for use in crafting their arguments on the proper interpretation of a provision of Chapter 15.²³¹ Further, a judge can require counsel to submit memoranda which focus on the particular interpretive issue and address all relevant case law of implementing states.²³² The submission of memoranda by counsel can facilitate a judge's understanding of the issue and the foreign case law on the matter.²³³

If review of CLOUT abstracts leads to the need for review of a full decision that is not available in English, the judge may have the document translated by a qualified translator. However, given tight judicial budgets, a judge might be better served by requiring submission of a memorandum or memoranda on the issue and requiring that counsel provided translated copies of case law referenced in the memoranda to the court.²³⁴ Judges can utilize both technology and capable legal practitioners to ensure their proper consideration of relevant case law by implementing states. Indeed, "[t]he excuse that a court cannot be expected to take cognizance of foreign decisions because of linguistic barriers, time constraints, and access constraints should not be accepted."²³⁵ This is particularly the case in the (still) early years of the Insolvency Model Law when it is crucial to develop a body of case law if it is truly to become the kind of harmonized international instrument it aims to be.²³⁶

²³¹ See MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 1983) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."). It follows that if lawyers know that a judge considers foreign case law under section 1508's directive, then lawyers, in the interest of zealously representing their clients, should prepare arguments to include such foreign case law.

²³² DAVID F. HERR ET AL., MOTION PRACTICE 5-5 (6th ed. 2015) (explaining in general that "a memorandum may be voluntarily submitted by a lawyer, requested by the judge, or required by local court rule").

²³³ *Id.*

²³⁴ Cf. 11 U.S.C. § 1515(d) (2012 & Supp. 2014) ("The documents [required for a petition for recognition under Chapter 15] shall be translated into English. The court may require a translation into English of additional documents.").

²³⁵ Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. TRANSNAT'L L. & POL'Y 217, 242 (2001).

²³⁶ *Id.*

VII. CONCLUSION

The Insolvency Model Law operates on the notion of harmonization of interpretation. Harmonization represents a dense network of checking and rechecking results and building on one another's work to create a solid and mutually reinforced consensus.²³⁷ It is a procedural manifestation of the adage "the whole is more than the sum of its parts."²³⁸ In adopting the Insolvency Model Law in Chapter 15 of the Code, Congress chose to center the United States' approach to cross-border insolvency on the same notion of harmonization. The best way to achieve this goal and to maintain the spirit of Section 1508 is to afford additional weight to the decisions of implementing states to use their authority in a way that goes beyond merely persuasive authority.²³⁹

²³⁷ Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 145 (2005).

²³⁸ ARISTOTLE, METAPHYSICA 10f-1045a.

²³⁹ See Flanders, *supra* note 47, at 82.