THE NORM LIFE CYCLE THEORY AND THE ROLE OF INSOL INTERNATIONAL IN SHAPING THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

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Abstract

The involvement of non-state entities in global public norm evolution has been the subject of many studies, especially in international human rights law and policy. This study explains the role of a non-state entity, INSOL International, in shaping the UNCITRAL Model Law on Cross-Border Insolvency, adopted by the UN General Assembly in 1997 using the life cycle approach developed in the human rights and policy context. The study utilized a triangulation of doctrinal, empirical and legal history data to determine whether the norm life cycle theory could explain the role of INSOL in shaping the Model Law. The study found that non-state entities have influenced bankruptcy norms even before Roman Times. State involvement in setting bankruptcy norms is a reasonably recent phenomenon. The Model Law results from a complex and complicated private-public legal ordering in which non-state entities' interests intermingle with state sovereigns, providing legitimacy and accountability to multilateral normative sites.

The life cycle approach enabled a look back on how INSOL manoeuvred the policy terrain to generate, cascade and ensure internalization of cooperation and coordination norms among state courts. These norms underpin the Model Law. The study found that a gap exists between the interests of non-state entities and low GDP states excluded from participation at the two earlier stages of emergence and cascade but required to diffuse the norm at the last stage of internalization. The study indicates that while the life cycle theory is helpful in our understanding of the role of INSOL in shaping the Model Law provides no solution for dealing with the gaps in normative weight of states in global lawmaking. Given the impact of non-state entities on global lawmaking, the study suggests balancing the gaps through the early involvement of members from low GDP states in the activities of non-state entities and at the early stages of the life cycle of a norm. This approach would render internalization and diffusion of such norms easier in those states later.

Keywords: Norms, Cross-Border Insolvency, Model Law, UNCITRAL, Bankruptcy, Insolvency Practitioners, Access Recognition and Relief, Norm Emergence, Norm Cascade, Norm Internalization, Global Law Making, Non-State Entities, Multilateral Organizations

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The sad loss of my father stunted my academic career. Honourable Justice Chukwunweike Idigbe of the Supreme Court of Nigeria passed on the same day I enrolled as a Solicitor and Barrister in Nigeria on July 30, 1983. After over three decades in private legal practice, the feat of returning to academia became possible because of the sacrifices of my supportive wife, Elizabeth, and our children Isioma, Chukwuemeka, Ikechukwuka, and Obiajulu.

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Anthony I. Idigbe

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Abbreviation Chart

Abbreviation	Unabbreviated Version
INSOL International/INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals
UNCITRAL	The United Nations Commission on International Trade Law
UN	United Nations
TWAIL	Third World Approach to International Law
WHO	World Health Organization
MIICA	Model International Insolvency Cooperation Act
IBA	International Bar Association
The Convention/ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
WTO	World Trade Organization
FATF	Financial Action Task Force
FTC	Free Trade Commission
NAFTA	North American Free Trade Agreement
ICANN	Internet Corporation for the Assigned Names and Numbers
IMF	International Monetary Fund
CGTC	Commodity Futures Trading Commission
UNIDROIT	International Institute for the Unification of Private Law
CERI	Center for International Studies and Research
SEC	Securities and Exchange Commission
MEG/MNE	Multinational Enterprise Groups
NGO	Non-governmental Organization
ICT	Internet, Communication and Technology
IPA	Insolvency Practitioners Association
ABA	American Bar Association
III	International Law Institute

ALI	American Law Institute
JIN	Judicial Insolvency Network
EIPA	European Insolvency Practitioners Association
GDP	Gross Domestic Product
ICC	International Criminal Court
IFC	International Finance Corporation
ART	African Round Table
OHADA	Organization for Business Law Harmonization in Africa
MENA	Middle East and North America
OECD	Organisation for Economic Co-operation and Development
BRIPAN	Business Recovery and Insolvency Practitioners Association of Nigeria
GRIPA	Ghana Restructuring and Insolvency Practitioners Association
CAMA	Companies and Allied Matters Act
ECOWAS	Economic Community of West African States
WTO	World Trade Organization

1. Chapter One – Introduction

Section A – Context and Structure

1.1 **Summary and Structure of the Study**

Non-state entities have influenced cross-border bankruptcy norms from time immemorial as traders set norms for bankruptcy.[1] State and court involvement in setting cross-border norms of bankruptcy and purely commercial transactions is a reasonably recent phenomenon, with English courts playing a pioneering role from the late 18th century.[2] Norm-setting in cross-border insolvency is challenging for many reasons. States exercise territorial exclusivity over bankruptcy norms within their states while seeking the universal effect of those norms over assets and debtors located outside their territory. Conflict and accommodation are inevitable, with other states refusing to recognize foreign bankruptcy orders.

Treaties allow states to accommodate their differences on bankruptcy norms, but negotiating treaties is cumbersome. As a matter of the general strategy to maintain world peace and security, states establish multilateral institutions for the negotiation, modernization, and harmonization of international laws, especially trade laws, including insolvency law. The activities of non-state entities in norm evolution at multilateral institutions have been the subject of academic studies, and many approaches and theories have developed around global norm making. As a result, there is a drought of study on non-state entities' role in influencing global public insolvency norms, providing the opportunity for examining the evolution of cross-border insolvency norms.

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[1] Jérôme Sgard, "Bankruptcy Law East versus West" in Debin Ma & Jan Luiten van Zanden, eds, *Law Long-Term Econ Change- Eurasian Perspect* (Stanford, Calif: Stanford University Press, 2011) 198; Gunther Teubner, "Global Bukowina: Legal Pluralism in the World-Society" (1996), online: <https://papers.ssrn.com/abstract=896478> pointing out that the lex mercatoria, the transnational law of economic transactions, is the most successful example of global law without a state.

[2] Ian F Fletcher, "Walking on Thin Ice - The Formative Era of Judicial Cooperation in Cross-Border Insolvency: An English Perspective" in *Bankruptcys Univers Pragmatist Festschriff Honour Prof Lawrence Westbrook* (Ann Arbor, MI: Michigan Publishing, 2021).

This study seeks to explain the role of the International Association of Restructuring, Insolvency & Bankruptcy Professionals ("INSOL International" or "INSOL"), a non-state federation of insolvency practitioners in the emergence, cascade and internationalization of the norm of cooperation and coordination among state courts which underpins the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law").[3] The United Nations Commission on International Trade Law ("UNCITRAL") adopted the Model Law in May 1997, and the United Nations ("UN") General Assembly adopted it in December 1997.[4] The study utilizes the norm life cycle approach developed in international relations and human rights and policy context to explain the role of INSOL in the adoption of the Model Law as a global insolvency norm.

The research considered the impact of INSOL on the Model Law using the life cycle approach in three main areas, namely,

a) The rationale for forming INSOL and the preferred approach to change in the global norm on cross-border insolvency, otherwise, the why question.

b) The explanation of the cascade of INSOL's preferred norm to the UNCITRAL modelling site, leading to adopting the Model Law; otherwise, the how question.

c) Following the institutionalization of the Model Law as a global norm by its adoption at UNCITRAL and the UN General Assembly, the role of INSOL in states' internalization and diffusion of the norm through wide acceptance, particularly by low GDP states.

The study utilized a triangular research methodology (Chapter 2 provides a detailed research methodology).[5] The first pillar of the research triangle is historical data from archival materials collected through the legal history method to explore the roles of INSOL, UNCITRAL,

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[3] "INSOL - About", online: <https://perma.cc/2YHR-Q7MN>.

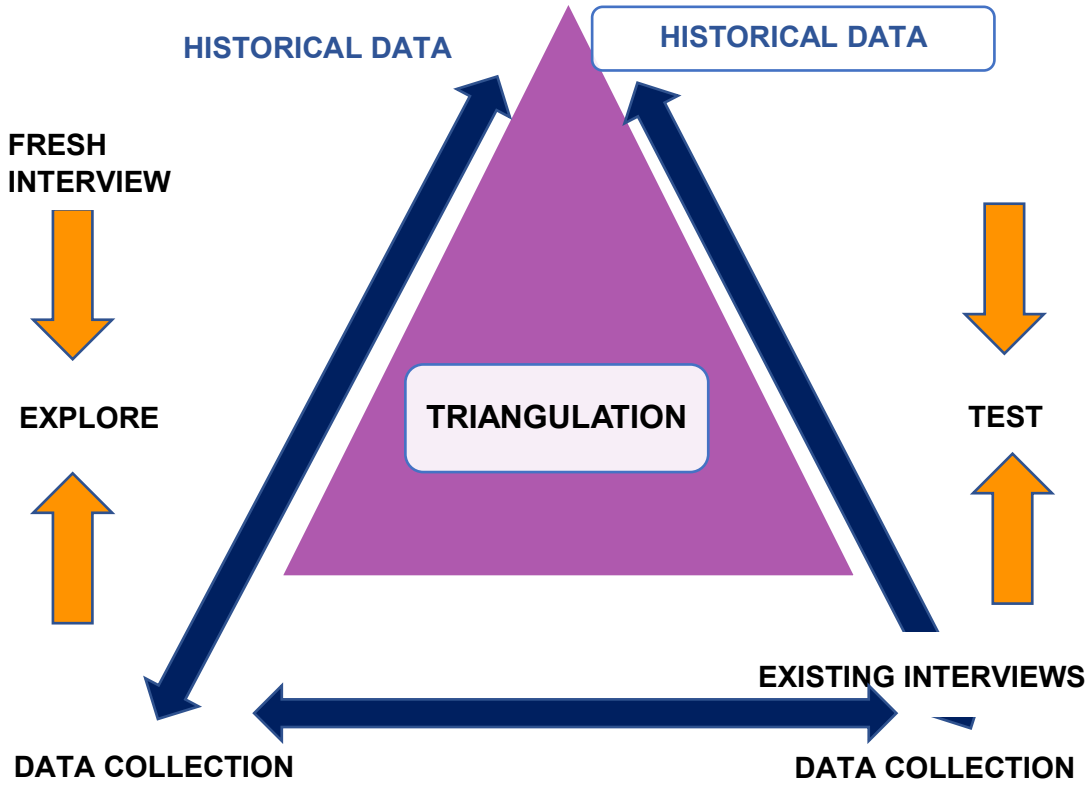
[4] "UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment", online: <https://perma.cc/2JFC-52JY>.

[5] "New Public Management & Criminal Justice New Wine in Old Bottles? A Case Study of Youth Justice" Joseph Nwokobia, A Doctoral Thesis, Anglia Ruskin University Cambridge (15 September 2017) at 3. Nwokobia's work is unpublished. Fuller account of the research method is in Chapter 3.

and states in the making of the Model Law. It then triangulates using existing interviews and recollections of witnesses who observed or participated in the norm-making process. This second leg of the triangle became useful as many potential respondents for the fresh empirical study population were no longer available due to death, ill-health and retirement. The perceptions of potential but unavailable respondents captured in pre-existing interviews in available records or previous writings enabled the testing of the study's elite interview data and archival documents for consistency. The last linchpin of the triangle is fresh interviews conducted to gather empirical data, which enhanced the exploration of the historical data, and pre-existing interviews enabling accurate contextual reconstruction using the life cycle approach. Figure 1 is the graphical representation of the research methodology.[6]

Figure 1 Triangulation of Research Methodology

[6] Adapted from model of Joseph Nwokobia's unpublished work *ibid* at 3.



Martha Finnemore and Kathryn Sikkink, Professors of International Relations and Human Rights Policy, postulated that a norm has a life cycle with three stages: emergence, cascade, and internalization, and different actors perform different roles with different motivations at the various stages of the norm life cycle.[7] While states are primarily responsible for promulgating international law at the cascade stage, non-state entities, as shown in this study, could play a dominant role in the emergence and internalization stages. Even at the cascade stage, states' normative weight alone is not the determinative factor in what norm cascades to a global norm. Non-state entities can convert norm leaders who then persuade other states to become norm followers by applying

[7] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Int Organ 887–917.

persuasion techniques.[8] Further, the institutionalization of a global norm through adoption does not necessarily result in states' compliance and behaviour change, leading to a failure to launch.[9] A norm achieves internalization when compliance and behaviour change occur. States do not consistently internalize global norms for several reasons. State practice, lack of homogeneity with local norms, existence or otherwise of an epistemic community of experts, political associations, and domestic coalitions all affect the domestic diffusion of global norms.[10] The global power imbalance among states affects Third World states' participation in norm contestation at the various stages of the norm life cycle.[11] There is an assumption that the norm becomes "stable" after the cascade stage, and contestation no longer affects the norm.[12] However, the intimate relationship between norm contestation and political backlash may lead to norm erosion after cascade.[13] The norm life cycle stages are not distinctly separated but blurred, as norm dynamism

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[8] *Ibid* at 895.

[9] Jennifer Hadden & Lucia Seybert, "What's in a Norm: Mapping the Norm Definition Process in the Debate on Sustainable Development" (2016) 22:2 Glob Gov 249–268.

[10] Thomas Risse-Kappen, "Ideas Do Not Flow Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War" (1994) 48:2 Int Organ 185–214; Mark A Weisburd, "The International Court of Justice and the Concept of State Practice" (2009) 31 Univ Pa J Int Law 295; Peter M Haas, *Epistemic Communities, Constructivism, and International Environmental Politics* (Abongdon Oxon, New York NY: Routledge, 2016); Dwayne Leonardo Fernandes & Devahuti Pathak, "Harmonizing UNCITRAL Model Law : A TWAIL Analysis of Cross Border Insolvency Law", online: *Asian Yearb Int Law* <http://unov.tind.io/record/70687>; Linda A White, "Do International Organizations Influence Domestic Policy Outcomes in OECD Countries?" (2020) Palgrave Handb Fam Policy 69–86.

[11] Christoph Paulus, "Global Insolvency Law and the Role of Multinational Institutions" (2007) 32 Brook J Intl L 755 at 761; For discussion on the power imbalance between Global North and Global South using the Third World Approach to International Law see Antony Anghie, "University and the Concept of Governance in International Law" in Edward K Quashigah & Obiora Chinedu Okafor, eds, *Legitimate Gov Afr Int Domest Perspect* (1999); Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law" (1996) 5:3 Soc Leg Stud 321–336; Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall Law J 171; J T Gathii, "Assessing Claims of the Emergence of a New Doctrine of Pre-emptive Was under the Doctrine of Sources" (2005) 43 Osgoode Hall Law J 67.

[12] A Wiener, "The dual quality of norms and governance beyond the state: Sociological and normative approaches to 'interaction'. 10(1): 47–69." (2007) 10:1 Crit Rev Int Soc Polit Philos 47–69.

[13] Nicole Deitelhoff, "What's in a name? Contestation and backlash against international norms and institutions" (2020) 22:4 Br J Polit Int Relat 715–727; See also Karen J Alter, James T Gathii &

and contestation result in back and forth movement. Recognizing norm dynamism enables the norm entrepreneur to manoeuvre in global norm making.

