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**Observing at UNCITRAL:**

**The Creation and Development of Insolvency Norms**

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*Introduction*

The UNCITRAL Model Law on Cross-Border Insolvency was approved by the General Assembly of the United Nations in a resolution on 15 December 1997.[[1]](#footnote-1) To date, the Model Law has been adopted by an ever-growing number of countries, counting some 58 state members representing 61 jurisdictions in total**.** In the context of the quest for international regulation, the adoption of the Model Law by UNCITRAL represents for many the most important step taken in the emergence of a truly international framework for co-operation in insolvencies. This is not to denigrate the many excellent initiatives at regional level that continue to flourish, such as the European Insolvency Regulation (Recast), early work on whose predecessors influenced the shape of the UNCITRAL text. Nonetheless, UNCITRAL’s reputation as a consensus builder and its work on many successful international texts has done much to ensure that this text genuinely represents the views and expectations of stakeholders.

Of interest, however, is that UNCITRAL did not come to work in insolvency at the outset, when it was formed in 1966. Working Group V, where the work on insolvency is now situated, began its life examining international economic relationships (procurement and construction contracts), before moving on to contract practices and the conclusion of a convention on the assignment of receivables in international trade. Only in 1993 did proposals emerge suggesting that the Working Group examine the rules on the international aspects of bankruptcy, but not its substantive rules, whose harmonisation was deemed too difficult in the absence of a unified approach to bankruptcy across the world.[[2]](#footnote-2) Furthering this initiative was a colloquium in Vienna in April 1994, co-sponsored by INSOL International, at which those suggestions were given flesh. The first meeting of Working Group V on insolvency in fact took place in Vienna in 1995 and four sessions were to go by before a definitive text was produced two years later.[[3]](#footnote-3) As work by UNCITRAL had begun to move in this direction, the format chosen for the text was that of a Model Law, which would allow countries to enact the measure rapidly as part of their domestic legislation when the final version was adopted in May 1997.[[4]](#footnote-4) Though the provisions were contained in a relatively brief document of only 32 articles, the text was still the most detailed of all the then extant texts in the field.[[5]](#footnote-5)

*A Steer from Practice*

In this context, of particular note is the participation of INSOL International in the work by UNCITRAL. The history of international insolvency law had hitherto been mostly populated by states and organisations, whose membership consisted of state parties. Though insolvency is naturally a very pragmatic and practice-focused subject, the stakeholders with the most interest in the outcomes tended not to be seen, much of the work on lobbying occurring at domestic level, if indeed it did, to influence the position of states in discussions leading to the adoption of mostly black-letter texts, such as conventions and treaties. However, precedent had been created in the work of the International Bar Association (IBA), which began in 1988 with the formation of a working group of its Committee J,[[6]](#footnote-6) looking into the question of international insolvency co-operation.[[7]](#footnote-7) This practitioner-led initiative eventually produced a text called the Model International Insolvency Co-Operation Act.[[8]](#footnote-8) Though ultimately unsuccessful, its emergence prompted Committee J to also draft a Cross-Border Insolvency Concordat adopted in 1995,[[9]](#footnote-9) which was intended as a flexible set of guidelines for harmonising the conduct of international insolvency proceedings without being a substitute for treaty or domestic legislation regulating this area.[[10]](#footnote-10)

The involvement of the IBA in the production of international texts can be explained by the rising number of international insolvencies from the 1980s onwards, particularly the cases of Olympia and York, Maxwell Communications, BCCI etc., which revealed the consequences of having inter-connected economic and financial networks promoted by globalisation and their impact in the inevitable cycles of downturn and distress. INSOL International, which had been formed in 1982, was not to be left out of this dynamic and rapidly secured a reputation in promoting cross-border practice and taking practical steps to secure cooperation. From its origins as a networking forum, INSOL International acquired, through its Technical Committee, a basis for this work and rapidly identified links with UNCITRAL as an opportunity to further cooperation at an international level with international law- and policy-makers.[[11]](#footnote-11) The 1994 Colloquium in Vienna was a direct result of the links being forged, as was the pivoting from 1995 onwards of Working Group V towards insolvency, NGOs being represented in its deliberations alongside state parties, the requisite technical expertise being provided by the presence of INSOL International and the IBA.

