INSOL International and UNCITRAL

- Celebrating 20 years of collaboration
Just over twenty years ago, INSOL International and UNCITRAL started working together to address the cross-border issues that affected the efficiency of insolvencies and the usefulness of insolvency proceedings to stakeholders. The result of that collaboration is the work not of these two organisations, but of the hundreds of delegates from nation states together with “observers” from intergovernmental organisations, including international financial organizations, and non-governmental organizations, generally referred to as NGOs, that comprise UNCITRAL’s Working Group V.

The output of WG V has been a succession of invaluable publications (well, we would say that, wouldn’t we?) for use by policy makers, legislators, insolvency practitioners, academics and judges. Nowhere, however, has the history of the collaboration of the two organizations over the last twenty years been committed to paper. We have been assisted in our recollections by the generous contributions of past and present members of WG V and of judges who are hopefully assisted by the products of the WG.

We hope that we have fairly recorded the achievements of WG V – if the text seems bland at times, it may be because we have avoided the temptation to attribute progress to individuals or delegations for the simple reason that all decisions of the WG are collective. However, thanks should be given to the chairs of the WG, Kathryn Sabo of Canada who saw through the Model Law and Wisit Wisitsora-At, who has chaired most subsequent meetings, and those who have stood in for them from time to time.

We are both proud of having played a part in this process. This book is dedicated to the memories of Professor Ronald Winston Harmer and Judge Burton R. Lifland, two dedicated servants of both organisations and among those responsible for formulating the Model Law on Cross-Border Insolvency.

Jenny Cliff
UNCITRAL Secretariat

Neil Cooper
Past President, INSOL International
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1. INSOL International – its background to working with UNCITRAL

These days, we are all familiar with reference to international or cross-border insolvency but it was not so long ago that these were rather exotic and widely misunderstood expressions. Exotic, because most practitioners only undertook domestic insolvency cases, and misunderstood because, almost universally, very little was understood about other countries’ systems. Misunderstandings arose because of erroneous assumptions that, for example, a French *syndic* or a German *konkursverwalter* was the local equivalent of the English bankruptcy trustee, and that therefore their qualifications, objectives, resources and approaches to an insolvency case should be the same as those of an English trustee. To the extent that they differed, the individual or the professional in question was presumably deficient! And for the avoidance of any doubt, this was not an English but a universal assumption.

For that small number of academic and practicing insolvency specialists interested in developing international insolvency law and practice, the general misunderstanding was that others assumed our objective to be one of harmonising insolvency laws universally, a task now acknowledged to be only one step more difficult than turning lead into gold.

The problems were quite simply that insolvency laws had been written to deal only with domestic insolvencies: almost all insolvency laws assumed that all assets wherever situated were available to discharge creditors’ claims, but the laws did nothing to facilitate the recovery of assets outside the domestic jurisdiction. There had been attempts to address these problems, albeit with limited success. There were a number of international treaties, the most successful of which was probably the Nordic Treaty, and initiatives exploring the possibility of a universal insolvency law, the most developed of which was the International Bar Association’s Model International Insolvency Cooperation Act (MIICA), based on the quite effective framework provisions in Articles 304 to 306 of the US Bankruptcy Amendment Act. But for a variety of reasons, MIICA was not destined to become the global solution and great minds were working on alternative solutions.

INSOL International was still a relatively young professional body in the early 1990s, but finding solutions to international problems was part of our raison d’être and INSOL had incorporated an international committee from the outset to work on such matters. As an organisation, INSOL International first began to explore the idea of working with UNCITRAL in the middle of 1992 following discussions between Richard Gitlin of INSOL, Carl Felsenfeld, then of Fordham University, and a few others. Somewhat experimentally, the 1993 INSOL conference in Melbourne focused on cross-border insolvency. Based on the delegates’ reception of the topic at the conference, Council endorsed their support for the opportunity to work with UNCITRAL although in truth, no one had any clear idea of what might be achieved as a result of this collaboration.

At the UNCITRAL General Assembly in July 1993, the Secretariat noted the possibility of future work on cross-border insolvency in a paper that today looks quite far-reaching, covering issues such as cross-border judicial assistance; cross-border compositions; the international recognition of security interests; and the impeachment of debtors’ transactions prejudicial to creditors. The paper recorded some of the previous initiatives towards the regulation of cross-border insolvencies and concluded that practitioners found “it would be desirable to harmonise some of the areas of insolvency laws, which would allow international insolvencies, including compositions, to be resolved in a more predictable fashion and without undesirable conflicts between the jurisdictions interested in the insolvency”. Quite clearly, no one could foresee what a field day arguments over COMI would prove to be for lawyers globally.

2. UNCITRAL – its history and mission

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly 1966 to reduce or remove the obstacles to trade created by the disparities between the national laws governing international trade. With a focus on harmonisation and modernisation of international trade law, the Commission was regarded as the vehicle by which the UN could play a more active role in this field. As an intergovern-mental body, the Commission comprises 60 member States elected by the General Assembly, which represent the world’s various geographic regions and its principal economic and social systems. UNCITRAL conducts its business through working groups and the Commission. Working groups are, as the name suggests, the forum that does the day-to-day work on developing legislative texts. They are an amalgam of the 60 States that are members of the Commission, other UN member states that attend meetings as observers, as well as intergovernmental organisations and non-governmental organisations that are invited to attend as observers. The Commission secretariat (the Secretariat), which is based in Vienna, prepares

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1 There was a lot going on in connection with the European Bankruptcy Convention in connection with which the views of our then officers were sought. All member associations were requested to form “International Committees” to liaise with INSOL on cross-border matters, with mixed effectiveness.
and services annual meetings of the Commission and biannual meetings of six working groups, which prepare the substantive legal texts designed to harmonise and modernise international trade law. Of those six groups, one of them has been considering various aspects of insolvency law since 1995.2

Discussion at meetings of both working group and the Commission is usually based upon documents prepared by the Secretariat (usually in English) and translated into the other 5 official United Nations languages. Delegations ask to speak by raising their “flag” (essentially their country nameplate). The discussion progresses by order of the raising of the flag. Delegations can speak in any one of the six official UN languages (Arabic, English, Chinese, French, Russian and Spanish) and what they say is simultaneously interpreted into the other five.