Without legitimacy methods like direct elections, participation of non-state entities in international intergovernmental organizations' lawmaking process enhances those organizations' legitimacy.[14] The study explores non-state entities' involvement in internalizing global norms by transforming them into local norms through domestic adoption by states. It examines how non-state entities navigate local legislative challenges to enactment compared with multilateral institutions in many states. Particularly intriguing is the possibility of the non-state entity transmitting norms to new and succeeding practitioners and adherents through professionalization, as postulated by Finnemore and Sikkink.[15]

1.2 **Problem Statement and Motivation for the Study**

The UNCITRAL Commission study between 1992 and 1993 reported to the UN General Assembly that many states claim universal effect for their insolvency proceeding and recognize in varying degrees with some limitations the global impact of insolvency proceedings, opened abroad.[16] However, the study also found that states deny such influence to a foreign insolvency proceeding while claiming universal effect for their insolvency proceedings.[17] This study was significant in identifying how the cross-border insolvency recognition paradox led to hardship for creditors and debtors and frustration for cross-border insolvency practitioners, which inspired the creation of a non-state international federation determined to intervene in the global public

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Laurence R Helfer, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences" (2016) 27:2 Eur J Int Law 293–328 assessing the impact of backlash on the regional courts in West, East and Central Africa.

[14] *The Politics of International Economic Law: Legitimacy and the UNCITRAL Working Methods*, SSRN Scholarly Paper, by Claire Kelly, papers.ssrn.com, SSRN Scholarly Paper ID 1371214 (Rochester, NY: Social Science Research Network, 2009).

[15] Finnemore & Sikkink, *supra* note 7.

[16] *UNCITRAL Note to General Assembly on Possible Future Work*, by UNCITRAL Commission Secretariat, A/CN.9/378/Add.4 (Vienna: UNCITRAL Commission, 1993).

[17] Ibid para 13

lawmaking area of cross-border insolvency. The organization around which private agitators for a change in the global norm for insolvency successfully coalesced is INSOL, and its objective of influencing the global norm on insolvency was achieved when UNCITRAL adopted the Model Law.[18]

In international bankruptcy and insolvency proceedings, the issue is how to get the different states whose laws are based on territorialism to harmonize cross-border insolvency regulation. In other words, how to manage the effect of a local bankruptcy consistently and universally abroad. Usually, state parties negotiate directly through officials of their relevant government organs through bilateral or multilateral bankruptcy treaties.[19] However, before establishing the League of Nations in the early 20th century, there were only a few formal multilateral platforms for normative contestation and modelling or involvement of non-state entities in state-led governance under international law.[20]

The UN was founded in 1945, and by 2020 had 196 (one hundred and ninety-six) member states replacing the League of Nations.[21] The UN Charter created the Security Council, Economic and Social Council, International Court of Justice, the Secretariat and General Assembly as a global framework for intergovernmental interaction.[22] The General Assembly is the chief deliberative, policymaking and representative organ.[23] The UN Charter empowers it to act on issues concerning peace and security of humanity.[24] In addition, the UN General Assembly

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[18] "INSOL - About", online: <https://perma.cc/H6YA-6LFT> for details about INSOL; note 4.

[19] Kurt H Nadelmann, "Bankruptcy Treaties" (1944) 93 U Pa Rev 58–97.

[20] David Kennedy, "International Law and the Nineteenth Century: A History of an Illusion" (1997) 17 Quinnipiac Law Rev 99–138.

[21] "Member States | United Nations", online: <https://perma.cc/3S8K-7CYT>.

[22] United Nations, *CHARTER OF THE UNITED NATIONS AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* (San Francisco: United Nations).

[23] *Working Documents | United Nations Commission on International Trade Law*.

[24] United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (San Francisco: United Nations) at 3 Articles 1-4.

creates platforms for members to negotiate and arrive at an agreement to achieve its objectives. UNCITRAL is one of such platforms established by the General Assembly.[25]

UNCITRAL Commission, with a membership of sixty (60) states elected by the General Assembly reflecting the diversity of regions and states, has the objective of modernization and harmonization of international commercial laws.[26] UNCITRAL is a permanent commission of the General Assembly, and its secretariat is part of the UN Secretariat.[27] UNCITRAL publication indicates that its work is organized and conducted at three levels, the Commission, which works through an annual plenary session, the intergovernmental working groups, at which negotiations occur on the development of work programmes and the secretariat, which supports the Commission and its working groups in their work.[28] The UNCITRAL Commission secretariat coordinates the work of the Commission's Working Groups consisting of state delegates. Each Working Group also has its support secretariat. The average membership of a Working Group is 40 (forty) member states drawn in such a way as to reflect the diversity of the geopolitical constitution of the UN. Observers consist of non-member states and non-state entity observers. The administrative support provided by the secretariat to the Commission's Working Groups includes preparing studies, reports, legal research, working papers and draft texts on topics for future work programmes or topics already included in the work programme and consulting outside experts from different legal traditions.[29]

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[25] *A Guide to UNCITRAL Basic facts about the United Nations Commission on International Trade Law* (Vienna: UNCITRAL International Centre, 2005).

[26] *Ibid* at 1–2 The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966 (see annex I). By resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. .

[27] *Ibid* at 3.

[28] *Ibid* at 5.

[29] *Ibid* at 9.

Since 1995, Working Group V ("WGV") has focused its attention on insolvency.[30] The Working Group allows observers to attend its meetings and contribute to debate but without voting rights. The Working Group reports its output through the Commission secretariat to the Commission, which reports to the General Assembly. The General Assembly adopts annually one or more resolutions regarding UNCITRAL's work.[31] According to the UN, these resolutions are usually provisional and then reissued at the end of the year as the last numbered supplement of the General Assembly's official records.[32]

The deliberation of UNCITRAL WGV, as with all other UN agencies, is governed by UN procedure until the agency adopts its formal rules, which UNCITRAL did not do during the study period but agreed at its first Commission session to work based on consensus.[33] On the other hand, the majority make decisions under the UN rules of procedure.[34] Claire Rita Kelly, an American Professor of Law and now a federal judge of the US Court of International Trade argues that notwithstanding the applicable regulations, decision-making at the UNCITRAL Working Group session is consensus-driven. She further argues that there is debate among member states over the degree of agreement necessary to achieve consensus and the participation of non-members.[35]

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[30] *Working Group V: Insolvency Law | United Nations Commission on International Trade Law*.

[31] supra note 25 at 29.

[32] supra note 23.

[33] United Nations, *RULES OF PROCEDURE OF THE GENERAL ASSEMBLY (embodying amendments and additions adopted by the General Assembly up to September 2016)*, A/520/Rev.18 (New York: United Nations, 2016) at 44 Part XVII Article 161 ; UNCITRAL Commission Secretariat, *Report of First Session of UNCITRAL 1968 A/7216* (United Nations, 1970) although UNCITRAL accepted that UN rules of procedure would apply, it adopted consensus as its mode of decision making at is first session. "UNCITRAL Rules of Procedure and Methods of Work | United Nations Commission On International Trade Law", online: <https://perma.cc/5SXU-J3SF> these formal rules of procedure were adopted in 2010.

[34] United Nations, *supra* note 33 at 34 Rule 125.

[35] Kelly, *supra* note 14 at 2.

There is tension among the fundamental UN concept of equality of states, majority vote and consensus. For instance, it is unclear whether the majority amounting to consensus is two-thirds or a simple majority. Also, observer non-member states or non-state entities can be called upon to contribute to debates simply by raising their delegation flag or name plaque showing the ease of participation. Indeed, UNCITRAL records suggest that an observer non-member state has produced the chairperson of WGV.[36] However, the participation of observers in the UNCITRAL lawmaking process has generated tension among some member states. The French voiced opposition to observers' participation in UNCITRAL working group deliberations and lack of French language use, among other objections.[37] The French argue that the UNCITRAL work method dilutes the centrality of state sovereignty in international law by allowing non-state entities to participate in its process and watering down the consensus concept by which it arrives at its decisions.[38] Other states like the United States ("US") do not necessarily agree with the French critique of the UNCITRAL work process, and the tension remains as to the relevance of non-state entities in the UNCITRAL work process.[39]

International organizations, it is said, lack political and democratic legitimacy to underpin their legal authority and have a "democracy deficit."[40] Legal academic literature abounds on how

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[36] UNCITRAL Working Group V, "Report of the Working Group on Insolvency Law on the work of the eighteenth session (Vienna, 30 October-l0 November 1995) (AlCN.9/419 and Corr.l)" in *Yearb U N Comm Int Trade Law 1996 Vol XXVII* (New York: United Nations, 1996) 113 The List of Attendance in this report of WGV first insolvency meeting and eighteenth session held Oct-Nov 1995 indicate that Canada was not a member state but an observer and Kathryn Sabo from Canada was elected Chairman of the session.

[37] *France's Observation on UNCITRAL's Working Methods*, UN, by UNCITRAL, UN A/CN.9/635 (UNCITRAL, 2007); *UNCITRAL rules of procedure and methods of work Note by the Secretariat Observations by the United States*, A/CN.9/639 (UNCITRAL, 2007).

[38] Kelly, *supra* note 14; UNCITRAL, *supra* note 37 France raised several observations relating to UNCITRAL work method in this document .

[39] For opposing US position, see note 37.

[40] Alfred C Aman Jr, "The Democracy Deficit: Taming Globalization Through Law Reform" (2004) at 3–5; quoted in James B Kelly, "A Basis for Governing: Legitimacy, Accountability, and the Value of Uniform Principles for Global Administrative Law" (2017) 86:5 Miss LJ 955 at 998; Alois Stutzer & Bruno S Frey, "Making International Organizations More Democratic" (2005) 1 REV ECON 305; Richard B Stewart, "Administrative Law in the Twenty-First Century" (2003) 78 NYU REV 437 at 439–440.

and why international organizations, particularly UNCITRAL, seek legitimacy and accountability through the participation of state delegates and non-state entities or expert groups in their work process.[41] In this context, legitimacy is the perception that authority to act is appropriately obtained and vested in the international organization enabling its effectiveness through compliance by those to whom its non-self-enforcing rules apply.[42] James Kelly, for instance, argues that the World Trade Organization WTO) addressed legitimacy concerns about its process and objectives by extending due process, fairness, transparency and participation beyond state parties.[43] Although the legitimacy of international organizations may stem from states' authority, strict adherence to state consent may impede the efficacy of such organizations' output and the need to include other parties such as non-state entities in the decision-making process.[44] The justification for any regime is the explanation of the source of legitimacy of the regime. Accountability is how a regime is controlled by those it serves. In this regard, non-state entities have internal and external legitimacy challenges of justifying their benefit to their members and stakeholders and their value to international organizations in global lawmaking.[45]

In 2009, Kelly did a preliminary study of the UNCITRAL work method and suggested further study to identify non-state entities or expert groups in the UNCITRAL work method, their

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[41] Kelly, *supra* note 14; Claire R Kelly, "Legitimacy and Law-Making Alliances" (2008) 29 Mich J Int Law 605, 606–07; Ian Hurd, "Legitimacy, Power, and the Symbolic Life of the UN Security Council" (2002) 8 Glob Gov 35; Ian Hurd, "Legitimacy and Authority in International Politics" 53 INTL ORG 379; Terence C Halliday, "Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead" (2006) 32 Brooklyn J Int Law 1081.

[42] Kelly, *supra* note 14 at 20.

[43] Kelly, *supra* note 40 at 1008.

[44] Kelly, *supra* note 14 at 19.

[45] Kenneth Anderson, "Accountability as Legitimacy Global Governance, Global Civil Society and the United Nations" (2011) 36:3 Brook J Intl L 841; Cazadira Fediva Tamzil, "Contesting Global Civil Society's Legitimacy Claims: Evaluating International Non-Governmental Organizations (INGOs)' Representation of and Accountability to Beneficiaries" (2016) 18:2 Glob J Polit Int 165–176; Athena Ballesteros et al, "Power, Responsibility, and Accountability: Rethinking the Legitimacy of Institutions for Climate Finance" (2010) 1 Clim L 261.

role, and how and when they generate norms.[46] She concluded that international rulemaking institutions require further research to improve reform. Also, further research could improve the assessment of legitimacy gains and the political trade-offs offset by the process, if at all or to what extent, by individual states' political agenda promoting those proposals.[47]

This research seeks to fill the gap identified by Kelly. First, it considers INSOL's role in shaping global norm making at UNCITRAL. INSOL is a federation of national associations of insolvency practitioners. UNCITRAL is a state-centred intergovernmental platform for negotiation among states on harmonization and modernization of international trade laws. Second, the study explains the UNCITRAL and INSOL relationship and identifies the factors that made the outcome of that relationship, the Model Law, successful, thriving over the dominant state-supported alternative norm promoted by another equally international non-state entity, the International Bar Association. Third, it further considers the internalization stage of global norm diffusion by observing interaction dynamics between domestic structures, states, multilateral institutions and non-state entities like INSOL. Ultimately, the study explains the extent to which the norm life cycle theory explains the role of INSOL in shaping the UNCITRAL Model Law, identifying divergence between the theory and the dataset.

1.3 **Context of the Study**

The UN emerged from the League of Nations' ruins in 1945 as the Second World War ended. The UN's eventual statute resulted from a compromise by some states and non-state entities over the normative basis for international peace's institutionalization.[48] As a result, member states and academics constantly review the UN's performance as an international institution. For example, Francis Wilcox, a United States Assistant Secretary of State, in a fiery review speech to the American Society of International Law in 1956, suggested that the Soviet

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[46] Kelly, *supra* note 14.

[47] *Ibid* at 32–34.

[48] Francis O Wilcox, "The United Nations in the Mainstream of History" (1956) 50:Seventh Session Am Soc Intl Proc 187.

leader “Stalin and his ungrateful protegees” were trying to rewrite the history of the UN.[49] He argued that the UN’s ancestry dates back to the nation-states’ rise, the evolution of constitutional government, the beginnings of modern economic patterns, and international jurisprudence from Grotius and Vittoria.[50] However, Wilcox emphasized that the UN’s success is attributable to how the institution has handled its challenge and the complex structure of norms and legal framework setting it up.

States and non-state parties have for centuries engaged each other in conceptualizing the normative future of international law. While World War II raged, about one hundred and eighty North Americans from various fields, primarily academics, led by the Honourable Manley O. Hudson, judge of the Permanent Court of International Justice, held conferences over two years postulating about the international law of the future. Their objective was to envision a future international law that would ensure an adequate governance structure to guarantee peace and security and prevent another world war.[51] In January 1944, they released a document detailing their postulates, principles and proposals.[52] This document proposed the set-up of a General Assembly of states with an executive arm. It also proposed that the institution should have the power to set up specialized agencies in various areas, including international trade.[53] In the same year, Kurt H. Nadelmann, an American expert on bankruptcy and comparative law, advocated for a specialized agency on international trade law in the form of an international bankruptcy centre that “could be entrusted with the task of coordinating the efforts devoted to the progressive

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[49] *Ibid* at 188.

