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A Review of Model Laws in the Context of Financial Crises: Implications for Procedural Legitimacy and Substantial Fairness of Soft Law Making

KANEKO Yuka

I. Introduction

While the major sources of international economic law remain “hard laws” that are multilaterally assumed or otherwise agreed upon among nations that henceforth assume the harmonization of each domestic law thereto, various types of “soft laws” are increasingly eroding such core sources. Some soft laws are formed through multilateral deliberations as cautious as those that are used to form hard laws, and are applied only on a voluntary basis (e.g., UNCITRAL Legislative Models). Others are unilaterally formed as “model laws” by leading international financial agencies such as the World Bank, the IMF (International Monetary Fund), the ADB (Asian Development Bank), and the EBRD (European Bank for Reconstruction and Development), and are rigorously implemented through forceful measures such as loan conditionalities and performance ratings (e.g., ROSC or Reports on Observance of Standards and Codes implemented by the World Bank/IMF). The latter type has been a phenomenon particularly in the area of financial law since the 1990s, when the “convergence” of each domestic legal system to the global standards for realizing “liberalization” was set as the policy goal in the lending activities of these international financial agencies in the developing and/or transition countries (World Bank 1995, 2001; EBRD 1992-1997; ADB 1999).

Although both types of soft laws are often equally deemed as products of

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multilateralism, and therefore could be similarly the target of general criticism by regionalists, their procedural and substantive natures largely differ. At least, the former type may deem the “convergence” as a natural result, but the latter type intentionally promotes it. Given that many of the recipients that have pursued the latter type of “convergence” to the model laws seem the very countries that are currently suffering from the world financial crisis, a thorough review of this new type of soft laws is crucial. This paper attempts this review through a comparative analysis in both procedural and substantive aspects. The focus will be on model laws in the areas of insolvency law and secured transaction law, which have been stressed by the leading international financial agencies. The final section will consider some alternative direction for future soft law making enabling fruitful interactions among both multilateral and regional endeavors.

II. Procedural Legitimacy of Soft Laws

The process by which international financial agencies introduce model laws contrasts sharply with the traditional way that soft laws are formed through cautious procedural steps.

The author had the experience to observe an international meeting meant for soft law formation, which was held at the ADB, Manila in October, 1999 under the co-sponsorships of the World Bank and the IMF. The purpose of this four-day-long meeting was to create a consensus among participants on the ADB-drafted secured transaction law model, as well as to confirm the consensus on the already disseminated World Bank’s draft principles of insolvency law. The author was almost the only Japanese admitted to attend there, which was made possible by the International Cooperation Department (ICD) of Ministry of Justice of Japan that recommended the author’s informal observation, instead of the ICD’s formal attendance which had been rejected by the ADB on unknown reason. Interestingly, all participants other than those from international agencies were the representatives of each judicial sector of Asian developing countries, or more precisely, the Asian Crisis-hit countries. Judicial officials and private lawyers from IMF-controlled countries such as Thailand, Indonesia and Korea sat in the

lowest section of the large conference room, followed by officials and lawyers from other crisis-affected countries such as Philippines, Pakistan, India, and China, all facing the ADB's secretariat team, which was seated at a distinguished higher table on the front stage of the room, as if they were judges inquiring criminal suspects before a number of witnesses. Even officers from the World Bank, the IMF, and other sponsoring agencies were seated at the upper right-hand corner of the room, in an analogical position of the jury. In this criminal court-like setting, the secretariat's drafts prepared by just a few experts from the law and economics school were "agreed upon" by all attendants, almost automatically, as each section was read by the secretariat team over the period of four days. The results were later published by each agency's own publishers after or even without having been formally approved by each executive board (World Bank 1999; IMF 1999; ADB 2000).

This example must illustrate typical procedural problems in the formation of model laws. In addition to the frequent criticisms on their implementation procedures,¹ there are more fundamental problems in their formation process which lacks substantial participation, deliberation, and approval. Participation is limited to a closed circle unilaterally selected by the host agencies; deliberation is short and takes place in a setting far from an equal-footing basis; and approval is almost automatically obtained, or even often bypassed, with no mention to the political structure of representation at the executive boards of these host agencies. It seems as if these international financial agencies are borrowing (or hijacking) the recent top-down mode of extension of international public law especially in the area of universal public interests (which could be inclusive of some emergency financial concerns such as emergency currency cooperation), although their model laws are directed to the standardization of private laws, which has been historically only cautiously pursued in an equal-footing discussion among nations while paying full respect to the difference among jurisdictions.