“The process of the Working Group was a marvel that required acculturation. The sequence of discussions and interventions was often non-linear; interventions by some delegates and observers were clearly for the purpose of proving their attendance while others were constructive and insightful. Personal styles of presentation ranged from direct to circumspect, from passive to aggressive.” Dan Glosband, USA

“Undoubtedly, the reason for UNCITRAL’s success in developing a framework to deal with cross-border insolvency disputes is the nature and quality of the delegates, who have the benefit of excellent support from the Secretariat. The fascinating mix of policy-makers, practising insolvency practitioners, lawyers, Judges and academics enriched the discussion and led to an informed debate on how one could best assimilate policies underlying different forms of insolvency law to achieve a common goal of promoting co-operation in, and efficient resolution of, cross-border insolvency cases. The way in which almost all of the delegates interacted, eschewing personal promotion to achieve a public good, was something to behold.” Justice Paul Heath, New Zealand

“What is clear to me at least, is that UNCITRAL’s insolvency working group has achieved recognition that, within the U.N. coterie of organizations, it is one of the few that successfully produces products having significant impact across the global economy. Of note is the fact that a critical mass of Model Law adopters has occurred with many states now considering its adoption.” Judge Burton Lifland, USA

“The most pleasing experience of my participation is the friendships, personal, professional and academic that I have been able to develop over the years. The spirit of collaboration, sharing of knowledge, respect and open-mindedness that characterize the working group is incomparable and unsurpassed by other like meetings and groups I have participated in over the years.” Carlos Sanchez Mejorada y Velasco, Mexico

“The insolvency work began with many—perhaps most—of the attending delegates being general commercial attaches who knew little about insolvency law. As we gathered momentum, more and more of the member states sent delegates expert in our subject. In turn, Group V has served to help create a worldwide insolvency community. Even beyond its important legislative work, I believe that creation of this community has made it far more possible to achieve modified universalism in global insolvency cases. As with any international meeting, the key conversations took place over lunch or a melange3 . . .” Jay Westbrook, USA

“I realized that this was a harmonious group of states and NGO’s and that concept has never changed but has been reinforced by the expertise, drive and collegiality of Working Group V . . . Only in such a Working Group, where an individual could say to another what the hell were you talking about and be able to discuss the same, could substantial progress be made.” Christopher Redmond, USA

2 Currently known as Working Group V (Insolvency Law) (WG V).
3 An Austrian coffee, not unlike a cappuccino.
3. UNCITRAL’s first work on insolvency law: the Model Law on Cross-Border Insolvency

At a Congress convened in 1992 to celebrate the 25th anniversary of UNCITRAL, the discussion on insolvency law focused on the growing significance of cross-border insolvency issues and the inadequacies of both domestic and international legal regimes for addressing those issues in a coordinated and predictable manner. A note of caution was sounded, however, in view of the failure of attempts in other fora to develop harmonized texts on cross-border insolvency. In response to a proposal that UNCITRAL should undertake work in the area of cross-border insolvency, the Commission requested an in-depth study on the desirability and feasibility of harmonized rules on cross-border insolvencies. INSOL agreed to provide that and the report was written by Ron Harmer and Evan Flaschen based largely on a review of the cross-border law and practice of about 30 countries undertaken by Neil Cooper, Rebecca Jarvis and Sonali Abeyratne. The report dispensed with the simplistic characterisation of laws as fundamentally universalist or territorial in nature in favour of a sliding scale of cooperation. The research had drawn attention to both the statutory provisions in each state, as well as the practice of courts and practitioners faced with cross-border problems. By the autumn of 1993, planning for the first colloquium was well underway with a draft programme and names being gathered for invitation to participate. The final invitation was to “representatives of governments and international organisations who have an interest in the development and improvement of laws dealing with multinational and cross-border insolvencies, rehabilitations and reconstructions” to a multidisciplinary/multinational colloquium to be held in Vienna from the 17 to 19 April 1994.

The proposed agenda was quite simple. On the Monday, we discussed the need for legislative reform, what already existed as workable provisions and what was being proposed at that point. Tuesday commenced with an open forum discussion and a report by a panel of “evaluators” comprising Lord Justice Hoffman, Professor Carl Felsenfeld and Gordon Marantz QC before the closing remarks by representatives of UNCITRAL and INSOL. In fact, it was as much as anything the quality of the summary of the meeting by the evaluators that helped to frame much of the work that followed.

The first UN document of significance was A/CN.9/378/Add. 4 of 23 June 1993 headed “Possible future work – Note by the Secretary – Cross-border insolvency”. Despite the very early stage of the debate, the note remains remarkably prescient and is a credit to the skills of the Secretariat who over the 20 years with which INSOL has been involved with UNCITRAL have shown a remarkable skill in converting jumbled thoughts and arguments into credible, logical and fair conclusions. INSOL International may have had the original idea but it would have come to nothing without the dedication and commitment of the UNCITRAL Secretariat.

The colloquium identified several areas in the field of cross-border insolvency in which work might be feasible “without necessarily straying into what is generally recognized as not, at least at this stage, a feasible or necessarily even desirable area of work, namely the substantive unification of insolvency law.” [Report of the Colloquium, A/CN.9/398, para. 16] The first area was judicial cooperation, which was to be explored further at the first of an ongoing series of multinational judicial...
conferences, held in Toronto, Canada in March 1995, with a particular focus on whether judicial cooperation was possible under current law and what rules might be required to enable judicial cooperation as a first step in dealing with difficulties that arise as a result of parallel proceedings and potentially conflicting legal regimes and jurisdictions.