[50] *Ibid*.

[51] Amos J Peaslee, *United Nations Government* (New York: Justice House, 1945) note 1. *Ibid* note 1.

[52] “The International Law of the Future Postulates, Principles and Proposals” (1944) 38:Sup 41 Am J Intl L, online: <https://heinonline.org/HOL/Page?handle=hein.journals/ajils38&collection=journals&id=45&startid=&endid=144>.

[53] *Ibid* Proposal 11(2)b.

solution of the bankruptcy problems in the international field" based on Proposal 11(2)b of the group of experts on the international law of the future.[54]

As it turned out, an unusual coalition that included the neoliberal United States, the defunct communist Soviet Union and parts of Western European states won the Second World War and established the UN. The UN constitutional structure consists of a General Assembly of states, an executive Security Council and the International Court of Justice.[55] There is debate among state parties as to their respective influences on the eventually adopted UN Charter. Amos J. Peaslee, one of the active participants in the North American group of experts' conferences, argues that the group's postulations, principles, and proposals significantly influenced the UN Charter.[56] Evsey Rashba collected materials on the Soviet Union opposing response, one of which is the writing of S. B Krylov, which recorded as follows:

> The Soviet Union took an active part in the preparation and creation of the United Nations Charter...the Soviet Union signed the Charter, and…It is all the more important to describe the part thus played, inasmuch as the position of the Soviet delegation "has more than once been crudely distorted and disfigured by the reactionary press, and by the American press in particular. Frequent attempts have been made to present in a false light the nature and intent of the Soviet delegation's action.[57]

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[54] Nadelmann, *supra* note 19 at 93. *Ibid*.

[55] United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (San Francisco: United Nations). United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (San Francisco: United Nations).

[56] Peaslee, *supra* note 51 note 1. *Ibid* note 1.

[57] "Materials Relating to Soviet Doctrines and Practices in International Law (New York: New York University., 1953)" Evsey S Rashba, New York: New York University (1953) quoting S. B. Krylov, Materials for the History of the United Nations, Vol. 1,"Framing of the Text of the Charter of the United Nations", pp. 344, publ. by the Academy of Sciences of the U.S.S.R., 1949. ; See also "Russian Users Flood White House Instagram Upon Rapper's Urging", online: *Bloomberg.com* <https://www.bloomberg.com/news/articles/2020-05-15/russian-users-flood-white-house-instagram-upon-rapper-s-urging> following a Whitehouse tweet on American influence in the setting up of the UN, a Russian rapper urged his over four million followers to respond and they did with a flow of tweets to the Whitehouse tweeter account attracting media attention to the issue. Rashba, *supra* note quoting S. B.

Wilcox captured the dilemma in the normative contestation at the UN when he made the following observation:

> The collision in the United Nations between these two currents, one running between the free world and international Communism, the other between Europe and its old imperial holdings, has served to mould the United Nations to the shape of the world it represents. It may have set discouraging limits to the organization. But it has also opened new possibilities for utilizing the United Nations to keep within peaceful bounds these sweeping tides and currents. The foremost task facing both the policy-maker and the scholar is to determine how best these forces can be turned to good and constructive use, in pursuance of our goals of peace with justice.[58]

The "old imperial holdings" of Europe refer to newly independent Third World states or the Global South whose engagement in the normative contestation over the making of global norms the TWAIL movement articulates.[59] They have taken full advantage of their perceived sovereignty and equality at the UN, resulting in the Global North's responses to maintain dominance in global norm-setting, which TWAIL scholars argue tend to ignore Third World states' broadly shared perspectives.[60] There is a third current challenge of the legitimacy of the neoliberal market harmonization agenda of the Global North as irrelevant to the development needs of the Global South and, therefore, requiring abandonment or reform.[61] In the context of these currents of power

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Krylov, Materials for the History of the United Nations, Vol. 1,"Framing of the Text of the Charter of the United Nations", pp. 344, publ. by the Academy of Sciences of the U.S.S.R., 1949. ; See also following a Whitehouse tweet on American influence in the setting up of the UN, a Russian rapper urged his over four million followers to respond and they did with a flow of tweets to the Whitehouse tweeter account attracting media attention to the issue.

[58] Wilcox, *supra* note 48 at 189.

[59] Anghie, *supra* note 11; Anghie, *supra* note 11; Gathii, *supra* note 11; Okafor, *supra* note 11.

[60] Okafor, *supra* note 11. *Ibid*.

[61] Alexander Kentikelenis & Erik Voeten, "Legitimacy challenges to the liberal world order: Evidence from United Nations speeches, 1970–2018" (2020) Rev Int Organ 1–34 Company: SpringerDistributor: SpringerInstitution: SpringerLabel: Springerpublisher: Springer US arguing that as states of the Global South become more open, they abandon their rhetoric of challenging neo-liberal agenda .

shifts and imbalance, the study considers non-state entities' role in multilateral institutions, norm making.

Many legal academics have researched the role of UNCITRAL and other transnational organizations in global lawmaking.[62] In Kelly's study, she considered private non-state entities' participation in the UNCITRAL work process and concluded a need for more research on the subject.[63] Susan Block-Lieb, a Professor of Urban Legal Studies and Terence Halliday, a Professor of Sociology and researcher for American Bar Association ("ABA"), examined the UNCITRAL work method between 1999 and 2004 and argued that the study of global lawmaking by an international organization should not be restricted to the organization as the unit of analysis but

[62] Gregory Shaffer & Carlos Coye, "From International Law to Jessup's Transnational Law, From Transnational Law to Transnational Legal Orders" (2017) 2017–02 Leg Stud Res Pap Ser Sch Law Univ Calif Irvine 10; *ibid*; T C Halliday & B G Carruthers, *Bankrupt: global lawmaking and systemic financial crisis* (Stanford, Calif: Stanford University Press, 2009); Terence Halliday, "Crossing Oceans, Spanning Continents: Exporting Edelman to Global Lawmaking and Market-Building" (2004) 38 Law Soc Rev 213; Susan Block-Lieb & Terence Halliday, "Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law" (2006) 42 Tex Int Law J 475; Susan Block-Lieb & Terence C Halliday, "Incrementalisms in Global Lawmaking" (2006) 32 Brooklyn J Int Law 851; T C Halliday, "Legitimacy, technology, and leverage: the building blocks of insolvency architecture in the decade past and the decade ahead" (2006) 32:3 Brooklyn J Int Law 1081–1102; *Legitimation and Global Lawmaking*, Fordham Law Legal Studies Research Paper, by S Block-Lieb & T Halliday, Fordham Law Legal Studies Research Paper (New York: Fordham University School of Law, 2006); Terence Halliday & Bruce Carruthers, "The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes" (2007) 112:4 Am J Sociol 1173; John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000); Edward S Cohen, "The Harmonization of Private Commercial Law: The Case of Secured Finance" in Christian Britsch & Dirk Lehmkuhl, eds, *Law Leg Transnatl Relat* (2007) 58; Kelly, *supra* note 14; Edward S Cohen, "Normative Modeling for Global Economic Governance: The Case of the United Nations Commission on International Trade Law (UNCITRAL), 36 Brook. J. Int'l L. 567 (2011)" (2011) 36 Brook J Intl L 567.

[63] Claire Kelly, *The Politics of International Economic Law: Legitimacy and the UNCITRAL Working Methods*, SSRN Scholarly Paper ID 1371214 (Rochester, NY: Social Science Research Network, 2009) at 12 quoting objection of France as follows: "Of particular concern to France is the fact that when UNCITRAL undertakes to draft an instrument, experts, or the groups that they represent, often initiate the process and provide most of the technical information considered by the respective working groups. Yet, these experts are neither representatives nor delegates of any Member. Furthermore, the working groups generally operate without any guidelines and the draft instruments that they submit to the plenary session are only altered "if there is a strong current of opinion in favor of such changes."

extended to its broader framework involving similar organizations and their internal context.[64] They argue that we can understand the role of UNCITRAL in global lawmaking only by reference to how it manages the competition, coordinates its agenda and delivers its work product.

On the other hand, Edward Cohen, a Professor of Law, considers normative modelling from state actors' perspective of using modelling sites to pursue their normative agenda in international law. In his view, the creation of UNCITRAL assuages the concerns of the United States and a few other countries that the General Assembly and other Eurocentric norm-making processes had become cumbersome and resistant to neoliberal capitalism's propagation the basis of international commercial law.[65] The admission of newly decolonized developing countries into membership of the UN in the 1960s intensified pushback on the US agenda.[66] However, the idea of a specialized agency on international trade law predates the creation of the UN.[67] According to Cohen, policy entrepreneurs "forum shift" to sites supporting and advancing their regulatory projects. UNCITRAL was a classic forum shifting by the US and its supporters once the General Assembly became perceived as unsuitable for the direct pursuit of their neoliberal agenda.[68]

Therefore, the input and outcome of UNCITRAL's work process should reflect American perceptions and dominance, which the forum shift referred to by Cohen intended to achieve.

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[64] Susan Block-Lieb & Terence Halliday, *Global Lawmakers: International Organizations in the Crafting of World Market* (Cambridge; New York; Australia and Singapore: Cambridge University Press, 2017) at 31.

[65] Cohen, *supra* note 62 Eurocentric law making sites refers to European domination of The Hague Conference on Private International Law and UNIDROIT processes and the one state one vote rule for the UN General Assembly was considered cumbersome to neoliberal economic agenda of the US. UNCITRAL working groups have smaller membership of between 40 and 60 member state and therefore an environtment for more detailed deliberation compared to the General Assembly. The UN was conscious of not overburdening the General Assembly in setting up specialized agencies and adopting its work procedure. United Nations, *supra* note 33 See Annexes I - VIII.

[66] Cohen, *supra* note 62 at 575, 576.

[67] note 52 Proposal 11(2)b; Peaslee, *supra* note 51. note 52 Proposal 11(2)b; Peaslee, *supra* note 51.

[68] Cohen, *supra* note 62 at 569.

Second, the research considers the impact of INSOL, a non-state group of experts on policy choices, global governance and global public lawmaking at UNCITRAL, a site for normative modelling consisting of a few dominant member states (norm leaders) such as the United States and many other member states (norm followers).[69] Third, the research considers the complex dynamic interplay between non-state entities or groups of experts and state delegates at UNCITRAL that distort the centrality of state agenda in the outcome of the UNCITRAL global lawmaking process. At the same time, UNCITRAL seeks to find its own feet among the ever-expanding number of international organizations involved in global norm making.[70]

Insights from the role of the private conference of concerned international lawyers and academics who developed the postulates for the international law of the future, which claims to have influenced the final draft of the UN Charter, suggests that the norms of non-state entities or experts since the early twentieth century could affect policy choices of states in international law. Therefore, the private parties and states dynamic in the UN Charter negotiation provides a valuable backdrop for this dissertation. This study observes the role of INSOL in the emergence, cascade and internalization of the norm of cooperation and coordination in cross-border insolvency from the frame of the norm life cycle theory developed by Finnemore and Sikkink.[71]

1.4 **Research Questions**

Why and how did the norm of cooperation and coordination in cross-border insolvency proceedings among INSOL members emerge, cascade to a global norm that influenced the UNCITRAL Model Law on Cross-Border Insolvency 1997 and internalized by a critical mass of state actors?

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[69] note 25 at 40 Annex I UN Resolution 2205 (XXI) Article 1 amended by its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 States to 60 States. *Ibid* Annex I UN Resolution 2205 (XXI) Article 1 amended by its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 States to 60 States.

[70] Block-Lieb & Halliday, *supra* note 64.

[71] Finnemore & Sikkink, *supra* note 7. *Ibid*.

1.5 **Roadmap of the Dissertation**

The presentation of the research is in six chapters. Chapter One, the introduction, is divided into three sections A, B and C. Section A sets the summary, structure, and context for the study. It discusses the research problem, research question, aim and scope of the study, its significance and contribution. Section B is a short literature review. It examines the existing legal academic literature on international law and states and non-state entities' role in generating norms and international lawmaking. Section C traces the role of non-state entities in the historical development of cross-border insolvency.

Chapter Two addresses the research design, research procedure and research methods. This chapter interrogates the questions raised from the research overview setting out the research design to answer the research question. It operationalizes the research question by identifying the variables that determine the relationships between states, power, international law, non-state entities and global governance. The study uses a mixed-method of desk research, archival research, interviews and legal history memory recall and contextual analysis for data collection, analysis and reconstruction. The research triangulation comprises historical data, existing interviews and fresh interviews. The research utilizes the data to explore the thesis and contextual reconstruction to observe the life cycle of the Model Law and the role of INSOL in it in the subsequent chapters.

Chapter Two lays the framework for the study. The subsequent chapters present the data in alignment with the three stages of the norm life cycle of the Model Law. Chapters Three focuses on norm emergence, Chapter Four, norm cascade and Chapter Five, norm internalization. Chapter Six is the findings and conclusion.

Chapter Three focuses on the period 1982 to 1993 and deals with the formation of INSOL and the emergence of the norm of cooperation and coordination in cross-border insolvency among INSOL members. The contextual analysis examined and utilized early recorded interviews on the founders' vision, primary data from formational documents like INSOL publications, publicly accessible websites, conference materials, members directory, records of actual cooperation and coordination in cross-border insolvency cases between members, other archival documents, and data. Besides existing interviews, writings and archival materials, the study conducted a fresh

elite interview of respondents from a population of participants involved in the norm-making process between 1982 and 1993.

From the documents examined and the interviews conducted, the study reconstructed the formation of INSOL, its early structure and funding. It also identified INSOL's vision and early strategy for realizing the vision of leadership in international insolvency law and practice. Chapter Three identifies the imperatives for cooperation and coordination among INSOL members in cross-border insolvency. It also considered how INSOL mobilized knowledge, leadership, and connections that facilitated the norm without formal mandatory rules on cooperation and coordination. The *Maxwell Communication* case was the climax of the successful adoption through a *Protocol* of INSOL inspired norm of cooperation and coordination in a significant cross-border insolvency case. Data from the research interview of a participant in the case was analyzed.[72]

This chapter examines the competing norms to understand why some norms succeed, and others do not, as norms do not emerge in a vacuum.[73] The chapter considered the motivation of INSOL to determine whether it was purely ideational, and the role self-interest played in the emergence of the norm.

Chapter Four focuses on 1993 to 1997 and discusses INSOL's engagement with UNCITRAL and the cascade of cooperation and coordination in cross-border insolvency into a global norm with UNCITRAL as the site for normative modelling. The chapter discusses the history of the creation of UNCITRAL, its composition and work method, and the impetus for INSOL's decision to engage with UNCITRAL harmonization and modernization plan for cross-border insolvency with an agenda to shift the emphasis from harmonization to cooperation and coordination. The role of non-state entities in the UNCITRAL work method is examined together with politics, power, accountability, and legitimacy issues. The chapter also examines the data on INSOL's engagement with UNCITRAL to determine how and why it diverted UNCITRAL from

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[72] Jay Lawrence Westbrook, "The Lessons of Maxwell Communication" (1996) 64 Fordham Rev 2531 for a post mortem on the case.