In contrast, the most recently adapted UNCITRAL Legislative Guides on the insolvency law and the secured transactions law are typical examples of soft laws formed through the process almost as cautious as those applied in the formation

of international treaties. The deliberation on the UNCITRAL Legislative Guides on Insolvency Law started in 1999 with the establishment of an expert group consisting of representatives from 36 member states, which continued deliberations for five years in a total of seven sessions. The result of this cautious deliberation was finally approved by the UNCITRAL in June 2004, and then sent to the UN General Assembly for the formal recognition at the year-end 2004 (Resolution No.59/40). Similarly, the UNCITRAL Legislative Guide on Secured Transactions took even more cautious deliberation steps by an expert group involving representatives from 60 jurisdictions, who met for twelve sessions during the years 2002-2007. The result of their discussions was approved by the UNCITRAL in December 2007, and then finally recognized by the UN General Assembly in December 2008 (Resolution No.63/121).

There is apparently a difference in the required level of procedural guarantee or the legitimacy between the formation processes of two types similarly referred to as “soft laws,” particularly in terms of the reach of participation, equal chances to the voice, the length and the depth of deliberation by expertise, and the supervision and final approval by a forum with greater international representation (see Chart-1).

Chart-1: Difference of Procedural Requirements in the Soft Law Formation

	Soft Law Formation at UN (ex. UNCITRAL Legislative Models)	Model Law of Donor Agencies (ex. World Bank Principles)
Drafting	Unilaterally by Secretariat	Unilaterally by Secretariat
Participation	Open and equal participation involving experts from both developed and developing countries	Closed participation selected by the secretariat
Discussion	Several years' long discussion in a single forum	A few days' ad hoc seminars in developing countries
Approval Procedure	1)Finalization by the Working Group 2)Approval by UNCITRAL 3)Recognition by UN General Assembly (multilateral representation)	1)Finalization by the Working Group 2)Approval by the Board (limited representation)
Implementation	Discretion to each country's legislative jurisdiction	ROSC assessment as loan conditionality to force law reforms

III. Substantive Fairness of Soft Laws

Model laws drafted by leading international financial agencies have been largely influenced in their substance by the American model, including the Federal Bankruptcy Code's Chapter-11 and the Uniform Commercial Code's Article-9. While the original drafts prepared by the secretariat for UNCITRAL Legislative Guides basically succeeded these preceding models of international financial agencies,² nevertheless, their substantive outcomes were interestingly different from the original drafts. This deviation might imply better substantive possibilities under better procedural guarantees.

1. Substantive Features of Financial Model Laws

To begin with the policy goals of insolvency law models drafted by the World Bank and other international financial agencies,³ they emphasize that the debtor-friendly legal design is appropriate for the purpose of "rescue" because it stimulates entrepreneurship, secures employment, and particularly, bails out industries in the phase of financial crises that are the inevitable result of global financial liberalization, or the so-called 21st century-type crisis (IMF 1998).

Accordingly, their substantive designs feature a reorganization procedure, with an automatic priority over the liquidation procedure, wherein notorious debtor-friendly designs are copied from the U.S. Federal Bankruptcy Code's Chapter-11, which guarantees the interests of debtor's managers and new money providers at the expense of existing creditors' rights. Such designs include the automatic stay applied to both secured and unsecured creditors; debtor's continued control of the estate and the reorganization planning as "debtor-in-possession"; special procedures of classification and clam-downs for an easy approval of flexible reorganization plans against dissenting creditors, including secured creditors; "super priority" extended to new money investors against the equal treatment principle under the priority rules given by substantive laws; deregulation of the annulment system of fraudulent and preferential transactions; and deregulation on court supervision (for more details, see Kaneko 2004; Kaneko 2008). In addition, for the particular phase of financial crises, it is empathized that this debtor-friendly legal procedure should be linked to the government-led "structured

voluntary workouts” where debtor-friendly private workouts are prioritized over the formal insolvency mechanisms and backed by the injection of public money and other governmental rescue programs.