The second area was access and recognition, with a third being the formulation of a set of model legislative provisions on insolvency. Discussion at that colloquium was aided by a report prepared by INSOL summarizing the current legal environment and identifying obstacles to judicial cooperation, access and recognition. The report of the Colloquium indicated that “While it was not the conclusion of the Colloquium, and it is not here proposed to draft a comprehensive insolvency code with a view to achieving substantive unification of law, work in this area of law may eventually be important not only for Governments concerned with modernization of law, but also for the commercial community and for legal practitioners.” [A/CN.9/398, para. 19]

“Only a few years ago a pioneering article on cross-border insolvency law could be entitled “The International Void in the Law of Multinational Bankruptcies”. At the time, the law was just beginning to develop in the United States, primarily through a series of decisions involving section 304 of the U.S. Bankruptcy Code, particularly those by Judges Lifland and Brozman of the Southern District of New York. Nevertheless, despite the developing case law under section 304, the statutory basis for recognizing foreign proceedings was vague, and there were decisions that appeared to deny recognition on parochial grounds. Relatively few cases granted foreign representatives substantive relief, and there were very few cases in which a foreign court was willing to grant recognition to a U.S. proceeding, particularly a case under chapter 11.” Judge Allan Gropper, USA

“I remember vividly the first three hours of the first insolvency meeting of Group V, the one that led to the Model Law. We elected our Chair and then there was silence and silence and silence. No one spoke for minutes at a time, then a delegate would make a purely formal statement that he or she had obviously been instructed to make and the silence would return. Finally, that grand man, the Secretary General Gerold Hermann, announced he was turning off the recording and telling the secretary to lay down its pens. Everything would be off the record and any sort of comment was admissible yet would be unattributable. Slowly, like the little steam engine climbing the hill, the conversation began.

We decided to do a Model Law rather than a convention, despite a sizable minority that thought a convention better. It was a question closely related to reciprocity, which the Group rejected. Although only history will tell if we made the right choice, its adoption by my country and 19 others important in world trade is amazing progress…

The most important thing to remember about the Model Law project is that we were assured by all the experts that it would fail. The Model Law, for all its weaknesses, has progressed farther than anyone thought possible in 1995, when we convened…” Jay Westbrook, USA

4. The negotiation process and adoption of the final text

In May 1995, the Commission agreed that a working group should be established to develop a legislative framework to address an area that was not only of critical importance for international trade, but also one that was likely to increase in its incidence. The negotiations had a number of clear objectives, identified from the consultations with judges and insolvency practitioners conducted in the preparatory stages of work on a possible legislative text. The initial focus was upon judicial cooperation and access and recognition and was later extended to include assistance to foreign proceedings.

A second judicial colloquium was held in March 1997 in New Orleans to consider cases of cross-border insolvency that had occurred, as well as the draft UNCITRAL Model Provisions on Cross-Border Insolvency. From the reports of the cases discussed a number of points emerged: (a) communication between courts was possible, but should be done carefully and with appropriate safeguards for the protection of substantive and procedural rights of the parties; (b) communication should be done openly, with advance notice to the parties involved and in the presence of those parties, except in extreme circumstances; (c) communications that might be exchanged were various and included exchanges of formal court orders

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4 Before my appointment to the bench I represented one of the U.S. banks in an unsuccessful effort to resist recognition in the first major case under section 304, which was pending before Judge Lifland, In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982). Later I filed Judge Brozman’s first cross-border case, In re Gee, 53 B.R. 891 (Bankr. S.D.N.Y. 1985), and still later represented on appeal one of the three defendant banks in the seminal cross-border case of Maxwell Communications Corp., 93 F.2d 1036 (2d Cir. 1996), an appeal from a decision of Judge Brozman.
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or judgements; supply of informal writings of general information, questions and observations; transmission of transcripts of court proceedings; (d) means of communication included telephone, fax, electronic mail facilities and video; and (e) where communication was necessary and was intelligently used, there could be considerable benefits for the persons involved in, and affected by, the cross-border insolvency.

The Colloquium observed that the old methods of dealing with cross-border insolvency would not be sufficient when parties and courts were faced with the difficulties of rescuing a corporate enterprise in two or more States simultaneously. What was required was a new spirit, which had to be one of cooperation, where each jurisdiction was prepared, where appropriate, to defer to the other and where each jurisdiction was sensitive to the concerns of the other. It was considered that the best way to ensure that the judges were able to cooperate was to give them the statutory authority to do so, as provided in the Model Provisions. It was generally considered that those Provisions, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases, providing the necessary legislative basis for foreign insolvency representatives to have easier and much quicker access to courts and a useful formal foundation for communication. The Colloquium recognized the high degree of cooperation achieved within the UNCITRAL working group during the preparation of the draft.

The UNCITRAL Model Law was negotiated in five two-week sessions between October 1995 and May 1997: the working group comprised representatives of some 72 States, seven inter-governmental organizations (IGOs) and ten non-governmental organizations (NGOs). In practice, these statistics are misleading: the dialogue was driven by the delegates of INSOL International and the International Bar Association in dialogue with the national delegations from the USA and a small number of European nations whose delegates had been involved in the negotiation of European Bankruptcy Convention, later renamed and enacted as the Insolvency Regulation. So while the Model Law was not “based on” the Bankruptcy Convention as is sometimes reported, the dialogue was most certainly informed by those delegates who had already spent several years negotiating in Brussels. However, the formal sessions were only part of the success. Every day during those early years, informal committees would meet without translators to progress the work of the WG. In many ways, these informal groups were the reason the Model Law was completed as rapidly as it was.