[73] Finnemore & Sikkink, *supra* note 7 at 897.

harmonization to cooperation and coordination. It reviews the data collected and explains why the alternative norm of harmonization based on the Model International Insolvency Cooperation Act ("MIICA") championed by the International Bar Association ("IBA") that rehashed the US Bankruptcy Code s.304-306 failed at UNCITRAL.[74] The US agenda was to extend its bankruptcy regime, particularly its reorganization procedure, to a global norm. INSOL policy agitation stood between powerful states like the US and other competing non-state entities like the IBA. From available historical and primary data, including interviews, this chapter explains the methods, formal and informal, used by INSOL to socialize state delegates who were norm leaders (dominate member states) and who then socialized other state delegates (norm followers), achieving a critical mass of acceptance and adoption of the UNCITRAL Model Law. It also considers why the UNCITRAL output, the Model Law, remains substantially in the format presented by INSOL to UNCITRAL despite vigorous debate at UNCITRAL WGV sessions.

Chapter Five deals with adopting the Model Law by UN member states as part of their domestic law and internalizing the norm of cooperation and coordination, the last stage of the norm life cycle. The institutionalization of the Model Law as a global norm by the UN General Assembly adopting it in December 1997 does not complete the cycle of norm evolution under the life cycle approach. Promoting compliance and behaviour change requires more commitment; otherwise, there will be a "failure to launch."[75] The member states have to adopt the global norm as part of their domestic law as an international norm and then accept it as the current local norm, referred to as internalization.[76] Internalization engages the global norm with state practices and forces of convergence. The outcome depends on domestic reality and the homogeneity of local norms with the global norm and actions of epistemic communities, domestic coalitions and

[74] For detailed discussin of s.304 provisions on cross border insolvency under pre Chapter 15 US Bankruptcy Code see Stuart A Krause, Peter Janovsky & Marc A Lebowitz, "Relief under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies" (1996) 64 Fordham Rev 2591.

[75] Hadden & Seybert, *supra* note 9. *Ibid*.

[76] Finnemore & Sikkink, *supra* note 7 at 904.

political associations.[77] Even widely accepted norms can be unevenly applied.[78] The research sought evidence to explain the role INSOL played in the Model Law's internalization by states. The data showed a low rate of adoption by member states of the UN, and the research sought to explain the low rate and its impact on the effectiveness of the norm using the life cycle approach.

The actors at the internalization stage are different from those at the emergence and cascade stages.[79] Their motivation may also be different.[80] The study considers whether UNCITRAL is suited for a significant role at the internalization stage and how non-state entities remain relevant at the internalization stage. While UNCITRAL may not be the most appropriate multilateral institution for the diffusion of the Model Law at the internalization stage, the study considers other multilateral institutions with a source of authority to coerce state adoption. The dynamic between state practices and global norms and the presence of new actors provides the opportunity to consider the role of non-state entities, domestic coalitions and local political associations in achieving diffusion. Professional organizations may be more suited to assist with internalization through training and professionalization of the norms.[81] Chapter Five further considers the implications of non-internalization in non-adopting states, particularly developing

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[77] Weisburd, *supra* note 10 discussing what is meant by state practice as the process by which a state acts to confirm a norm as a rule including its institutions and persons by which it acts; Fernandes & Pathak, *supra* note 10 discussing how state practice affected adoption of the Model Law in India; Anthony Ogus, "Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law" (1999) 48 ICLQ 405 discussing forces of convergence as either homogenous or heterogenous, the latter attracting more resistance; Damilola Odetola, "Contesting the Trend Towards the Globalisation of Laws in Corporate Bankruptcy: The Experience in Africa" Int Insolv Inst, online: <https://www.iiiglobal.org/sites/default/files/media/ODETOLA%20submission%20for%20the%20III%20Prize%20in%20International%20Insolvency%20Studies%202018.pdf> discussing the diffusion of insolvency reforms in Africa; Haas, *supra* note 10; Risse-Kappen, *supra* note 10; White, *supra* note 10.

[78] Srobana Bhattacharya & Bidisha Biswas, "International Norms of Asylum and Burden-Sharing: A Case Study of Bangladesh and the Rohingya Refugee Population" J Refug Stud, online: <https://academic.oup.com/jrs/advance-article/doi/10.1093/jrs/feaa122/6044360> discussing the challenge of uneven application of accepted norm in the context of international protections for refugees.

[79] Finnemore & Sikkink, *supra* note 7. *Ibid*.

[80] Finnemore & Sikkink, *supra* note 7. *Ibid*.

[81] Finnemore & Sikkink, *supra* note 7. *Ibid*.

states, and suggests filling the norm internalization gap through increased engagement with non-state entities and international institutions.

Chapter Six contains the conclusions of the research. Based on the observation and analysis of the historical data relating to the role of INSOL in the UNCITRAL work process and diffusion of the Model Law, the research generalizes on the role of non-state entities in global lawmaking. This chapter also includes further data analysis supporting the theses established by Chapter Two. Also, the concluding chapter explores the areas of diversion between the research finding and the norm life cycle theory.

1.6 **Research Outcome**

The global lawmaking space is complex and complicated, allowing for multiple interactions among states as norm leaders and norm followers on the one hand and non-state entities as norm entrepreneurs on the other hand. The distinction between public international law as an area for state sovereignty and private international law for non-state entities have become blurred. States have devised various schemes of multilateral agencies to enable them to continue to exercise global lawmaking powers. Block-Lieb and Halliday argue that these international agencies compete to fill up the policy space.[82] Kelly indicates that multilateral agencies like UNCITRAL seek legitimacy from non-state entities' participation in their work process.[83]

The study observes INSOL and UNCITRAL and analyzes historical materials and existing and new data on the evolution of the Model Law to determine the motivations for non-state entities as norm entrepreneurs in cross-border insolvency and makes generalizations. In addition, the inquiry explains why and how INSOL, a non-state entity, generated cross-border insolvency norms, cascaded them to global public norms, becoming internalized by states.[84] The outcome of

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[82] Block-Lieb & Halliday, *supra* note 64 at 50–91 Chapter2 for discussion on the competitive ecology of new international organizations.

[83] Kelly, *supra* note 14; See also Block-Lieb & Halliday, *supra* note 64 at 322–356 Chapter 8 for discussion on role of non-state entities in UNCITRAL work process.

[84] Finnemore & Sikkink, *supra* note 7. *Ibid*.

this research will contribute to the understanding of the scope of private participation in global public lawmaking in cross-border insolvency.

Block-Lieb and Halliday observed that since the core participants as delegates at UNCITRAL Working Groups are from a small number of advanced countries, there is a need for a trade-off or what they termed "meta-bargain," obtained through the inclusion of non-state entities in the UNCITRAL work process.[85] The study considers the implications of non-state entities' role in the "meta-bargain" to determine whether it imposes on non-state entities significantly more obligation than pursuing members' interests. Again, this study's likely outcome is generalizations on non-state entities' obligations in global norm making and determining the areas of the study, if any, the life cycle theory does not explain.

The study seeks to identify the motivation of INSOL as the norm entrepreneur for the norm that underlay the UNCITRAL Model Law, including whether INSOL's motivation was ideational based on empathy, altruism and ideational commitment or driven by its members' self-interest. It also seeks to understand how INSOL generated these norms, whether by practice, processes, or formal rules.[86] Investigating how the INSOL norms on cross-border insolvency came to be is driven by various entities' contending claims to norm generation. The study's outcome would contribute to understanding the relationship between the norm entrepreneur's motivation and generation of the norm.

Current studies on non-state entities' role in global governance and lawmaking focus on institutionalization or privatization of private governance.[87] This enquiry contends that non-state entities can effectively participate in global public lawmaking without the need for institutionalizing

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[85] Block-Lieb & Halliday, *supra* note 64 at 355–356.

[86] Christopher J Borgen, "Transnational Tribunals and the Transmission of Norms: The Hegemony of Process" (2007) 39 George Wash Int Law Rev 685.

[87] Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge University Press, 1995); Risse-Kappen, *supra* note 10; Philipp H Pattberg, *Private Institutions and Global Governance: the new politics of environmental sustainability* (Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing, 2007). Risse-Kappen, *supra* note; Risse-Kappen, *supra* note 10; Pattberg, *supra* note.

themselves or privatizing the process. The skills required for engagement in global public lawmaking are different from those required for private global governance. Whereas norm contestation in global private governance can be adversarial and downright aggressive, the preferred method is persuasion in global public lawmaking.

1.7 **Scope of the Study**

The study seeks to understand the relationship between INSOL and UNCITRAL. First, it considers the macro and micro factors that led to the development and success of the relationship. Second, the study observes the norm's evolution that formed the fulcrum of their engagement's output through the life cycle theory paradigm. Third, it examines how non-state entities shape and influence global norm-making by multilateral state institutions.

There is some academic work on multilateral institutions like UNCITRAL in global norm-making in insolvency laws.[88] However, there is a lack of research on the contribution of INSOL, a private institution, to the process of global public governance at UNCITRAL. There is work articulating the role and influence of private institutions in global public governance and private global governance in human rights policy, environment, internet, and accounting standards but not in insolvency.[89] This research seeks to fill the gaping interstice concerning research in this area on cross-border insolvency and the role of INSOL.

1.8 **Significance of the Study**

The research will make a unique contribution to the literature, which considers the participation of non-state entities like INSOL in global lawmaking by intergovernmental lawmaking institutions like UNCITRAL and their role in global norm making, the politics and legitimacy of international institutions in international law. Understanding the history of how the UNCITRAL Model Law came to be will enable legal doctrines to interpret the text within the historical context. Most of the existing literature on the transnational legal space focuses on multilateral state

[88] Block-Lieb & Halliday, *supra* note 64.

[89] Pattberg, *supra* note 87; Risse-Kappen, *supra* note 87. Pattberg, *supra* note 87; Risse-Kappen, *supra* note 87.

agencies engaged in global public lawmaking or private institutions involved in private governance within the transnational space. Risse-Kappen et al. empirical study focuses on the transnational actors and seeks to determine their ability to influence policy in specific issue areas based on the domestic structure or level of international institutionalization of the policy.[90] Pattberg considered non-state entities' role in private global governance where the non-state entity directly institutionalizes its norm at the international level.[91]

This research is different because it focuses on how a non-state entity's private norm came to be transformed into a global public norm and then got domesticated as the local norm through internalization by states. The study is not about the private norm of a non-state entity becoming the global private norm through non-state entity institutionalization, but private participation in global public norm making. It is not about the multilateral agency itself but the non-state entity's role in influencing global public norm-making.

There is some literature on the involvement of non-state entities in global public lawmaking at international intergovernmental organizations. Cohen, Kelly, Halliday and Block-Lieb have written on UNCITRAL as a site for normative modelling, but their focus has been on the UNCITRAL work process.[92] Apart from the general discussion of participation of observers by Kelly, Block-Lieb and Halliday, academic literature has not focused on INSOL as a non-state entity that interacts at the lawmaking level of UNCITRAL. While the texts of the UNCITRAL Model Law and the UNCITRAL work process have been the subject of scholarly work, no work exists on the role of INSOL in the emergence of the norm that underlies the Model Law before its cascade to UNCITRAL. All the existing works on the UNCITRAL work method did not focus on the role of INSOL and did not go back far enough in time in the life cycle of the norms UNCITRAL eventually adopted, that is, the period 1982 to 1997. The study is significant because it tracked INSOL's formation in 1982 to the UN adoption of the Model Law in December 1997. The life cycle approach

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[90] Risse-Kappen, *supra* note 87. *Ibid*.

[91] Pattberg, *supra* note 87. *Ibid*.

[92] Cohen, *supra* note 62; Kelly, *supra* note 14; Susan Block-Lieb & Terence C Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge: Cambridge University Press, 2017).

enables tracking the norm's evolution from emergence to internalization. The adoption of the Model Law in 1997 institutionalizes but is not the internalization of the norm. The study, therefore, considers the last stage of the life cycle to determine the norm diffusion dynamics.

The study will contribute to our understanding of how norms and principles intersect with substantive law and the role of non-state actors like INSOL in shaping international and domestic law in cross-border insolvency, an essential aspect of international commercial law. The study also observes private institutions' role in developing transnational insolvency regulation using the norm life cycle approach to explain findings from primary data and historical and archival materials.

Understanding the forces and processes that shape cross-border insolvency will enable us to anticipate the course of future regulation and encourage the generation of alternative approaches to those outcomes. We underestimate non-state actors' role in norm emergence, cascade to global norms, and their internalization and therefore understudy their relevance in global lawmaking. The study seeks to accurately locate the non-state entity as a significant factor in global public governance. It draws generalizations based on observation of the formation and growth of INSOL and its role in the UNCITRAL work process leading to the adoption of the 1997 Model Law and its subsequent diffusion.

1.9 **Limitations and Further Research**

The research in collecting primary data is time-bound and limited to the formation of INSOL in 1982 and December 1997 when the UN General Assembly adopted the UNCITRAL Model Law on Cross-Border Insolvency. However, there is no limitation on desk research and secondary data considered in the study, especially for the norm life cycle's internalization stage, which occurred after 1997. Also, desk research extended beyond 1982 to give historical context to consider the primary data obtained from 1982 to 1997. Further, the COVID-19 Coronavirus infection gained global prominence in March 2020 when the World Health Organization ("WHO") declared a global pandemic. The pandemic led to many government lockdowns and social distancing measures to contain it, pending a vaccine's discovery. These events affected the implementation of field research which was adjusted and conducted online and via telephone.

Chapter Five on internalization further explores the low rate of adopting the Model Law, particularly among low GDP states. Chapters Three and Four indicate that the low levels of participation of low GDP states in the emergence and cascade of a norm affect their diffusion of the norm. Further research could improve the engagement of low GDP states in making international commercial laws that affect them.

Section B – Literature Review

1.10 Background

INSOL is significant to this study because it was the organizational platform of insolvency professionals to engage with states in international public lawmaking on cross insolvency. INSOL was formed in 1982, envisioning itself as a global association with membership in every country offering leadership in information, ideas, and insolvency experience. INSOL functions mainly through its members' volunteer work, but a small core of career staff manages the secretariat. As of September 21, 2020, 44 (forty-four) federating member Associations with over 10,500 (ten thousand five hundred) professionals participated as members in over 90 (ninety) countries.[93]

The mission statement of INSOL is to assume a leadership role in the practice of international turnaround, insolvency and related credit issues; facilitate the exchange of information and ideas; encourage international cooperation and communication among the insolvency profession, credit community and associated constituencies.[94] Its stated goals include participation in government advisory groups, liaising with governments on cross-border insolvency issues, and developing cross-border insolvency policies, international codes and best practice guidelines.[95]

INSOL, like many non-state entities made up of experts with aspirations of leadership in global governance under international law, suffers from the lethargy which Philip H. Pattberg, a Professor of Transnational Environmental Governance, identified as that private international organizations are "overlooked largely in world politics" and global governance, and consequently, in the making of international law.[96] For instance, in discussions on the UN's history, not much

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[93] note 3.