These features of model laws reflect a new-liberalist bias among the insolvency law schools. Policy debates in the 1980s used to be made in clearer “market v. state” setting, in which the “proceduralists” tried to limit the role of insolvency law within the maximization of debt recoveries through private bargains (see Jackson 1982), while the “traditionalists” utilized the insolvency law as a tool for judicial intervention to achieve better rescues or redistributive outcomes (see Kennedy 1981). However, a recent trend of academism has encouraged switching the whole setting, while using the insolvency law for private bargains to rewrite the given substantive priority rules, with concessions of existing secured credits on one hand, and super priorities given to new money providers on the other, as well as possibilities of public money injections. Justification is given that the market can better achieve redistributive outcomes than the state (Jackson and Scott 1989), although criticisms have been made on the debtors’ manipulation without genuine redistributive results (Easterbrook 1990). Despite self-contradictions in this switched rescue theory of the market-side bargains achieving the best result under the state’s money injections, it seems to have acquired a central position in the process of soft laws making.

Secured transaction law models of the same international financial agencies also reveal an extreme type of policy choice. The ADB’s base line model featured the establishment of a minimum notice filing system for floating secured interests on movable properties for both present and future acquired assets, as well as their flexible enforcement system through repossession by self-help and private foreclosures (ADB 2000b; ADB 2002). Although this registry model has campaigned for a blanket type revolving security interest on inventories and receivables to achieve better financing access of small-and-medium-sized enterprises (SME), while referring to the empirical evidence under the original model of UCC Article-9, it in fact assures an upmost priority of registered security interests over the preferential rights of daily business counterparts of SMEs. This implies the underlying policy of creating an absolute, monopolistic creditor’s

control over debtor's properties, as often envisaged in huge investment projects such as project-financings for infrastructure development.⁴

This overly monopolistic design of security interests cannot be free from a famous debate on whether the first-priority creditor can best serve as a monitor over the SME's corporate governance (Modigliani and Miller 1958; Roe 2000; Kanda and Levmore 1994; Bebchuk and Fried 1996). It seems as if this excessively monopolistic design of secured transactions was intentionally chosen to justify for the debtor-friendly rewriting in the insolvency phase: namely, the concession of existing secured creditors while assuring a super priority for new money investors who may enjoy the benefits of public money injection.

2. Substantive Features of UNCITRAL Legislative Guides

Although the secretariat prepared the original drafts of the UNCITRAL Legislative Guides based on preceding models provided by international financial agencies, their substantive results, after each five-year-long intensive discussion, contain remarkable changes from the original models which had biases of the rescue culture and/or the monopolistic security rights.

As for the UNCITRAL Legislative Guide for Insolvency Law, immediately noteworthy is a balanced mention to multilateral policy goals (provided in Part One), starting with the market disciplines and transparency, and stressing the need to guarantee creditors' recovery for the promotion of financial access. This liberal market-oriented stance is firmly maintained when it casts doubts on the idea of state-structured private workouts (Part One-II-D), although this has been particularly emphasized in the model laws of international financial agencies. Part Two further details technical designs reflecting this balanced stance among multilateral policy goals. Among all, an apparent tendency is observed toward incorporating repeated chances of judicial supervision for every occasion in which procedural manipulations or excessive infringements of substantive rules by the debtor-in-possession can occur. This includes supervision at the initiation of the reorganization (Recommendation 20), annulment of preferential and/or fraudulent transactions (Recommendation 137-8), review of reorganization plan (Recommendation 152-3), and priority rule of new money providers (Recommendation

67). These provisions reflect a basic stance of the Legislative Guide to guarantee the fairness of private bargains through public supervision, which is an approach of regulated-liberalist that is clearly different from both extremes of the market-side laissez-faire and the state-led bailouts.