The final negotiations on the draft text took place during May 1997, with the final text being adopted by consensus as the Model Law on Cross-Border Insolvency on 30 May 1997. The text was endorsed by the General Assembly in its resolution 52/158 of 15 December 1997.7

“In cross-border insolvency law did not come into its own until the formulation of the UNCITRAL Model Law and its comprehensive rules for recognizing and granting relief to foreign insolvency proceedings. As the work of the international community, it was afforded great international credibility. Beyond its specific provisions, the Model Law represents an international commitment to bring structure and clarity to an increasingly important area of commerce. It demonstrates that the U.S. decision to recognize foreign proceedings under section 304 without insisting on reciprocity was sound, as the willingness of foreign courts to recognize and enforce U.S. insolvency decrees has changed altogether since the Model Law was adopted.


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From my perspective, the Model Law, adopted in the United States as chapter 15 of the Bankruptcy Code, has engendered little controversy. It is drafted logically and has few of the ambiguities that often result in litigation regarding the construction of a new statute. In my personal view, most of the cases to date have struck a reasonable balance between the protection of local interests and the mandate of cooperation with and recognition of foreign insolvency proceedings and decrees. For example, the U.S. courts have given a narrow view to the construction of the term “public policy” in article 6 of the Model Law (section 1506 of chapter 15), while affording a broader construction to the concept of “adequate protection” of creditor interests in articles 21 and 22 (adopted as “sufficient protection” in sections 1521 and 1522 in the United States). The Model Law is effectively supported by the Guide to Enactment and the Legislative Guide.” 

Judge Allan Groppper, USA

“Having been a player these many years there are too many memorable recollections to recount and rank. But, on a personal level there are two events that stand out:

a) I may have contributed to the end of the Cold War. During the heart of the Cold War, I raised the U.S. placard and made an intervention. Shortly thereafter the Soviet (Russian) Delegate raised his placard and surprisingly stated, “We agree completely with the position taken by the Distinguished Delegate of the U.S.” The breakthrough was perhaps facilitated by an earlier “get to know” you lunch.

b) Concerned over the potential for litigation abuse, the U.S. Delegation and others ascribed to the desideratum of a narrow interpretation of the “Against Public Policy” provision. This narrow interpretation was raised by me at a point in time when the chair was presiding, but a majority of the WGV was still on a coffee break. When they returned my motion was carried with no further debate. As a result the narrower interpretation is now widely adopted. This has helped diffused its use as a “wild card” in the cross-border contested litigation.

The Model Law and it ancillary products are working well. Most of the cases before me are resolved without litigation and efficiently handled by the Parties In Interest. Where recognition or provisional relief is contested, there is sufficient local law to provide decisional guidance.”

Judge Burton Lifland, USA

“In preparation for the Session in Vienna, I reviewed the various working papers that had been prepared by the Secretariat. It became apparent that I was facing a very steep learning curve. Although I had considerable background in the area, first as a practicing lawyer and later as a judge, my knowledge of the development of the Model Law was severely lacking.

Having now participated in Working Group Sessions continuously since 2008, there is no question that the experience that I have gained has been a great asset to my judicial career. My knowledge of the Model Law and the accompanying texts enables me to assess the merits of contrasting positions in cross-border cases in a far more comprehensive manner than prior to 2008. A number of the issues that have been discussed over the years in Working Group Sessions have found their way into my decisions.”

Justice Geoffrey Morawetz, Canada

“[The Model Law’s] genius lies in not seeking to harmonize rules but in providing a procedure for accommodating difference. A framework based on “recognition” and “assistance” focuses attention upon fundamental similarities: as they say in the world of ecumenism “That which unites us is greater than that which divides us”. The office holder may have a different name, be installed by a different process and have a range of different powers: but he or she is still recognizably an office holder participating in an insolvency process, and so is recognized and afforded the assistance that a domestic officer holder would receive.

I have participated both in the Africa Round Table (promoted by INSOL and the World Bank) and in regional forums such as FAIR. As an English judge I am sensitive to the historical context and to the cultural differences between Anglophone and Francophone Africa, between common law and civilian traditions, and between the accumulated experience of a mature economy and the emerging authentic voice of a developing economy. I have found that for the teacher or facilitator the Model Law is a great springboard from which to launch discussion
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and examination of core problems: an internationally based treaty employing autonomous concepts which proceeds by saying “We accept where you are: now these are the ways we can work together”.

Of course, the Model Law speaks to its own time. It assumed that the paradigm was a territorially based single economic unit: and it assumed that insolvency proceedings would be Court-based. So out-of-court restructuring of multi-national groups present challenges, currently being addressed by working groups. But the Law has proved flexible enough to accommodate change to a degree, and when its limits are reached then its very existence and the habit of co-operation which it promotes have encouraged, and been an exemplar for, specific protocols.

I have also found it illuminating when considering our domestic legislation. If a question of construction arises in relation to a term that is also employed in the Model Law English judges remind themselves that the term in the Model Law has an autonomous meaning and try and avoid giving the equivalent domestic term a uniquely English meaning.” Justice Alastair Norris, United Kingdom

“I will start with what I think works well. When cases are not contested, are intended to implement an agreed restructuring or plan of arrangement or where relief is not needed urgently, proceedings tend to be efficient and to run smoothly. Recognition in such cases is granted without controversy, thereby economically aiding the administration of the foreign main proceeding and fostering cross-border commercial predictability. In most cases, it also is quite obvious where the debtor has its centre of main interests and conflict over COMI is unlikely. In these more routine proceedings, chapter 15 is a useful tool to protect assets, to assure that there will be no interference with domestic financial intermediaries, to ratify the terms of a home court’s order or to obtain discovery to assist the foreign representative. These forms of assistance are easily provided and support the proposition that the law is working very well indeed.