[94] note 18.

[95] *Ibid*.

[96] Pattberg, *supra* note 87 at 200.

attention is paid to the private group of international law experts whose ideas significantly influenced the positions taken by public officials who negotiated the UN treaty.[97]

1.11 States and International Law Making

Before the twentieth century, state power was dominant in public international law, and international institutions had little influence on international relations' conduct and structure.[98] In the absence of law and shared values, the struggle over the distribution of resources by individual self-interested territorial states' actions resulted in disorder, force, refutation of consensus value and uncertainty of outcome under international law.[99] David Kennedy, a Professor of Law, defined global governance as the attempt to bring order to the disorganized international law terrain of struggle for advantage through problem-solving, moderation of conflicts and shared values made real.[100]

The now-defunct League of Nations, which emerged in the early twentieth century, provided a platform for states to negotiate directly with each other. Before then, they dealt with any international challenges on a bilateral or multilateral basis without the need for any intervening international institution. Jeffrey W. Legro, a Professor of Politics, argues that the focus then of international law was the exercise of state power, and norms and institutions had little influence on the conduct and structure of international relations.[101] However, by the twentieth century, Legro's study shows that international norms restrained states' use of force during World War II. The international community stigmatized some types of warfare as heinous and immoral, thereby

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[97] note 52; Peaslee, *supra* note 51.

[98] Jeffrey Legro, "Which Norms Matter? Revisiting the Failure of Internationalism" (1997) 51 Int Organ 31–63 at 32.

[99] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016) at 10.

[100] *Ibid* at 17.

[101] Legro, *supra* note 98 at 31.

shaping state response, including justification, rationalization, and restraint.[102] Legro argues that states favour adherence to norms prohibiting a particular form of combat if that form is antithetical to their military bureaucracy's war-fighting culture because of the military's expertise. [103]

Legro's study shows that the sovereign state's military expertise influenced domestic war norms in the US and international war norms.[104] While states retain expertise, some state agencies transfer their expertise to newly created international institutions. The allocation and transfer of state expertise to international institutions are affected by power relations among states.[105] Some states enjoy specific positions or influence experts who can occupy those positions.[106] Even non-state entities now have expertise in matters of international relations.[107]

The creation of multilateral international institutions and the emergence of bureaucratic expertise are a constraint on state sovereignty.[108] A professor of political science, Peter Haas, highlighted the role of transnational networks of professional experts organized in epistemic communities in global governance in environmental issues.[109] Thomas Risse-Kappen, an international relations scholar, argues that the change of norms on international security during the Cold War from national security to common security in the USSR, Germany and the United States was attributable to cooperation and coordination among the transnational network of liberal

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[102] *Ibid* at 32.

[103] *Ibid* at 37.

[104] Legro, *supra* note 98.

[105] Expert Briefings, "The next WTO leader is set to be African and female" (2020) Oxf Anal, online: <https://doi.org/10.1108/OXAN-ES256771>; James McBride, Andrew Chatzky & Anshu Siripurapu, *What's Next for the WTO?* (Council on Foreign Relations, 2021).

[106] *Ibid*. Also the convention is that the US produces the President of the World Bank while Europe produces that of the International Monetary Fund.

[107] Pattberg, *supra* note 87.

[108] Legro, *supra* note 98 at 37; Risse-Kappen, *supra* note 10; Haas, *supra* note 10 emphasising the role of expertise in limiting sovereignty in domestic and international law.

[109] Haas, *supra* note 10.

internationalists in those countries.[110] Finally, Dan Wielsch, a German jurist and relational justice advocate, argues that where sovereignty is ineffective or absent in the international arena, private standards can cross borders due to globalization and become the norm to avoid a void in international lawmaking.[111] It follows that despite the dominance of state power, bureaucratic and epistemic communities of experts based in states influence international lawmaking.

1.12 **Classical and Modern International Law**

The current role of expertise and norms in limiting state power under international law is challenging for state-centred classical theorists.[112] David Kennedy, an American Professor of Law and critic of modern international law, argue that the nineteenth century was the "classical period, in which sovereignty and the state were consolidated as the fundamental doctrinal and philosophical underpinnings for international law, only to be eroded, rejected and replaced by twentieth-century international law."[113] Other scholars perceive the role in international law of epistemic communities of experts as positive, leading to an aversion to global conflict.[114] However, other scholars argue that the twentieth-century shift in international law from states to multilateral organizations and experts is insufficient to correct the power imbalance against Third World states.[115]

The establishment of multilateral agencies like the UN and UNCITRAL as venues for managing issues arising under international law is perceived only as part of the exercise of state sovereignty by the state-determined school of international law. Following scholars like Kenneth

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[110] Risse-Kappen, *supra* note 10.

[111] Dan Wielsch, "Relational Justice" (2013) 76:2 Law Contemp Probs 191 at 210–211.

[112] Kenneth N Waltz, *Theory of International Politics* (McGraw-Hill, 1979); Kennedy, *supra* note 99; Kennedy, "Quinnipiac L Rev", *supra* note 20.

[113] Kennedy, "Quinnipiac L Rev", *supra* note 20 at 101 He is also one of the leaders of the New Stream Movement of the variant of critical legal studies (CLS).

[114] Haas, *supra* note 10; Risse-Kappen, *supra* note 10; Risse-Kappen, *supra* note 87.

[115] Gathii, *supra* note 11; Okafor, *supra* note 11; Anghie, *supra* note 11.

Waltz, Kennedy argues that states would only concede power to other international law subjects such as non-state entities or groups of experts when state interests are not threatened, or those other subjects are not powerful enough to do so.[116] The creation of international institutions and the incursion of norms and expertise of state agencies and non-state entities into the exercise of state power has led to a blurring of the distinction between public and private international law.

Martin Boodman, a Canadian legal scholar, defines public international law as regulating "the relations of sovereign states," and private international law or conflict of law as "the system of rules for determining which laws apply to resolve inter-jurisdictional legal problems."[117] Boodman argues that:

> [P]olitical and legal sovereignty is synonymous with the unenforceability of foreign laws. The unenforceability or illegitimacy of foreign laws is synonymous with the institutional or theoretical diversity of laws. Thus, even if the laws of two sovereign jurisdictions are ostensibly identical, they are nonetheless theoretically and, probably functionally, diverse and susceptible to harmonization.[118]

Modern international law tends towards harmonization of laws, which erodes the sovereign assertion of the unenforceability of foreign law. Kennedy disapproves of modern international law with its normative proliferation of institutionalist regimes of regularity dominated by experts.[119] Oona Hathaway, a Professor of International Law, argues that sovereign states agree to specific international law by treaty and treaty is based on state consent.[120] The school of thought that international law is state-determined or state-centred with no scope for influence of

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[116] Kennedy, "Quinnipiac L Rev", *supra* note 20.

[117] Martin Boodman, "The Myth of Harmonization of Laws" (1991) 39:4 Am J Comp Law 699–724 at 704.

[118] *Ibid*.

[119] Kennedy, "Quinnipiac L Rev", *supra* note 20 at 101; Kennedy, *supra* note 99.

[120] Oona A Hathaway, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72:2 U Chi Rev 469–536 Also, Vienna Convention on the Law of Treaties, Article 34 provides that: A treaty does not create either obligations or rights for a third State without its consent.

private international organizations is well articulated by Waltz, a neorealist scholar, when he said that states are "unitary actors who, at a minimum seek their own preservation and, at a maximum, drive for universal domination."[121] Some state-centred proponents of international law argue that the effectiveness of international law has a sovereignty cost. These scholars argue that creating international organizations and allowing non-state entities or multilateral state agencies to perform governance duties chips away at state sovereignty.[122]

In contrast, others argue that delegation to international organizations or non-state entities' involvement in global governance does not diminish state sovereignty. Instead, it requires the states' consent, which usually also reserves the power to withdraw from every such delegation of power.[123] For example, Wolfgang H. Reinicke, a Professor of Political Economy, proposed a response to the perceived loss of power due to globalization, immigration and information technology by national governments in the international lawmaking space through delegation of tasks to other actors and institutions who are better able to implement global public policy including non-state entities.[124] On the other hand, Kennedy, one of the *New Stream* or *New Approaches to International Law* movement, deprecates international law experts' role as fundamentally a distortion of state-centred classical international law based on internal and external sovereignty.[125]

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[121] Waltz, *supra* note 112 at 118.

[122] Kenneth W Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54 INTL ORG 421 at 436–437; Oona A Hathaway, "International Delegation and State Sovereignty" (2008) 71:1 Law Contemp Probl (The Law and Politics of International Delegation) 115–149 at 119 note 9.

[123] Hathaway, *supra* note 122.

[124] Wolfgang H Reinicke, "Global Public Policy" (1997) 76:6 Foreign Aff 127 at 132.

[125] Kennedy, *supra* note 99; Kennedy, "Quinnipiac L Rev", *supra* note 20 See wikipedia for attribution to leadership of movement https://en.wikipedia.org/wiki/David_Kennedy_(jurist); Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press) Chapter 7 discussing the New Stream and New Approaches to International Law Movement and the role of David Kennedy in those movements.

State consent or authority alone has not been sufficient to give legitimacy to multilateral institutions. The decisions of international organizations have a substantial effect on individuals, markets and national social values with no corresponding accountability to those whom their decisions affect.[126] Participation of non-state entities in the work process of international institutions is one way of addressing legitimacy concerns and the "democracy deficit" of multilateral organizations.[127]

1.13 **Non-State Entities in Global Law Making**

While states dominate public international law, non-state entities dominate private international law. Some scholars argue that international law can exist without the need for states based entirely on private global governance overcoming the taboos of state authorization and sanctioning.[128] These scholars promote *lex mercatoria* and independent international arbitration systems as proving the existence of global legal order independent of states.[129] Other supporting concepts include customary international law, *droit corporatif* of economic actors (institutionalism) or *societes mercatorum* and more adventurous concepts of *contrat san loi* or self-regulatory contracts.[130] Gunther Teuber, a German professor of social theory of law, sets out the arguments

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[126] Joseph H H Weiler, "The Geology of International Law - Governance, Democracy and Legitimacy" (2004) 64 Heidelb J Intl L 547 at 550; Kelly, *supra* note 40 at 998.

[127] Kelly, *supra* note 14; Kelly, *supra* note 40 at 1008.

[128] Eugen Ehrlich, *Grundlegung der Soziologie des Rechts, Nachdruck (Principles of the Sociology of Law)* (Duncker & Humblot, Harvard University Press, 1913); Teubner, "Global Bukowina", *supra* note 1 providing an overview of the debates on non-state global legal system.

[129] Berthold Goldman, "The Applicable law: general principles of law - the lex mercatoria" in J D M Lew, ed, *Contemp Probl Int Arbitr* (London: The Eastern Press, 1986) 113; Josef Esser, *Richterrecht, Gerichtsgebrauch und Gewohnheitsrecht, Festschrift für Fritz von Hippel* (Tübingen: Mohr & Siebeck, 1967); Hans Otto Freitag, *Gewohnheitsrecht und Rechtssystem* (Berlin: Duncker und Humblot, 1976); all cited in Teubner, "Global Bukowina", *supra* note 1 at 6.

[130] Berthold Goldman, "Frontières du droit et 'lex mercatoria'" (1964) 9 Arch Philos Droit 177–192; Philippe Kahn & Berthold Goldman, "Droit international économique, droit du développement, lex mercatoria: concept unique ou pluralisme des ordres juridiques?" in *Droit Relat Économiques Int* (Paris: Libraries Technique, 1982) 97; Clive M Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 9th ed (London: Stevens & Sons, 1990); all cited in Teubner, "Global Bukowina", *supra* note 1 at 6.

for and against the exclusion of states from international law, including the challenges of the absence of sovereignty and coercive power for private global governance.[131] He argues that a middle way is for a new living law of the world nourished not from stores of tradition but by the ongoing self-reproduction of highly technical, specialized, often formally organized and narrowly defined global economic, cultural, academic or academic or technical networks.[132] He surmised that the new global law's character would differ from the nation-states' law regarding boundaries, law sources, independence and unity of law.[133]

The nature and character of state participation in international law have been changing with the rise of bureaucracy and expertise. Anne-Marie Slaughter, an American international lawyer, foreign policy analyst, political scientist, and public commentator, argues that global networks of state sub-sovereign and non-state entities now form institutional networks that shift away from traditional multilateral sovereign international organizations for the creation of global norms.[134] It follows that given the difficulties of either the exclusive dominion of states or non-state entities over international law, there are global challenges for regulation through a cooperative process where non-state entities engage in agenda-setting and lobbying within a state-centric global public lawmaking process. The collaborative process involves state and non-state entities generating general principles, guidelines, directives, and model laws.[135] States then adopt these

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[131] Teubner, "Global Bukowina", *supra* note 1 at 7 setting out the arguments against lex mercatoria as constituting global legal system independent of state sovereignty; See also, Michael Mustill, "The new lex mercatoria: the first twenty-five years" in Ian Brownlie & Maarten Bos, eds, *Liber Amicorum Lord Wilberforce* (Oxford: Clarendon Press, 1987); Georges R Delaume, "Comparative analysis as a basis of law in state contracts: the myth of the lex mercatoria" (1989) 63 Tulane Law Rev 575–611; O Kahn-Freund, "General Problems of Private International Law" in *Recl Cours Hague Acad* (The Hague: A W Sijthoff, Leyde, 1975) 139 arguing that a global system of law based solely on private international law would lead to a state of chaos.

[132] Teubner, "Global Bukowina", *supra* note 1 at 5.

[133] *Ibid*.

[134] Anne-Marie Slaughter, *A New World Order* (Princeton and Oxford: Princeton University Press, 2004).

[135] Shaffer & Coye, *supra* note 62; However, with respect to private global governance, the problem solving process has not always been cooperative Pattberg, *supra* note 87 at 2 arguing that the

general principles, guidelines, directives and model laws as part of their national laws creating a different international law field known as transnational law.[136]

Private and public administrative authorities have become the subject of international law with rulemaking powers generating international and transnational law, otherwise called soft law.[137] Gregory Shaffer and Mark Pollack, law and political science professors, argue that the traditional classification of literature into legal positivists favouring hard law and constructivist soft law as the alternative is no longer adequate.[138] Instead, they contend that the third category of rationalists now accepts an interaction between hard and soft law that could be antagonistic, complementary or alternative depending on the conditions.[139] In other words, soft law could harden, and hard law could soften, thereby blurring the traditional distinction.