The UNCITRAL Legislative Guide on Secured Transactions reflects the results of further complicated policy choices. Like the model of international financial agencies, the ultimate goal is set for a flexible notice-based registration system enabling revolving secured interests on movable properties. However, its design reflects an opposite policy goal from that of international financial agencies aiming at comprehensive bases for huge investments. The Legislative Guide is rather closer to the UCC Article-9 in that it gives due respect to the original policy goal of stimulating SME financing. Interestingly, there are considerable attempts in the Legislative Guide to modify the weak aspects of the UCC Article-9 for better serving to the SME financing needs. This includes the identification of each secured credit (Recommendation 14c) and the requirement of maximum amount to be secured (Recommendations 14e, 57d, 98), which altogether conciliate the monopoly question of blanket-lien creditors with regard to the contests from subordinating creditors, and defends the role of blanket-lien creditors as SME-monitor. Another aspect of modification is the judicial supervision and other protective mechanisms for the debtor and third parties cautiously incorporated into the whole process of creditors' repossession and foreclosure (Recommendation 136-8, 141, 147-51) to extend public supervisions over the private enforcements.

Legislative Guide also appears to pay due respect to existing comparative differences among jurisdictions, instead of forcing conversion to the American model. It details the interface with the acquisition-type financial custom prevailing in Europe particularly as a means of financing that allows secrecy (Chapter IX); admits different designs of statutory preferential liens without asking a later-filing rule for priorities, instead of simply following the UCC approach on the purchase money security interests (Recommendation 76, 83); attempts a technical conciliation between the civil law tradition of automatic title-transfer upon sales of personal properties and the UCC protection only available for

buyers-in-the-ordinary-course-of-business, by bringing into the civil law logic of bona fide purchaser protections (Recommendation 81); and incorporates detailed conflict of law provisions reflecting its basic respectful stance on the differences among jurisdictions (Chapter X). Perhaps, the only problematic example of “conversion” of the Legislative Guide to the most recent UCC amendments seems to be its full support for flexibilities and super priorities given to the “securitizations” (Recommendation 25, 48, etc.), which seems to have helped a causal structure behind the present outcomes of subprime loans and predatory lending.

In sum, we could observe a clear contrast between substances of soft laws. Those model laws formed in a flexible way by international financial agencies are colored with specific policy goals for ultimate “conversion” such as debtor-rescue and monopolistic blanket-liens, whereas the UNCITRAL Legislative Guides formed through traditional cautious procedures take more balanced approach among policy goals while paying due respect to the difference among jurisdictions (see Chart-2 and Chart-3).

IV. Implications

1. Regulating the Procedural Legitimacy of Soft Laws

In this paper, differentiation of financial soft laws was first attempted according to the extent of procedural guarantees in their formation process, with reference to fair participation, equal chances to the voice, and the supervision and approval by properly represented multilateral forums. It was found that international financial agencies give less consideration to these aspects of procedural fairness, as if they borrow the top-down approach often taken in the area of international public law for universal public interests, as if claiming that financial law making is a part of universal public interests.

The difference of substantive outcomes was then reviewed according to such procedural differentiation. Despite speculative criticism on the UNCITRAL Legislative Guides such that they are mere tools of American legal imperialism with softened outlooks, this paper has identified fairly fundamental improvements made through these Legislative Guides presumably as a result of long-term

Chart-2: Substantial Difference of Soft Laws (Insolvency Law)

Proceduralists	Traditionalists	World Bank/ADB	UNCITRAL
Credit Recovery	Debtor Rescue	Debtor Rescue	Balancing Credit-recovery and Debtor-rescue
Private Autonomy	Judicial Discretion	Private Autonomy	Private-autonomy backed by Judicial-supervision

Chart-3: Substantial Difference of Soft Laws (Secured Transactions)

	UCC-9	EBRD Model	WB/ADB	UNCITRAL
Policy Target	global blanket with limited priority (SME monitoring)	floating charge with limited priority (SME financing?/Project Finance?)	global blanket with full priority (Project Finance)	global blanket with limited priority (SME monitoring)
Filing System	notice filing (accuracy)			notice filing (strengthened administrative liability)
Collateral	personal properties	real + personal	(real +) personal	personal properties
Debt	present and future (monopoly)	present and future (maximum amount)	present and future	present and future (identification + maximum amount)
Priority Rule	PMSI > banker BIOCOB > banker identifiable proceeds	preferential liens (PMSI)	banker > preferential liens	preferential liens (PMSI) > banker. bona fide purchasers (BIOCB) > banker. acquisition financing (+ filing).
Enforcement	repossession by self help. notice to debtor → strict foreclosure.	notice → crystallize repossession by bailiffs. prohibition of strict foreclosure.	repossession by self help. notice to debtor → strict foreclosure	compensation consent by debtor supervision by courts

well-represented deliberations in their formation process. One implication is that a better procedural guarantee would enable deeper deliberation with more comparative expertise and broader policy considerations.