That said, there are challenges when parties contest recognition or oppose injunctive relief or the granting of additional assistance. In such instances, judicial discretion becomes an important variable. In several cases, I have considered and ruled on challenges to recognition. In one, I granted recognition despite objections that the foreign proceeding should not qualify because the foreign regime was unfair to unsecured creditors and the proceeding not truly a collective proceeding. That decision was affirmed on appeal but ultimately dismissed when the foreign representative (a corporate insider) refused to cooperate with the objecting creditors. In another, I denied recognition finding that the individual foreign debtor’s COMI was in the United States rather than in London as alleged. I found that the operative date for determining COMI was the date of commencement of the foreign proceeding; other courts, including the Court of Appeals for the Second Circuit, have concluded that the date of filing of the chapter 15 petition should control. When dealing with more vexing questions such as these, judges, even at the circuit court level, do not have definitive precedent to guide them and that can lead to non-uniform outcomes. Nonetheless, during the past eight years considerable case authority has developed in the United States that is providing greater clarity as to the application of the provisions of chapter 15.

Perhaps the biggest unresolved issue in cross-border insolvency is that chapter 15 does not address issues of insolvent corporate enterprise groups. The Lehman case is a good example of the problem. Everyone knows that Lehman managed its global operations from headquarters in New York, but no procedure existed at the time of the collapse to centralize Lehman’s worldwide liquidations in one location or to supervise them. Lehman entities entered insolvency proceedings all over the world, leading to a decentralized approach to resolving claims against and among affiliates. The adoption of a multi-national protocol for cooperation was an ad hoc response to the need for better coordination that allowed foreign representatives to interact with one another and to reconcile and resolve claims.
To sum up, I would say that the Model Law is a big hit, not just because of its codified provisions and procedures but because of its aspirational goals of greater cooperation and coordination in a globalized world economy. I believe that the law has helped insolvency professionals and tribunals, regardless of their home jurisdiction, to think beyond their own borders. That more expansive way of thinking about international restructuring problems is an encouraging side effect of the Model Law and an indication that the law may exert a positive influence even in those countries that have not yet adopted it. James Peck, former bankruptcy judge, USA

The [legislation] incorporates the Model Law as a Schedule, adopting it 'with as few changes as are necessary to adapt it to the Australian context'. This has facilitated consistency in the Model Law’s interpretation and application within Australia and elsewhere. The [legislation’s] streamlined process for foreign representatives to approach local courts directly for recognition and enforcement of foreign insolvencies is an improvement on the more lengthy process under the statutory aid and auxiliary provisions. The process to be followed for recognition of foreign proceedings is now well-established. It has been used to recognise foreign representatives from a range of civil law jurisdictions (South Korea, Japan, Italy, and Iceland) as well as jurisdictions with which Australian insolvency law has more in common (England, New Zealand, British Virgin Islands and Cayman Islands). Rosalind Mason, Australia

Some 21 States have enacted legislation based upon the Model Law. It is anticipated that by the end of 2014 that number may be more than 40. A report on the enactment of the Model Law would not be complete without tribute being paid to Kathryn Sabo of Canada who acted as chair of the Working Group throughout. Kathryn’s background was not in insolvency law, and that may have been an advantage as there were no preconceptions about what a competent law should contain. Although the perverse nature of some delegates must have driven Kathryn to distraction at times, her strength of character and good humour saw the task completed. INSOL is indebted to Kathryn especially for forcing the completion of the final draft at a time when several important delegations were changing delegates and there was a sense of “now or never” in the chamber.

5. Where next? The second colloquium

The Asian financial crisis at the end of the 1990s highlighted the inadequacies of many insolvency laws for addressing the crisis and its consequences and led to work being undertaken by a number of international organizations (ADB, EBRD, IMF and World Bank) to strengthen domestic insolvency law as a means not only of crisis prevention but also of crisis management. While all these initiatives enhanced the debate as to what constituted an adequate insolvency law, the multiplicity of models risked confusing the tasks of those involved with law reform in emerging and transition economies. It was universally accepted that a common model was needed and that UNCITRAL was best placed to facilitate this because of its successful conclusion of the Model Law on Cross-border Insolvency and because of the opportunity for wide participation and discussion afforded by UNCITRAL Working Group approach.

In 1999, Australia proposed that UNCITRAL should develop a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes. At its 1999 session, the Commission heard that while the type of insolvency regime that a country adopted had become a “front-line” factor in international credit ratings and was thus of significant importance, work on an international level to develop insolvency legislation involved sensitive and potentially diverging socio-political choices. For those reasons, it was suggested that a universally acceptable model law was in all likelihood not feasible and any work undertaken by UNCITRAL might not be brought to a successful conclusion.

Without committing itself to establishing a working group to develop a specific type of text, the Commission decided to convene an exploratory session in December 1999 to prepare a feasibility proposal. After two weeks of slow and painstaking deliberation, the positive recommendations of that session led the Commission in 2000 to ask WG V prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.

To assist the preparatory work and to provide an opportunity for discussion of the work on insolvency law being undertaken by the international organizations, a colloquium was held in December 2000, organized in conjunction

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with INSOL International and the International Bar Association. Over 150 insolvency experts from the academic community, private practice, the judiciary, numerous governments and governmental organizations attended. In addition to discussing the work of the international organizations, the colloquium looked at experiences with insolvency law reform in a number of countries and discussed the form and content of work that UNCITRAL might undertake. At the end of the three-day period, a consensus had been reached that not only was the project appropriate, but the primary elements of an effective insolvency system had been identified with a recommendation to the Commission that the project should move forward. Perhaps recalling the previous misgivings voiced at the colloquium held in 1994, as well as at the Commission session in 1999, there was still a degree of scepticism about the likelihood of success of the venture.