There is a movement of international public law towards convergence. By this convergence, international law is driven not by states alone but by international public and private institutions exercising public power and authority.[140] John Gerard Ruggie, an Austrian born Professor of Law, Human Rights and International Affairs, argues that "public" in international politics has shifted from the realm of state sovereignty and interstate relations to one of embeddedness in a broader and deepening transnational arena concerned with the production of

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predominantly confrontational relationship between multinational companies, states and civil society (NGOs) has been supplemented by partnerships that led to institutionalization of systems of governance in the form of transnational organizations and private governance.

[136] Shaffer & Coye, *supra* note 62.

[137] H Cantu-Rivera, "The Expansion of International Law Beyond Treaties" (2014) AM J INTL UNBOUND, online: <www.asil.org/blogs/expansion-international-law-beyond-treaties-agora-end-treaties>; Benedict Kingsbury, Nico Krish & Gordon Stewart, "The Emergence of Global Administrative Law" (2005) 15 Law Contemp Probl 68; Nico Krish & Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) Vol. 17:No. 1 EUR J INTL L 1–13.

[138] Gregory C Shaffer & Mark A Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance" (2009) 94 Minn Law Rev 706.

[139] *Ibid*.

[140] Risse-Kappen, *supra* note 87; Risse-Kappen, *supra* note 10.

global public goods.[141] He argues further that multi-stakeholder engagement is an essential tool of global governance. Consequently, there should be recognition of the "newly emerging global public domain that is no longer co-terminus with the system of states…an institutionalized arena of discourse, contestation and action organized around the production of global public good" and "constituted by interactions among non-state actors as well as states."[142]

1.14 **States, Norms and International Law**

The unbridled exercise of sovereignty under international law and the absence of a central enforcement regime despite treaties among states constraining behaviour based on perceived rational self-interest has led to the creation of international institutions. States now view international institutions as crucial to resolving their cooperation problems.[143] Institutionalism is the view that international institutions matter to state actors under international law.[144] Kennedy construes modern international law's rise based on institutionalism as a negation of classical international law based on state-centred realism or rational choice.[145] Hasenclever et al. describe neo-liberal institutionalism as an attempt to fill the void left by realism's decline as the dominant theoretical framework for studying international cooperation and institutions by construing

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[141] John Gerard Ruggie, "Reconstituting the Global Public Domain: Issues, Actors and Practices" (2004) 10 Eur J Intl Relat 499 at 519.

[142] *Ibid*; quoted in Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 Can B Intl L 51 at 106; Matilda Petersson, "Making waves : A study of the patterns and consequences of non-state actor participation in global fisheries governance" (2020), online: <http://urn.kb.se/resolve?urn=urn:nbn:se:su:diva-184051> arguing that non-state actors pariticipation matter for governance of transboundary fish stock by multilateral regional fisheries management organizations despite resistance and misunderstanding of their role in the effectiveness of sustainable multilateral regulation of fisheries .

[143] Kennedy, *supra* note 99; Kennedy, "Quinnipiac L Rev", *supra* note 20; David Kennedy, "The Move to Institutions" (1987) 8 Cardozo Rev 841.

[144] Andreas Hasenclever, Peter Mayer & Volker Rittberger, "Integrating Theories of International" (2000) 26:1 Rev Int Stud 3–33 at 5; Robert O Keohane & Lisa L Martin, "The Promise of Institutionalist Theory" (1995) 20:1 Int Secur 39–51 at 40–41.

[145] Kennedy, "Quinnipiac L Rev", *supra* note 20.

international institutions as helping states to realize their common interest.[146] Claude, Keohane and Martin describe liberal institutionalism as using power and interest to influence international institutions for their self-interest in cooperation with other states. Other institutionalist approaches include the republican or classic liberalists who perceive effective international regimes and institutions as emerging with deep roots in functional demands of domestic political or transnational society.[147] The relationship between norms, states, and international institutions has become blurred as norms based on domestic bureaucratic expertise constrain states domestically and internationally.[148] Further, the growth of expertise within international institutions constrains state sovereignty in the international political arena.

In the international law context, a norm is a rule of conduct forming the basis for states' interactions, including the fairness or otherwise of the rule.[149] A norm is "a standard of appropriate behavior for actors with a given identity."[150] Norms are socially constructed.[151] A norm differs from "institutions," defined as "a relatively stable collection of practices and rules defining appropriate behavior for specific groups of actors in specific situations."[152] Finnemore and Sikkink argue that norms and institutions are almost the same; however, norms are single rules while institutions are

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[146] Hasenclever, Mayer & Rittberger, *supra* note 144; cited in Obiora Chinedu Okafor, "Conventional conceptions of international human rights institutions" in *Afr Hum Rights Syst Act Forces Int Inst* (Cambridge: Cambridge University Press, 2007) 12 at 20.

[147] Andrew Moravcsik, "Explaining International Human Rights Regimes:: Liberal Theory and Western Europe" (1995) 1 Eur J Int Relat 157; See, Okafor, *supra* note 146 for detailed discussion of the various approaches and their criticisms.

[148] Legro, *supra* note 98.

[149] Oona A Hathaway, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72:2 Univ Chic Law Rev 469–536 at 481–483.

[150] Finnemore & Sikkink, *supra* note 7 at 891. *Ibid*.

[151] John Gerard Ruggie, "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge" (1998) 52 INTL ORG 855.

[152] JG March & JP Olsen, "The Institutional Dynamics of International Political Orders" (1998) 4 Int Organ 948.

the aggregation of rules.[153] Gerry Mackie, an American political scientist specializing in harmful social practices, distinguishes between social convention and social norms and argues that the former elicits compliance based on prudential interest.[154] The latter demands compliance based on belief and approval of a reference social group.[155]

For a reference social group's approval to foster compliance with social norms, the believer must identify with the social group. For example, James Fearon, a political scientist, argues that:

> "identity" refers to either (a) a social category, defined by membership rules and (alleged) characteristic attributes or expected behaviors, or (b) socially distinguishing features that a person takes a special pride in or views as unchangeable but socially consequential (or (a) and (b) at once). In the latter sense, "identity" is modern formulation of dignity, pride, or honor that implicitly links these to social categories.[156]

Fearon asserts that typically a rule of conduct would not be a social norm unless a shared moral assessment is attached to its observance or non-observance.[157] Whatever the definition, the critical difference between norm and law is that while the law may elicit compulsion to ensure compliance, compliance with the norm relies on the approval of an identified reference social group based on a shared moral assessment attached to its observance or non-observance.[158]

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[153] Finnemore & Sikkink, *supra* note 7 at 891.

[154] Gerry Mackie, "SOCIAL NORMS OF COORDINATION AND COOPERATION" (2018) 35:01 Soc Philos Policy 77–100.

[155] *Ibid*.

[156] "What Is Identity (As We Now Use the Word)? Unpublished manuscript, University of Chicago, Chicago, Ill." James D Fearon, University of Chicago, Chicagi Il (3 November 1999) see abstract.

[157] *Ibid* at 27.

[158] Fearon, *supra* note 156; cited by Finnemore & Sikkink, *supra* note 7 at 892.

Finnemore and Sikkink assert that it is unclear how many actors would share the norm's moral injunction before achieving a shared moral assessment.[159] Even though they recognize that the question is partly empirical, they argue that "one way to understand the dynamics of this agreement process is by examining what we call the ''life cycle'' of norms."[160] Norms may be regional, for example, but not global. Even within a community, norms are ''continuous, rather than dichotomous, entities. . . . [They] come in varying strengths'' with different norms commanding different levels of agreement.[161] Through their empirical studies, Finnemore and Sikkink show how agreement among a critical mass of actors on some emergent norm can create a tipping point after the agreement becomes widespread.[162] Based on a study of international prohibition regimes on slavery, prostitution and drugs, Nadelmann argues that global norms emerge and are promoted because they reflect the economic and security interest of dominant members of the international society and their moral interests and emotional disposition.[163]

Gordon Bergsten, an economist, argues that norms are a third factor between the contesting ideas of whether there should be more government or more free market in dealing with the constant and changing failures of market and government intervention in a market economy.[164] In other words, norms sit between the contesting theories of "public goods" and "public choice." Finally, Krasner argues that norms and principles influence regimes in a particular issue area.[165] For this argument, he relies on Max Weber's finding that Christian Calvinist norms

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[159] Finnemore & Sikkink, *supra* note 7 at 892.

[160] *Ibid*.

[161] Legro, *supra* note 98 at 33; also cited in Finnemore & Sikkink, *supra* note 7 at 892. Legro, *supra* note 98 at 33; also cited in Finnemore & Sikkink, *supra* note 7 at 892.

[162] Finnemore & Sikkink, *supra* note 7. *Ibid*.

[163] Ethan A Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society" (1990) 44:4 Int Organ 479–526 at 524.

[164] Gordon S Bergsten, "On the role of social norms in a market economy" (1985) 45 Public Choice 113–137.

[165] Stephen D Krasner, "Structural causes and regime Consequences: Regimes as Intervening Variables" in Stephen D Krasner, ed, *Int Regimes* (Ithaca: Cornell University Press, 1983) 1.

of hard work, urging profligacy and worldly success as a measure of predestined fate, spurred the regime of capitalism.[166] Krasner concludes that non-economic norms facilitate economic activities.[167]

The constructivist theory contends that social norms and institutions play a role in legal ordering as actors derive their social preferences from the social structure.[168] Normative authority can, therefore, persuade public actors to change their interests and behaviour.[169] According to Haas and Kratochwil, international institutions fundamentally matter in power relationships because their ideas, knowledge, and norms constrain states' rational actions.[170] Social constructivists argue that ideas (norms) create social facts that shape states and their institutions' behaviour in these international interactions, thereby constraining state sovereignty.[171]

However, there seems to be renewed push back on the legitimization of international law through participation of other non-state parties and the role of socially constructed facts and norms in international relations with "BREXIT" and trade protectionism based on neo-utilitarianism.[172] Hathaway argues that the pushback is unjustified, citing state refusal, particularly of the United States, to cooperate or participate in various international initiatives ranging from

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[166] *Ibid*.

[167] *Ibid*.

[168] Ryan Goodman & Derek Jinks, "Toward an Institutional Theory of Sovereignty" (2003) 55 Stan Rev 1749.

[169] *Ibid* at 1752.

[170] F Kratochwil, "Norms Versus Numbers: Multilateralism and the Rationalist and Reflexivist Approaches to Institutions: A Universal Plea for Communicative Rationality" in John Gerard Ruggie, ed, *Multilateralism Matters Theory Prax Institutional Form* (New York: Columbia University Press, 1993) 471; Ernst B Haas, *When Knowledge Is Power* (Berkley: University of California Press, 1990).

[171] Ruggie, *supra* note 151 at 897.

[172] Shaffer & Coye, *supra* note 62 BREXIT refers to the movement for exit of Britain from the European Union.

climate change regulation to trade on fear of the erosion of their sovereignty.[173] There has been a resurgence of political backlash against modernist international law and the role of non-state entities, particularly international experts generally with issues like the management of the COVID-19 pandemic by the World Health Organization ("WHO").[174] International institutions face domestic opposition and nationalist political forces, posing a challenge to international cooperation.[175] De-globalization discourages international cooperation with implications for cross-border insolvency norms based on international cooperation.[176]

Deitelhoff argues that a linkage exists between backlash and normative regression pursued by "norm anti-preneur" against norm entrepreneurs.[177] However, norm contestation is not inherently harmful because any societal change is ultimately linked to contestation over norms.[178] Vries, Hobolt, and Walter, political science professors and academics, argue that politicization

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[173] Hathaway, *supra* note 122. *Ibid*.

[174] Shaffer & Coye, *supra* note 62; "Has covid-19 killed globalisation?", online: *The Economist* <https://www.economist.com/leaders/2020/05/14/has-covid-19-killed-globalisation>.

[175] De E Catherine Vries, Sara B Hobolt & Stefanie Walter, "Politicizing International Cooperation. The Mass Public, Political Entrepreneurs and Political Opportunity Structures" (2021) Int Organ 43; Farok J Contractor, "Global Leadership in an Era of Growing Nationalism, Protectionism, and Anti-Globalization" (2017) 2:2 Rutgers Bus Rev 163–185 arguing that leadership styles of domestic leaders now emphasized ethnic group identity and distrust for immigrants; Nikil Saval, "Globalisation: the rise and fall of an idea that swept the world", *The Guardian* (17 July 2017), online: <https://www.theguardian.com/world/2017/jul/14/globalisation-the-rise-and-fall-of-an-idea-that-swept-the-world> arguing that following the Brexit vote and election of Donald Trump as president of the United States, many economists who swore by free trade changed their mind and now support protectionism. Thomas Frank, "From rust belt to mill towns: A tale of two voter revolts", *The Guardian* (7 June 2017), online: <https://www.theguardian.com/politics/2017/jun/07/from-rust-belt-to-mill-towns-a-tale-of-two-voter-revolts-thomas-frank-us-and-uk-elections> identifying that rural dwellers in the UK attributed loss of jobs to globalization leading to their decision to vote for BREXIT.of jobs due.

[176] Vries, Hobolt & Walter, *supra* note 175.

[177] Deitelhoff, "What's in a name?", *supra* note 13. *Ibid*.

[178] Deitelhoff, "What's in a name?", *supra* note 13. *Ibid*.

has stabilizing and destabilizing effects on international cooperation, and some international organizations show resilience in the face of political backlash.[179]

According to the TWAIL movement, these occurrences of globalization, de-globalization, internationalization, nationalism, protectionism and backlash ignore the voices of weaker Third World states of the Global South as the Global North pursue an agenda to enthrone neoliberal free-market ideology and norms worldwide through coordinated uniform and harmonized legislative policy and rules.[180] They view the UNCITRAL Model Law as part of the larger Global North market economy agenda and caution its adoption without reflecting on domestic state practices' realities.[181] Christoph Paulus, a Professor of Law, who is not a TWAIL scholar, observed the lack of participation of Third World states in the emergence and cascade of the Model Law.[182] Nevertheless, Ruggie argues that international law's theoretical repertoire must include an understanding of norms and how they relate to and affect law and states to understand the reality of the world of international relations fully.[183]

At the international level, global governance was how states sought to moderate the plurality of their self-interested exercise of power in the international space. The scope for private participation in global and domestic governance is ever-expanding. The very definition of governance is in flux and a mystery.[184] R A W Rhodes, a British professor of political science, argues that the term "governance" is imprecise and contends that locally and internationally, governance is no longer exclusively for government institutions, as socio-cybernetic systems and

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[179] Vries, Hobolt & Walter, *supra* note 175; See also Contractor, *supra* note 175; Saval, *supra* note 175; Frank, *supra* note 175.

[180] Anghie, *supra* note 11; Obiora Chinedu Okafor, "The Third World, International Law, and the 'Post-9/11 Era': An Introduction" (2005) 43:1/2 Osgoode Hall Law J 1–5; Okafor, *supra* note 11. Anghie, *supra* note 11; Okafor, *supra* note; Okafor, *supra* note 11.