Accordingly, a serious effort should be made to standardize the formation process of the soft laws so as to avoid the abuse of multilateralism. The question

is, in what practical ways can such standards be duly binding on these highly political international agencies?

The first possible approach is a permanent network among Asian academics to closely watch over and share real-time information on any formation movement of model laws. This network can always initiate a joint call for a wider participation and better procedural frameworks for substantially equal, continuous, and deliberate forums involving experts from both developed and developing countries. A passive approach such as waiting for occasional information disclosure or ad hoc calls for NGO participations will not suffice, which would only to force us into silent agreement. Instead, a positive participation into a soft law formation process often exposes us to the world's most advanced comparative knowledge, which is beneficial for the legal development back in each jurisdiction.⁵

Second, we need to decisively approach to reject the unilateral imposition of model laws that were formed without procedural legitimacy, even when they are forcefully imposed in conditionalities and/or performance ratings. If the international financial agencies dare to impose sanctions (suspension, acceleration, or cross reference default of loans) against such a rejection, we can use that as an opportunity to bring the issue to the international dispute resolution forums to argue the fairness in the formation and imposition processes of relevant model laws.⁶ Such disputes will induce an accumulation of precedents to be followed henceforth.

Third, the mechanisms for interpreting soft laws should also be reconsidered, because such soft laws are often vague and leave room for interpretation. This has allowed the discretion of international financial agencies to develop their own interpretation in the individual practice of loan conditionalities and evaluation standards for performance ratings, causing confusions in the domestic law-making scenes of many recipient countries (see Kaneko 2005). Although every dispute resolution forum may reserve a freedom to take part in the development of interpretation of soft laws, the ultimate responsibility of consistent interpretations should be assumed by the very forum of experts who once formed the soft law.⁷ Thus, such a responsible body as the expert group participated in the drafting at the UNCITRAL should be maintained permanent, and of course, the

academic network should continually act as a watchdog on the trend of such self-interpretative works on soft laws.

2. Substantive Alternative for Liberalization

This paper also looked into the substantive provisions of soft laws which revealed, after all, a bias toward new-liberalism calling for deregulation and rewriting of substantive laws. Although various justifications have been given in the American academism, such as “conversion” theory (Pistor and Wellons 1998; Hansmann and Kraakman 2001), “legal origin” theory (La Porta et al 1997; Shleifer et al. 2003), “legal transplant” (Berkowitz, Pistor, and Richard 2003), these theories seem to reduce influence since the worldwide financial crisis. Now is the time to resume an objective search for possible alternatives.

Perhaps, the answer does not lie far from the American models. Back in the pre-deregulation period, varieties of regulatory designs were pursued for effective function of the market, in which financial laws were designed for balancing the needs of better financial access and effective corporate governance. If we borrow a framework of Pistor and Wellons (1999) to illustrate the different policy choices of law-making in a matrix consisting of the allocator’s axis and the regulatory axis, all major regulatory endeavors in the pre-deregulation period could be put in the upper-left hand side dimension of Chart-4. In this same dimension, many other endeavors of the same regulated-liberal stance have been pursued in various jurisdictions, though the new liberals have harshly disdained them as inferior to the Anglo-American model. These are all clues for comparative legal studies to follow.