“The purpose of the working group meeting was a final read through of the text of the Legislative Guide. I had noticed that in some places the obligatory “should” needed to be replaced with the permissive “could” (and vice versa) and likewise “shall” and “may”. I diligently and doggedly spent the week pointing this out as we moved through the text. Then we moved onto the glossary. On delegate immediately pointed out that we should define “should”, “could”, “shall” and “may”. I then pointed out that should meant should, could meant could, shall meant shall and may meant may and that there was no need for those terms to be defined. A North American voice from the back (not on microphone) said “well it might do in your language Richard but it doesn’t in ours.” And so it was that those terms became defined in the glossary for the avoidance of doubt. A valuable lesson learnt for the future by me— and it has stood me in very good stead since.”

Richard Favier, United Kingdom

6. Legislative Guide process and end result; recollections

Work commenced on what became the Legislative Guide on Insolvency Law in July 2001. Various NGOs and experts were asked to prepare outlines of the key elements identified at the colloquium, indicating the issues to be addressed and the content of possible legislative provisions. This material provided the basis for the first draft of the text considered in July 2001. Over the ensuing 4 years the Guide was developed through formal sessions of the working Group and consultation with insolvency experts. A total of 87 States, 14 inter-governmental organizations and 13 non-governmental organizations participated in the elaboration of the text. The final negotiations on the draft legislative guide took place in New York from 14 to 21 June 2004 and the text was adopted by consensus on 25 June 2004. The United Nations General Assembly endorsed the Legislative Guide by resolution 59/40 of 2 December 2004.10

“The long lines at coffee breaks always provided opportunities for some heated discussions on secured creditors’ rights, for example, and the benefits or not of court involvement in company reorganizations. As a representative of an IFI, it was fascinating to observe the particular issues and concerns for countries represented. As the “observer” from an Asian IFI, I felt it important to represent for example, that courts could not be assumed as established and functioning systems available to service the needs of debtors/creditors. In the end, the Legislative Guide was a compromise document. However, given the wide-ranging views, we achieved a fair outcome. At no other time in my working life have I learned more about negotiations, inter-agency and international relationships, etc. or developed deeper friendships with colleagues from other institutions. It remains a seminal and memorable period in my career.”

Clare Wee, Asian Development Bank

9 The topics were: eligibility criteria; access criteria; debtor’s rights and obligations; administrator’s rights and obligations; the insolvency estate; automatic stay; creditors and claims; role of management; role of creditor committees; treatment of contractual obligations; avoidance actions; distribution priorities; the reorganization plan; post-commencement finance; relationship between liquidation and reorganization. Differently formulated, these topics form the basis of the draft UNCITRAL Legislative guide to insolvency law.

10 See note 5.
“When UNICITRAL, INSOL, the IBA and a phalanx of illustrious professionals embarked upon this journey at the Vienna colloquium in December 2000, we envisaged something quite basic - I think we identified ten aspects of insolvency law which quickly became thirteen sections. What the Working Group has, in fact, produced is far more comprehensive and of real practical value. I can tell you that the Guide is already being used in the reform of the insolvency laws and systems of one central European state and I envisage that it will be universally accepted as the world standard. It is a credit to the work of UNICITRAL and deserves the support of delegates, observers, friends and colleagues worldwide.” Neil Cooper, INSOL International

“One of my lasting memories is of chairing a session in New York on the Legislative Guide. During this particular week, when the chair was unavoidably absent, the vexed topics of voluntary administration and Chapter 11 were for consideration. It was reasonably clear that a consensus as to the most appropriate means of rehabilitating entities in financial distress could not be reached – the gulf between the Chapter 11 approach and that used in other jurisdictions was too wide. Instead, the meeting went down a different pathway; one on which consensus was quickly reached. The Working Group decided to identify the key elements of each of the business rehabilitation models and to focus on what measures were compatible with each. That response by delegates to a problem that could have led to much bickering was positive. A discussion with many insightful contributions took place and the meeting moved on without the need to debate what particular delegates regarded as the “ideal” business rescue model.

The fact that there were so many experienced practitioners, Judges and academics present with no specific mandate from a Government to negotiate particular terms also assisted in reaching consensus on a number of issues that might otherwise have caused difficulties. The standard of the working papers presented by the UNICITRAL Secretariat informed the quality of the debates. They provided a source of comparative law on which delegates could reflect before a meeting.” Justice Paul Heath, New Zealand

“I believe that a superb job has been done in translating a lot of conflicting points of view, erudite thoughts, half thought-out submissions, confused thought and sometimes utter gibberish into a cohesive guide. I believe that this has been done in a way whereby the nation states will feel that they own the end product and that as a result, it is likely to be used. That was our objective. We, the insolvency community, have benefited from an invaluable dialogue over the last few years about some of the key issues of our time – the role that reorganization laws have; the conflicts of laws; the importance of out-of-court proceedings; the relative powers of the courts and creditors and the ability to cram creditors down etc. This has been done with good humour and a great deal of intellectual input from the secretariat. I have no doubt that the end result of our labours will be useful and will become the benchmark by which insolvency and reorganization systems are assessed. We at INSOL International are proud to have been associated with the project from the outset and to have been able to work with so many talented and dedicated professionals who have given freely of their time and energy. Tribute should also be paid to the efforts of the chairman, Wisit Wisitsora-At, whose energy and clear summing up permitted a conclusion to be reached.” Neil Cooper, INSOL International

“The Inverworldcase taught me that international guidance matters. It still does. The Legislative Guide has served as the template for the World Bank ICR Principles, which are now used by both the World Bank Group and the International Monetary Fund in their work around the planet. Case law now heavily relies on UNICITRAL publications for support and guidance. Dr Herrmann was right to think that an international body can make a difference in the way things work in the real world. I am proud to have been a small part of that effort. And I treasure the special friendships I have made along the way.” Leif Clark, former bankruptcy judge
7. Treatment of enterprise groups in insolvency