[181] Fernandes & Pathak, *supra* note 10. *Ibid*.

[182] Paulus, *supra* note 11 at 761. *Ibid*.

[183] Ruggie, *supra* note 151 at 857.

[184] Kennedy, *supra* note 99. *Ibid*.

self-organizing networks now complement markets and hierarchies as governing structures for authoritatively allocating resources and exercising control and coordination.[185] He explains that this new age of change is the result of neoliberal ideology's triumph.[186] Critical international law scholars admit that modern international lawmaking is based on pragmatic cooperation between states and non-state entities, even as they argue that it is still rooted in nineteenth-century legal formalism.[187] Kennedy contends that in addressing the 'mystery of global governance,' we know little about how we are governed if indeed we are governed at all.[188] Haas, Risse-Kappen, Slaughter and Pattberg argue that transnational networks of epistemic communities of experts, sovereign subunits of states and international non-state entities have a role in global lawmaking.[189]

Pattberg argues that the authoritative international problem-solving locus does not rest with government and international organizations alone.[190] He found three variations in private institutions' influences and private governance in global norm making, to wit: regulatory, cognitive/discursive and integrative.[191] He defines private governance as "..the role of private actors, both profit and non-profit, in the establishment and maintenance of issue-specific

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[185] R A W Rhodes, *The New Governance: Governing Without Government* (RSA London, 1995); R A W Rhodes, "Understanding governance: 20 years on" Natl Gov Rev 29 arguing that British political and constitutional system is now a differrentiated polity given the many distortions sprung upon it by networks, agencies and impact of involvement in European Union on domestic constitutionalism; R A W Rhodes, *Understanding Governance; Policy Networks, Governance, Reflexivity and Accountability* (Open University, 1997); Haas, *supra* note 10 arguing that epistemic international community of experts also influence governance and domestic policy within different states.

[186] Rhodes, *supra* note 185. *Ibid*.

[187] Kennedy, "Quinnipiac L Rev", *supra* note 20; David Kennedy & Chris Tennant, "New Approaches to International Law: A Bibliography" (1994) 35:2 Harv Intl J 417 listing the bibliography of many members of this school of thought.

[188] Kennedy, *supra* note 99; Bianchi, *supra* note 125 Chapter 7.

[189] Haas, *supra* note 10; Risse-Kappen, *supra* note 87; Risse-Kappen, *supra* note 10; Slaughter, *supra* note 134; Pattberg, *supra* note 87.

[190] Pattberg, *supra* note 87 at 2. *Ibid*.

[191] Pattberg, *supra* note 87 at 7. *Ibid*.

transnational rule systems, in contrast to either private agenda setting and lobbying or international rulemaking."[192] This study focuses on private actors' role in international public rulemaking and not private governance, as postulated by Pattberg.

Social constructivist theories on the evolution and transmission of norms from domestic to international norms and vice versa include how social facts influence international law and institutions. Christopher Borgen, a Professor of Law and Co-Director of the Center for International and Comparative Law at St. John's University School of Law, summarized the various constructivist theories except for the norm life cycle approach.[193] According to Harold Hongju Koh, an American Professor of International Law, there are four phases in transforming a norm from the international level to the national: interaction, interpretation, internalization, and obedience.[194] An American Professor of International Affairs, Robert Keohane, argues that there must be four political and institutional features for internalization to occur: wit, transparency, professional connections, connections between domestic NGOs and transnational advocacy networks, and elites' accountability to the public.[195] Both law professors, Ryan Goodman and Derek Jinks, argue that socialization at the global level occurs through acculturation, persuasion, and coercion.[196] Finally, John Ikenberry, a Professor of Politics and International Affairs and Charles Kupchan, Professor of International Affairs, contend that normative persuasion, external inducement and internal reconstruction can lead to normative change.[197]

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[192] Pattberg, *supra* note 87 at 3. *Ibid*.

[193] Borgen, *supra* note 86.

[194] Harold Hongju Koh, "How is International Human Rights Law Enforced?" (1999) 74 IND LJ 1397; quoted in Borgen, *supra* note 86 at 720.

[195] Robert O Keohane, "When Does International Law Come Home," (1998) 35 Hous Rev 699; quoted in Borgen, *supra* note 2 at 721.

[196] Goodman & Jinks, *supra* note 168; See also Derek Jinks & Ryan Goodman, "How to Influence States: Socialization and International Human Rights Law" (2004) 54:3 Duke LJ 621.

[197] G John Ikenberry & Charles A Kupchan, "Socialization and hegemonic power" (1990) 44:03 Int Organ 283; cited by Borgen, *supra* note 86 at 721.

Borgen used the internalization frame to consider international tribunals' role in shaping states' behaviour and other actors at the domestic level. He argues that in addition to the enforcement of international tribunals' decisions, these tribunals' *methods* and *processes* are essential for transmitting the norms.[198] Koh and Borgen were more interested in how international law influences domestic law. Robert Putnam, a Professor of Public Policy, asserts that despite the scholarly emphasis on interdependence and transnationalism, the role of domestic factors slipped out of focus as "international regimes came to dominate the subfield."[199] He suggests that "we need to move beyond the mere observation that domestic factors influence international affairs and vice versa, and beyond simple catalogs of instances of such influence, to seek theories that integrate both spheres, accounting for the areas of entanglement between them."[200]

The literature suggests dynamism in the evolution of norms. Formal rules of conduct may not be the only source of norms. Domestic factors, as much as international and transnational factors, interact in various directions to produce norms.[201] Even with no formal rules, an organization's methods and processes can generate a rule of conduct.[202] The three stages of the norm life cycle approach, emergence, cascade, and internalization, enable us to explain the various blurred spaces in the evolution of a global norm. It is an integrative theory accounting for the various intersections between rational choice and values, private and public international law, hard and soft law, norms and law, norms and regime, public and private global governance, domestic, transnational and international factors, and states and non-state entities in international norm making.

1.15 **Interaction of States and Non-State Entities**

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[198] Borgen, *supra* note 86 at 718.

[199] Robert D Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games" (1988) 42:3 Int Organ 427–460 at 431.

[200] *Ibid* at 433.

[201] Nadelmann, "Global Prohibition Regimes", *supra* note 163.

[202] Borgen, *supra* note 86 at 718.

In considering political interactions in the UK during the early Victorian period, Oliver McDonagh argues that some groups influenced changes and reform by their opposition.[203] In other words, administrative revolutions are also the product of overcoming, circumventing or compromising with opposition.[204] Norms change "by nibbling away at 'principle'" and not by Chartism.[205] The same logic applies to global law-making. Thomas Risse-Kappen, a Berlin-based international relations scholar and Professor of Government, edited a scholarly book that put together several case studies on non-state actors' impact on world politics and states' foreign policies.[206] He defines transnational relations as "regular interactions across national boundaries when a least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization."[207] He concludes that transnational relations now permeate world politics.[208] Risse-Kappen argues that there is an interaction between domestic structures and the international institutionalization of transnational policy actors. This interaction determines the extent of the international public law movement from state-dominated global governance toward public and private institutions exercising or influencing global public power and authority.[209]

Transnational networks and the interaction among states and between states and non-state entities take different forms. One of such is the state-directed policy network. William D. Coleman, a Canadian Professor of Political Science, describes such networks as structured linkages among state agencies and between those state agencies and civil society actors where

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[203] Oliver McDonagh, *Early Victorian Government, 1830 - 1870* (London: Holmes & Meier Pub, 1977).

[204] *Ibid* at 20, 45 and 148.

[205] *Ibid* at 70.

[206] Risse-Kappen, *supra* note 87.

[207] *Ibid* at 3.

[208] *Ibid*.

[209] Risse-Kappen, *supra* note 87; Risse-Kappen, *supra* note 10; Pattberg, *supra* note 87 at 200.

state actors retain all decision-making competence.[210] He argues that a state-directed policy network requires equilibrium between state autonomy and civil society actors' support to ensure accountability and legitimacy.[211] Multilateral agencies such as UNCITRAL, whose work process admits participation of non-state entities while reserving decision making to states, could be construed as state-directed policy networks. However, so long as participation occurs, the participants by their support, opposition or contestation impact the output of multilateral agencies. Critical international law scholars concede that interaction under modern international law has shifted from absolute state sovereignty towards a global community of diverse cooperative subjects of international law.[212]

Other scholars argue a power imbalance exists between colonial and imperial powers and post-colonial states in the universal problem-solving and moderation of state behaviour. They contend that international law or global governance interactions focus on perpetuating shared Western values ignoring the history of colonialism and imperialism.[213] Obiora Okafor, a Canadian-Nigerian Professor of Law, argues that international law is unlikely to be altered to foster a more equitable world economic order envisaged by Third World states.[214]

This power imbalance resonates in norm contestation among states at the diffusion stage of norm evolution. Some scholars argue that "stable norms" cannot be regressed by contestation and political backlash.[215] For example, Nicole Deitelhoff, a German Professor of International

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[210] William D Coleman, "Monetary Policy, Accountability and Legitimacy: A Review of the Issues in Canada" (1991) 24:4 Can J Polit Sci 711.

[211] *Ibid* at 734 Please note that Coleman wrote in the context of domestic state-directed policy network in relation to monetary policy in Canada.

[212] Kennedy, "Quinnipiac L Rev", *supra* note 20 at 133–136.

[213] Anghie, *supra* note 11; Okafor, *supra* note 11.

[214] Obiora Chinedu Okafor, "Poverty, Agency and Resistance in the Future of International Law: An African Perspective" in R Falk, B Rajagopal & J Stevens, eds, *Int Law Third World Reshaping Justice* (2008).

[215] Wiener, *supra* note 12.

Relations, disagrees that "stable norms" cannot be regressed based on her study of political backlash from the US and African states on the International Criminal Court ("ICC").[216] Instead, she argues an intimate relationship between norm contestation and political backlash, leading to norm erosion at the diffusion stage.[217] However, as Karen J. Alter, a political science and law professor, and Michael Zurn, a political scientist, argue, not every backlash is aimed at regression, and some can lead to progression.[218]

In these interactions, alliances and coalitions resolve contestation in power imbalance, as explained by the nested game theory. George Tsebelis, an American political scientist, tested the nested game theory on the cohesion of French electoral coalitions in 1978 and found that cooperation and competition could co-exist within a coalition because a higher-order game exists between the coalition and their opposition.[219] Kelly Kollman and Aseem Prakash, professors of politics and political science, argue that adversarial economics between non-governmental organizations and multinational corporations result in voluntary compliance with non-state international institutions' standards at levels higher than those legally required.[220]

The interaction between non-state entities and states in the somewhat turbulent and unbalanced international arena generates competition and cooperation, resulting in global norms as McDonagh, Lester, Wielsch, and other scholars predicted and explained by the nested games theory.[221] Despite the power imbalance observed by scholars of various schools of thought, norms

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[216] Deitelhoff, "What's in a name?", *supra* note 13.

[217] *Ibid*.

[218] Karen J Alter & Michael Zurn, "Conceptualising backlash politics: Introduction to a special issue on backlash politics in comparison" (2020) 22:4 Br J Polit Int Relat 563–584; Karen J Alter & Michael Zurn, "Theorising backlash politics: Conclusion to a special issue on backlash politics in comparison" (2020) 22:4 Br J Polit Int Relat 739–752.

[219] George Tsebelis, "Nested Games: The Cohesion of French Electoral Coalitions" (1988) 18:2 Br J Polit Sci 145–170.

[220] Kelly Kollman & Aseem Prakash, "Green by Choice: Cross-National Variations in Firms' Responses to EMS-Based Environmental Regimes" (2001) 53 World Polit 399.

[221] Wielsch, *supra* note 111; Tsebelis, *supra* note 219.

are still generated, cascaded and internalized and reflect varying input from states and non-state entities of the different power structures.[222] It follows that the outcome of the interaction may not necessarily reflect power balance or rational choice as other factors such as norms, opposition, alliances, and the coalition of forces could result in compromises or different outcomes.

In other words, there are sufficient tensions among states, between them and non-state entities and among non-state entities in the international arena to encourage cooperation in global lawmaking while competing over the exercise of state sovereignty and influence. As a result, different approaches have emerged in studying international institutions and their relationships with states and non-state entities.[223] The approaches can be placed on a spectrum from state-centric realists focusing on the power and self-interest of states based on rationality to constructivists, emphasizing international institutions as structures for generating ideas, value, and shared understandings that affect state behaviour.[224] Straddling between the spectrum's extremes are various approaches that moderate, rational choice and normative theories, such as liberal institutionalism and quasi-constructivism.[225] While institutionalists contend that international institutions matter, liberal institutionalists argue that international institutions merely provide an opportunity for states to influence each other based on their respective power and interest, and cooperation is relative.[226] Okafor, Jeffery Checkel and Jennifer Sterling-Folker argue that upon closer inspection, the differences in approaches between schools of thought from

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[222] Kennedy, "Quinnipiac L Rev", *supra* note 20; Kennedy, *supra* note 99; Wielsch, *supra* note 111; Anghie, *supra* note 11; B S Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15 Eur J Int Law 1; Okafor, *supra* note 11 TWAIL stand for Third World Approach to International Law; Finnemore & Sikkink, *supra* note 7; Wiener, *supra* note 12.

[223] For detailed discussion of these approaches in the context of international human rights institutions, see Okafor, *supra* note 146 at 12–62 Chapter 2.

[224] Hasenclever, Mayer & Rittberger, *supra* note 144; Keohane & Martin, *supra* note 144; Kennedy, *supra* note 143; Inis L Claude, *Swords into Ploughshares: The Problems and Progress of International Organisation* (New York: Random House, 1984); Moravcsik, "Explaining International Human Rights Regimes", *supra* note 147; Haas, *supra* note 170; Kratochwil, *supra* note 170.

[225] Jeffrey T Checkel, "Review: The Constructivist Turn in International Relations Theory" (1998) 50:2 World Polit 324–348 discussing the various constructivist approaches.

[226] Hasenclever, Mayer & Rittberger, *supra* note 144 at 5; Keohane & Martin, *supra* note 144 at 48 arguing that since international institutions matter to state actors the rebuttal burden was on realism .

realism to institutionalism and constructivism are not always as significant as they seem first to appear.[227] Okafor also argues that most approaches are state-centered, compliance-centered and excessively positivist, and few consider domestic actors except the republican or classical liberalism.[228] There is blurring between norms, regimes and law at the tipping point, where norms cascade into law.