Particularly in the post-Asian Crisis context, we may take part in, rather than avoid, the deliberation of what should have been the substantive meaning of the multilateral agenda of “liberalization”. We have to start this with thinking how to deal with the once transplanted new-liberalist model laws. Although the pre-crisis financial laws of many crisis-hit countries, with weak private law regime and strong state intervention, could be similarly put in the lower right part of Chart-4, their reactions to the post-crisis conditionalities diverged (Kaneko 2008). Thailand reacted with a diplomatic tactic to achieve a quick

graduation from the IMF control, without touching on fundamental legal reforms beyond several emergency decrees, and continues to be in the same position in Chart-4 as before. Indonesia seems to be very slow on the way of its own re-regulation, toward the upper position in Chart-4, though politically the nation often confronted with IMF conditionalities. Korea was expected to pursue an idealistic liberalist re-regulation of private laws to achieve a shift through the upper-right position to the upper-left position in Chart-4, while borrowing the pressure of the IMF. Nevertheless, Korea seems frustrated by the unchanged financial infrastructure in the real economy, which tends to drop to the lower-left position.

A few lessons may be obtained from these comparisons. Above all, a “liberalization” from a state-led to a market-led system (or a shift from the right part to the left part in Chart-4) can never be done only with a loosening of state control. Rather, it must be accompanied by a certain regulatory effort to strengthen the private law regime so that the market can function in turn. Otherwise a “liberalization” can never be achieved, but would only end up with a chaotic “deregulation.” We should also learn that a successful “liberalization” can never be finished with a reform of written laws based on any model laws but involves a far more difficult effort to develop the whole infrastructure of financial culture,⁸ which could take longer than often thought and hence necessitates a certain supervisory role on the part of the state until a fully competent market

Chart-4: Matrix of Legal Policy Choices

	Allocative Axis	
	(Market)	(State)
Procedural Axis (deregulation) ← → (Regulation)	Regulated Liberal Market-based × Transparent Rules	Development State State-based × Transparent Rules
	New-liberalism Market-based × Discretionary Rules	Authoritarian State State-based × Discretionary Rules

culture is established.

Perhaps, this pursuit of multilateral agenda of “liberalization” will continue to be an experiment involving various forms of regional trials according to each local context.

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Notes

- ¹ There are criticisms on unclear legal nature of loan conditionalities, unconscionable setting or fictitious agreement on such conditionalities, and abuse of performance ratings. See for example Hikumahant (2007).
- ² See the Introduction (sec.A-4 etc.) of UNCITRAL Legislative Model on Secured Transactions as well as the UN General Assembly Resolution No. 63/121 dated December 11, 2008.
- ³ The World Bank’s “Principles and Guidelines for Effective Insolvency Systems” was drafted in 1998 and finalized in 1999, and later revised in 2005. The IMF’s “Orderly and Effective Insolvency Procedures: Key Issues” in 1999 and the ADB’s “Good Practice Standard” in 2000 were essentially the copies of the World Bank’s “Principles”.
- ⁴ Although the EBRD’s Model Law on Secured Transactions published in 1994 is known for the primarily purpose of promoting large scale project-financings, it involves much more consideration for balancing among stakeholders than the models of the ADB/ World Bank. The Model includes the identification of maximum amount, preferential order of statutory liens, strict notice requirements for crystallization, and prohibition of strict foreclosures. This balancing nature must stem from its formation process that involved experts from more jurisdictions.
- ⁵ The UNCITRAL Legislative Guides have provided meaningful opportunities for delegations from Asian developing countries. Vietnam, for example, is reported to start reviewing its secured transaction law regime once copied from the ADB model (Ishinada 2009).
- ⁶ This argument may take contractual approach such as abuse of bargaining powers or unconscionabilities. It may also take up the issue of fairness in the course of decision-making of international financial agencies, which may ultimately lead to fundamental structural reforms of their governance mechanisms.

- ⁷ For example, the OECD Principle on Corporate Governance published in 1999 (revised in 2004) has been frequently interpreted by the same committee that drafted the Principle, though this continued cycle of interpretation lacks procedural openness.
- ⁸ This includes improvements of micro-level problems such as lack of expertise for corporate and project analyses, excessive dependence on secured interests, monopolistic creditor-debtor relation, which altogether has created Rajan and Zingales-like over-lending practices (Dwor-Frecaut et al. 2002; Kaneko 2002; 2008). These micro level problems could have been reduced if the financial structural reform brought about a better competition as was described in the earlier prescriptions of the IMF (Kaneko 2004, Chapter-5).