In 2005, the Commission considered a series of proposals on possible future work on insolvency law. These included a proposal by INSOL International on the treatment of corporate groups in insolvency (a topic that had briefly been considered while developing the Legislative Guide, but had not been taken up in detail at that time in order to finalise the Legislative Guide in a timely manner), together with proposals on the use of cross-border insolvency protocols in transnational cases, post-commencement financing in international reorganizations, directors’ and officers’ responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency.11 Some preference for considering the first three topics was evident, but before making a decision on taking up further work, the Commission agreed to obtain the views of international organizations and insolvency experts as it had done in the past by holding a colloquium. The third international insolvency law colloquium, organized in conjunction with INSOL International, was held in November 2005 in Vienna. The report of the colloquium to the Commission suggested that the work on treatment of enterprise groups in insolvency was sufficiently developed to be referred to a working group and should include the topic of post-commencement financing, that the compiling of experience practical experience with respect to negotiating and using cross-border insolvency protocols should be conducted informally through consultation with judges and insolvency practitioners and that work being undertaken by other organizations on directors’ obligations in insolvency and pre-insolvency should be monitored with a view to the topic being considered at a later date.

The Commission agreed with those suggestions and work on corporate groups commenced in December 2006. The approach taken entitled considering the existing provisions of both the Legislative Guide and the UNCITRAL Model Law to see how they might be applied in the context of enterprise groups and to identify those issues requiring further discussion and the preparation of new recommendations. Because of the lack of domestic laws dealing with the treatment of enterprise groups in insolvency, work began with considering the measures that might be adopted by domestic laws to streamline the domestic treatment of groups. Once progress had been made on those domestic measures, their application in the international context was considered. The text was prepared to form an additional part of the Legislative Guide and was adopted by the Commission as part three on 1 July 2010. Part three was endorsed by General Assembly resolution 65/24 of 6 December 2010.

“]In preparing for the 2008 Session, I had anticipated that the agenda could be covered in a relatively short period of time. I did not appreciate how it could take an entire week! It was not until I was exposed to an UNCITRAL Working Group Session that I realized that I was working with a group of experts who had spent many years in developing the Model Law and the Legislative Guide, and any modifications or further description to be added to these existing texts had to be considered in a careful and nuanced manner.

On the first day of the 2008 Session, I instantly realized that I was now in a diplomatic setting. Prior to the formal commencement of the proceedings, I exchanged informal pleasantries with a number of delegates who I had previously met. However, when the Session formally commenced, the atmosphere changed. Suddenly, I was operating in a world with rules with which I was not familiar, and there was no rulebook to consult. The respect accorded to each delegate stood out in my mind as being significant. Whether you would agree or disagree with the point of view being expressed, it was a pleasure to work in an environment where experts in the field exchanged and debated ideas in a respectful and thoughtful manner.

The work in this field [insolvency law] is becoming more complex each year. However, the delegates to Working Group V are up to the challenge of assessing these issues and developing practical solutions on a consensual basis.” Justice Geoffrey Morawetz, Canada

8. Protocols and Judicial guidance

In 2007, the Secretariat had commenced work informally on the Practice Guide on Cross-Border Insolvency Cooperation in consultation with insolvency experts.

The work ran in parallel with the finalisation of part three of the Legislative Guide on enterprise groups. A draft of the Practice Guide was provided to the Commission in 2008 and then considered by WG V in November 2008. The Practice Guide provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. It illustrates how the resolution of issues and conflicts that might arise in those cases could be facilitated by cross-border cooperation, in particular through the use of cross-border insolvency agreements, usually referred to as “protocols”, tailored to meet the specific needs of each case and the requirements of applicable law.

It was finalised and adopted by the Commission on 1 July 2009 and endorsed by General Assembly resolution 64/112 on 16 December 2009. The Guide contains summaries of all the protocols known to have been adopted up to that date with sample clauses to assist practitioners and courts.

In response to requests for such information and guidance by judges attending the UNCITRAL / INSOL Multinational Judicial Colloquia, in early 2010, the Secretariat had commenced the preparation of materials to assist judges with the interpretation and application of the Model Law on Cross-Border Insolvency. The first draft was produced by Justice Paul Heath (New Zealand) during a sabbatical with the Secretariat in Vienna. At the request of the Commission, the draft was further developed by the Secretariat in consultation with judges and other insolvency experts, in the same manner as the UNCITRAL Practice Guide.
The text discusses the Model Law from a judge’s perspective, identifying issues that may arise on an application for recognition or cooperation under the Model Law and discussing the approaches that courts have taken in countries that have enacted legislation based on the Model Law. The draft text was adopted by the Commission on 1 July 2011 as The Model Law on Cross-Border Insolvency: the judicial perspective. It was endorsed by General Assembly resolution 66/96 on 9 December 2011. To ensure that the Judicial Perspective remains up to date and relevant to judges, it will be updated from time to time as the jurisprudence emerging around the world indicates that need, in consultation with a board of experts comprising judges and insolvency experts. The first update, finalised in July 2013, includes the newly revised Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency and cases decided between completion of the first version and 15 April 2013.

9. Directors’ obligations in the period approaching insolvency

In the course of its meetings in late 2009 and early 2010, WG V had discussed possible future work. The proposals with the greatest support from delegates included a search for a better definition of centre of main interests (COMI) and related jurisdictional issues in the context of the UNCITRAL Model Law; work on the liability and responsibility of directors and officers in insolvency and pre-insolvency cases (based on proposals by INSOL, the United Kingdom and others); and on the insolvency of large and complex financial institutions. It recommended that work should commence on the first two topics as soon as possible in view of the current circumstances facing many States as a result of the global financial crisis and the divergent approaches taken by national laws to those issues. The Commission endorsed that recommendation and work commenced on those two topics in late 2010. In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on directors’ liabilities should only be upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability nor to deal with core areas of company law.