*Modern Day Interactions*

INSOL Europe, first as part of the global body and later in its own right, has come to be represented at UNCITRAL meetings. In fact, the presence of INSOL Europe members has been long standing, including on national delegations to the body (Croatia, Denmark and Netherlands being more recent examples) and within other NGOs, especially European ones (ELI, GRIP21 etc.). While some of the more prominent members of the member states represented at UNCITRAL dominate the discussion, it is notable in recent years that the NGOs present have increasingly contributed to the debate, especially during the pandemic years, when the video-conferencing format promoted a more egalitarian approach to participation. It is noteworthy that the contribution of academia, practice and the judiciary increasingly dominates the theme of discussions, as texts become ever-more practically oriented. This is particularly welcome, especially as the focus of Working Group V has expanded beyond the 1997 Model Law to embrace the production of a Legislative Guide, first published in 2004 and added to regularly since, as well as initiatives that have seen two further Model Laws on insolvency-related judgments (2018) and enterprise group insolvency (2019) and the formulation of legislative recommendations on micro- and small enterprises (2021). More recently, UNCITRAL has embarked on newer workstreams in applicable law and asset-tracing, the latter being a highly useful practice tool. In fact, INSOL Europe’s close cooperation with the European Commission, which has promoted work on both these topics, has assisted in encouraging recognition of the need for these issues to be dealt with internationally.

*Summary*

Overall, despite the observation, often mistakenly attributed to Bismarck, about law-making,[[12]](#footnote-12) the direct interaction of bodies representing practice with the law- and policy-makers has undoubtedly had an impact on the shape of these laws. At international level, the persuasion coming from practice that UNCITRAL should undertake the development of rules in cross-border insolvency has borne fruit (and then some). In that arena, INSOL Europe and its members continue to play a vital part.

1. The texts of the UNCITRAL Model Law and Guide to Enactment are available through the UNCITRAL website at:

<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\_insolvency>. [↑](#footnote-ref-1)
2. See Note by the Secretariat (23 June 1993), paragraphs 1-3, available at:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V93/865/52/IMG/V9386552.pdf>. [↑](#footnote-ref-2)
3. See Richard Glosband, “The UNCITRAL Working Group on Insolvency Law” (1997), previously housed at: <www.bostonbar.org/sections\_&\_committees/bankruptcy\_law/doc\_center/uncitral.htm & ubcitral2.htm> (sites no longer available). [↑](#footnote-ref-3)
4. (1997) 36(5) *International Legal Materials* 1386 (with an Introductory Note by Harold Burman and Jay Westbrook). [↑](#footnote-ref-4)
5. See Ernest Krings, “Unification législative internationale récente en matière d’insolvabilité et de faillite” (1997) 2 *Uniform Law Review* 657. [↑](#footnote-ref-5)
6. See Bruce Leonard, “Internationalisation of Insolvency and Reorganisations” (1996) 24 *International Business Law* 203, 204-205; John Barrett, “Cross-Border Insolvency: Developments, Realities and Solutions” (1996) 24 *International Business Law* 208. [↑](#footnote-ref-6)
7. See Timothy Powers, “The Model International Insolvency Co-Operation Act: a Twenty-First Century Proposal for International Insolvency Co-Operation”, Chapter 30 in Jacob Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (OUP, 1994) (687-700). [↑](#footnote-ref-7)
8. Ibid., 690-691. [↑](#footnote-ref-8)
9. See Bruce Leonard *et al.*, *Report on the Committee J Cross-Border Insolvency Concordat* (International Bar Association, 1995). [↑](#footnote-ref-9)
10. *Introduction to Concordat* (International Bar Association, 1995). [↑](#footnote-ref-10)
11. See Neil Cooper, “World Standards – The Role of INSOL International “ (2004) 19(4) *International Corporate Rescue* 172. [↑](#footnote-ref-11)
12. “Laws are like sausages, it is better not to see them being made”. [↑](#footnote-ref-12)