The work focussed on the obligations that might be imposed on directors of an enterprise in the period approaching insolvency, with the aim of protecting the legitimate interests of creditors and other stakeholders and providing incentives to minimize the effects of financial distress experienced by the enterprise.

Part four of the UNCITRAL Legislative Guide on Insolvency Law: Directors’ obligations in the period approaching insolvency was finalised and adopted by the Commission on 18 July 2013 and endorsed by General Assembly resolution 68/107 on 16 December 2013.
10. Revisions to the Guide to Enactment of the Model Law

The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency is a revision of the 1997 Guide to Enactment. The purpose of the revision is to provide more information and guidance on the interpretation and application of selected aspects of the Model Law, particularly the concept of the debtor’s “centre of main interests” (COMI), as well as various elements of the definition of “foreign proceeding” under article 2 of the Model Law. These revisions do not in any way affect the text of the Model Law as drafted.

The revisions adopted include: (a) A shorter, more focused introduction to the Model Law and its key concepts; (b) Clarification of the use of the term “insolvency” in the Model Law; and (c) Provision of more information on (i) the elements of what constitutes a “foreign proceeding” for the purposes of article 2, (ii) the characteristics of “main” and “non-main” proceedings, and (iii) the articles dealing with recognition of a foreign proceeding, in particular article 16 and the factors that are relevant to rebuttal of the presumption that the debtor’s centre of main interests is its place of registration, as well as the time by reference to which COMI is to be considered in deciding on recognition under article 17.

The revised Guide was approved by the Commission on 18 July 2013 and endorsed by General Assembly resolution 68/107 on 16 December 2013.

11. What next??

In December 2013, the fourth international insolvency colloquium was held to discuss how it might develop the existing work on the cross-border insolvency of enterprise groups, the obligations of directors of enterprise group’s members in the period approaching insolvency, a possible convention on cross-border insolvency covering both enterprise groups and individuals and the insolvency of large and complex financial institutions.

A series of new topics for possible future work included (i) choice of law; (ii) issues concerning creditors and claims, such as establishing global standards for claims adjudication and ranking of claims; guidelines for relative voting rights of debt and equity holders; and coordinating creditor access to information and collective representation; (iii) the insolvency treatment of financial contracts and netting in the UNCITRAL Legislative Guide; (iv) regulation of insolvency practitioners; (v) enforcement of insolvency-derived judgements; and (vi) treatment of intellectual property contracts in cross-border insolvency cases. Several of these topics were proposed by INSOL International.

“*At its most recent meeting in December 2013 UNCITRAL Working Group V adopted an impressive agenda of future work that focuses on some of the most pressing issues that the Model Law does not yet govern directly. These include insolvencies of enterprise groups, issues of choice of law, the enforcement of insolvency-related judgments and decrees, and the application of the principles of the Model Law to small and medium-sized enterprises. The success of the collaborative process in the development of the Model Laws to date provides reason for optimism that these further issues will be dealt with as much success.*” Judge Allan Gropper, USA

“There is little doubt among the vast majority of the delegates of WG V that the combination of the global financial crisis, increasing globalisation of trade, the increasing divergence of the scale of economic endeavours and the interdependencies of economies all make continued work on insolvency and credit-related matters of the utmost importance. The work of UNCITRAL assists with both law reform and the development of institutional capacity to make that reform effective.” Neil Cooper, INSOL International.
12. Judicial Colloquiums

The first judicial colloquium was held in Toronto in 1995 by INSOL specifically to obtain the reaction of the judges to the report referred to early in this publication on the need for assistance to judges dealing with cross-border matters. That colloquium offered its wholehearted support for the work in hand, especially as some judges commented that under their existing rules, they were precluded from discussing matters before them with any other party including judges from their own courts. There was also a clear need for some international forum to permit judges to communicate and discuss cross-border matters.

Since 1995, INSOL International and UNCITRAL have sponsored a series of biennial judicial colloquiums that have provided a regular opportunity for judges involved in insolvency cases to meet and share their experiences and engage in an open and frank dialogue on issues of interest and concern to them. It has also provided the opportunity to inform judges from around the world about the Model Law on Cross-Border Insolvency and discuss recent cases involving its application. From 2007 the World Bank joined INSOL and UNCITRAL in sponsoring these events.

The meetings are always restricted to justice officials to facilitate free and frank discussions but reports of the matters discussed and general conclusions are published. The following evaluations are available on the INSOL website at www.insol.org:

- First Judicial Colloquium – Toronto, March 1995
- Second Judicial Colloquium – New Orleans, March 1997
- Third Judicial Colloquium – Munich, October 1999
- Fifth Judicial Colloquium – Las Vegas, September 2003
- Sixth Judicial Colloquium – Sydney, March 2005
- Seventh Judicial Colloquium – Cape Town, March 2007
- Eighth Judicial Colloquium – Vancouver, June 2009
- Ninth Judicial Colloquium – Singapore, March 2011
- Tenth Judicial Colloquium – The Hague, May 2013

The 2015 Judicial Colloquium is being held on 21st and 22nd March in San Francisco in conjunction with the INSOL International Annual Regional Conference.

In addition to the Biennial Judicial Colloquiums, we also hold Regional Judicial Roundtables focused on specific geographical regions. To date, Judicial Roundtables have been held in Cairo for the MENA countries (2002); Grand Cayman for the Caribbean jurisdictions (2013); and Hong Kong for the Asia Pacific region (2014).