1.16 **The Norm Life Cycle Theory**

Finnemore and Sikkink's norm life cycle theory explaining how private norms transform into global norms in human rights is a quasi-constructivist approach that captures rational and normative aspects of actors' behaviour.[229] They postulate that transformation is in three stages: emergence, cascade, and internalization. They identified three (3) types of norms: regulative, which orders and restrain behaviour; constitutive, which creates new actors, interests, or categories of action; and evaluative, which deals with the "oughtness" or norm value content.[230] They argue that domestic norms are intertwined deeply with the workings of international norms. Many international norms begin as local norms and become international through the efforts of norm entrepreneurs of various kinds. Norm promoters need some form of organizational platform to engage at the international level.[231] The structure of the organization or multilateral agency influences the norms it pursues.[232] Of significance is the use of expertise and information to

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[227] Okafor, *supra* note 146 at 16; Jeffrey T Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55:3 Int Organ 553–588; Jennifer Sterling-Folker, "Competing Paradigms or Birds of a Feather? Constructivism and Neoliberal Institutionalism Compared" (2000) 44:1 Int Stud Q 97–119 at 100, 105–110.

[228] Okafor, *supra* note 146 at 31–32.

[229] Finnemore & Sikkink, *supra* note 7.

[230] *Ibid* at 891.

[231] *Ibid* at 899.

[232] *Ibid*.

change the behaviour of other actors. The organizational platform provides the network for information dissemination to media and decision-makers.

Initially, the norm life cycle theory applied to human and civil rights norms within the public international law space.[233] It now applies in many areas of international relations.[234] Its application to cross-border insolvency in this research is novel. Scholars generally use other approaches to the study of cross-border insolvency. For instance, Dwayne Leonardo Fernandes and Devahuti Gathak utilized the Third World Approach to International Law ("TWAIL") to consider India's adoption of the Insolvency and Bankruptcy Code 2016.[235] The life cycle approach is preferred because it is comprehensive enough to accommodate TWAIL and other constructivist approaches.[236]

The life cycle approach is not without its challenges. Jennifer Hadden, a Professor of Government and Politics and Lucia Seybert, a Professorial Lecturer, questioned the idea that institutionalization will promote compliance with a norm and highlight the norm life cycle theory's limitation in its ability to accommodate diverse paths of norm evolution.[237] They shared empirical evidence from the UN sustainable development agenda showing that institutionalization alone was not sufficient for norm promotion and confirmatory behaviour despite the wide acceptance by states and institutionalization in treaties, a phenomenon they framed as "failure to launch."[238]

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[233] Mona Lena Krook & Jacqui True, "Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality" (2012) 18:1 Eur J Int Relat 103–127; Hadden & Seybert, *supra* note 9; Bhattacharya & Biswas, "International Norms of Asylum and Burden-Sharing", *supra* note 78.

[234] Kim Sorensen, "The Politics of International Law: The Life Cycle of Emerging Norms on the Use and regulation of Private Military and Security Companies" (2017) 26 Griffith Rev 89; Cecilia Jacob, "From Norm Contestation to Norm Implementation: Recursivity and the Responsibility to Protect" (2018) 24:3 Glob Gov 391–410.

[235] Fernandes & Pathak, *supra* note 10. *Ibid*.

[236] The literature review in Chapter 2 considers in greater detail the various theoretical approaches to the debate on norms.

[237] Hadden & Seybert, *supra* note 9 at 251. *Ibid*.

[238] Hadden & Seybert, *supra* note 9 at 253. *Ibid*.

Since norms can take different tracks, they proposed a norm definition process to include the relationship between interpretations espoused by norm actors over the norm's evolution.[239] They argue that four (4) elements of the norm definition process explain norm dynamism. These are concept definition, problem definition, justification, and linkages, and evaluating different interpretations of a norm and their relationship using the norm definition process.[240] Other scholars have also questioned the assumption of norm life theory that the stages are an irreversible growth pattern. Deitelhoff, Alter, Gathii, Helfer and Zurn, in their studies, show that norm erosion can occur during norm contestation or due to political backlash even for stable norms though not every backlash leads to norm regression.[241]

It is essential to consider theoretical thoughts on cross-border insolvency before concluding whether a theoretical framework developed outside the realm of cross-border insolvency is appropriate for observing the phenomenon under study. This enquiry is made more urgent by the limitations of the preferred approach.

1.17 Cross-border Insolvency Theories and Life Cycle Approach

Terence Halliday, a Professor of Sociology and Bruce Carruthers, a Professor of Economic History, did some pioneering work explaining the role of the World Bank, UNCITRAL and other international organizations in global bankruptcy norm making.[242] They argue that the globalization of bankruptcy law has proceeded through three cycles: (1) at the national level through recursive sequences of lawmaking, (2) at the global level through iterative cycles of norm-

[239] Hadden & Seybert, *supra* note 9 at 254. *Ibid*.

[240] Hadden & Seybert, *supra* note 9 at 263. *Ibid*.

[241] Deitelhoff, "What's in a name?", *supra* note 13; Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 13; Alter & Zurn, *supra* note 218.

[242] Terence Halliday and Bruce Carruthers, 'The Recursivity of Law: Global Norm-Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes', *American Journal of Sociology*, 112.4 (2007), 1173; T. C. Halliday and B. G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford, Calif: Stanford University Press, 2009).

making, and (3) at the nexus of the two.[243] Halliday and Carruthers focused on global norm-making in insolvency by multilateral institutions such as the World Bank. Damilola Odetola, a doctoral researcher, observed that developing countries vary in their integration into the global market and importance to the global economy.[244] She argues that global actors perceive it as essential that critical developing economies' commercial laws align with global scripts of bankruptcy.[245]

However, Halliday and Carruthers's explanation of global norms in cross-border insolvency treated the crisis of financial distress as the trigger for norm formation. Writers have long acknowledged that historical events or crises can lead to the search for new ideas and norms.[246] In those circumstances, winners stamp their norms and losers' norms discredited.[247] While crisis can trigger new norms, it is not the only causation. Understanding norm evolution and the motivation of different norm actors over the life cycle offer better insight into forming and accepting norms.

Block-Lieb and Halliday postulate an international organization's entry into the transnational global lawmaking space as a legal ecology process requiring ecological existence and sustainability strategy.[248] They dealt with the ecology of UNCITRAL as an international organization entering and seeking to survive in a space already crowded by other international organizations such as UNIDROIT and the United Nations Conference on Trade and Development ("UNCTAD"). While Block-Lieb and Halliday emphasized the survival strategies of UNCITRAL as an international institution, Cohen's postulation of "forum shifting" emphasized the role of state

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[243] Ibid; see also Paulus, *supra* note 11. Ibid; see also *ibid*.

[244] Odetola, *supra* note 77.

[245] Ibid (n 24) pp11-12

[246] Finnemore & Sikkink, *supra* note 7 at 909; Charles Jordan Tabb, "The History of the Bankruptcy Laws in the United States" (1995) 3:1 Am Bankr Inst Rev 5 discussing how cycle of financial crisis influenced US bankruptcy law for 100 years between 1798 and 1898.

[247] Finnemore & Sikkink, *supra* note 7 at 909. *Ibid*.

[248] Block-Lieb & Halliday, *supra* note 92 at 50.

actors in the creation of international organizations that would pursue their preferred norms. These scholars provide no substantive explanation of how norms came to be. States play a role in the creation of an international organization as a forum for norm modelling. Indeed, Block-Lieb and Halliday identified that the survival strategy of involving non-state entities in the informal lawmaking process of international organizations left a gap in determining the "origin of invention" of global norms which these international organizations pursue.[249]

Aside from the law and market approach of Halliday and Carruthers, the business regulation approach of Braithwaite and Drahos, and the legal ecology approach of Block-Lieb and Halliday, other sociological approaches to the study of global lawmaking by international organizations include the economic governance approach of Morgan and Quack and the human rights approach of Boyle, Halliday, Karpik and Feeley.[250] The economic governance approach of Morgan and Quack is interesting because it reveals the tension between evolutionary, functionalist driven notions of law and more historical and contingent accounts of the emergence of particular legal systems, practices, and forms. This approach shows how the law impacting the economic organization is moving and dynamic, national and international, public and private, soft and hard.[251] However, this approach focuses too much on the law as a business. The researcher argues that to understand the phenomenon, the life cycle approach enables us to look back at how the norm emerged and who the actors were at that stage and look forward to how it cascaded to an international norm and became internalized.

There is no detailed study of non-state entities' role in generating, cascading, and internalizing norms within the legal ecology of international organizations involved with cross-

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[249] Block-Lieb & Halliday, *supra* note 64 at 222.

[250] Halliday & Carruthers, *supra* note 62; Braithwaite & Drahos, *supra* note 62; Glenn Morgan & Sigrid Quack, "Law as a Governing Institution" in John L Campbell et al, eds, *Oxf Handb Comp Institutional Anal* (Oxford: Oxford University Press, 2010); Elizabeth H Boyle, *Female Genital Cutting: Cultural Conflict in the Global Community* (Baltimore: The John Hopkins University Press, 2002); Terence C Halliday, Lucien Karpik & Malcolm Feeley, eds, *Fighting for Political Freedom: Comparative Studies of rge Legal Complex for Political Liberalism* (Oxford: Hart Publishing, 2007); All cited in Block-Lieb & Halliday, *supra* note 64 at 49.

[251] Morgan & Quack, *supra* note 250.

border insolvency or critically examining their contribution to normative modelling. The norm life cycle approach could provide a framework for reviewing non-state entities' role in cross-border insolvency global norm-making by multilateral international organizations. The life cycle approach has been applied extensively in international relations, particularly in human rights law and policy and the environment.[252] For example, Jennifer Leigh Bailey, a Professor of Sociology and Political Science interested in environmental issues, used the life cycle approach to study the International Whaling Commission 1982 moratorium on whale hunting and found that the new norm against whaling failed in gaining traction because it was not adequately institutionalized.[253] Mona Lena Krook, an American Professor of Political Science and Jacqui True, an Australian Professor of Politics and International Relations, used the life cycle approach to explain how norms are processes, calling attention to both 'internal' and 'external' sources of dynamism.[254] They demonstrated this theory by tracing and comparing the life cycles of two global equality norms: gender-balanced decision-making and gender mainstreaming, and found that these norms emerged from two distinct policy realms, and after briefly converging in the mid-1990s, mainly developed separately from, and often in tension with, one another.[255] Hadden and Seybert noted the limitation of the life cycle approach as institutionalization alone did not guarantee a change of behaviour by states when they applied it to adopting sustainability goals by the UN's member states.[256]

Although Finnemore and Sikkink's work and its current application emphasize norms against bodily harm and international human rights policy, it has novel application to this research

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[252] Jacob, *supra* note 234; Oisin Tansey, "Lowest Common Denominator Norm Institutionalization: The Anti Coup Norm at the United Nations" (2018) 24:2 Glob Gov 287–308; Sorensen, *supra* note 234. Jacob, *supra* note 234; Tansey, *supra* note; Sorensen, *supra* note 234.

[253] Jennifer L Bailey, "Arrested Development: The Fight to End Commercial Whaling as a Case of Failed Norm Change" (2008) 14:2 Eur J Int Relat 289–318.

[254] Krook & True, "Rethinking the life cycles of international norms", *supra* note 233. *Ibid*.

[255] Krook & True, "Rethinking the life cycles of international norms", *supra* note 233. *Ibid*.

[256] Hadden & Seybert, *supra* note 9. *Ibid*.

that focuses on norms relating to the commercial area of insolvency.[257] The configuration of the interactions between states and non-state entities in human rights policy space are not dissimilar to those in cross-border insolvency. The modelling site is also the UN and its agencies responsible for the modernization and harmonization of international law. Finally, the strength of a theory is its applicability in different scenarios, and this study offers an opportunity to examine the life cycle approach in a commercial context.

Section C – Historical Background

1.18 History of Insolvency and Private Norms: Early Period

Chibuike Ugochukwu Uche, a Nigerian Professor of Banking and Financial Institutions, asserts that in pre-colonial Africa, credit (trusts) had developed in several parts of the continent, and the use of people as security for debt was not unusual, and debt slavery existed in the customary law of several African ethnic groups.[258] Other collaterals for lending transactions were limited because the land tenure system did not recognize individual private property land rights. He argues that this made it difficult for such land to be pledged in any way as security by individuals using them when seeking advances.[259]If a debtor were unable to pay a debt due or skipped town, the creditors would have to rely on the community's elders to mediate, and the family of the debtor may have to make good the debt to protect family honour, including providing a hostage. Many African societies had their traditional dispute adjudication systems, which dealt with all disputes, including debt and insolvency.[260]

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[257] Fernandes & Pathak, *supra* note 10 using the TWAIL approach has been used to study cross-border insolvency but there are no studies using the life cycle approach.

[258] Chibuike Ugochukwu Uche, *BANKING DEVELOPMENTS IN PRE-INDEPENDENCE NIGERIA: A STUDY IN REGULATION, CONTROL AND POLITICS A thesis submitted for the degree of Doctor of Philosophy to Department of Accounting and Finance The London School of Economics and Political Science* (University of London, 1997).

[259] *Ibid* at 90.

[260] Taslim Olawale Elias, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956) at 170.

Roman Twelve Tables legislation from BC 451-450 included one rule which allowed creditors to cut their debtors up into pieces.[261] Louis Edward Levinthal, a former US County Court Judge and university lecturer in Bankruptcy and Corporate Reorganization, argues that the execution was against the person rather than the debtor's property.[262] Religious and primitive sanctions prevailed with little need for bankruptcy jurisprudence.[263] Roman law moved from liquidation of the body to liquidation of the debtor's assets and loss of societal standing (*capitis deminutio*).[264] Levinthal argues that the transition to property was a shift from retaliation to compensation as the prevailing norm.[265] Christoph Paulus, a German professor of law with interest in insolvency and ancient Roman law, recalls that Emperor Augustus allowed debtors who failed through no fault of theirs to keep their "personal" dignity and argues that this practice though short and discarded during the middle ages and medieval times, foreshadowed bankruptcy discharge.[266]

The creditors took private actions against debtors during Roman times and in Italian city-states.[267] These were private rights of self-help and later of cooperation and contribution by creditors not based on state or public authority or court supervision.[268] The trade norms of the time guided the conduct of the parties. Jérôme Sgard, the Research Director at the Center for International Studies and Research (CERI) of Sciences Po, argues that bankruptcy laws are a medieval Western invention that emerged in the northern Italian trading cities and managed by

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[261] Christoph Paulus, "A Short History of European Insolvency Law" (2007) INSOL World Silver Jubil Ed 14–16; Louis Edward Levinthal, "Early History of Bankruptcy Law" (1917) 66:3 U Pa Rev 223 at 231 also for detailed discussion of Roman, early Italian, Dutch and Middle Ages bankruptcy history.

[262] Levinthal, *supra* note 261.

[263] *Ibid* at 231.

[264] Paulus, *supra* note 261; Levinthal, *supra* note 261 at 231–232.

[265] Levinthal, *supra* note 261 at 232.

[266] Paulus, *supra* note 261.

[267] Levinthal, *supra* note 261 at 231–239 and 240–241.

[268] *Ibid* at 240.

semi-independent trader courts.[269] He refers to the 1262 Sienese Statute as the foundation for the French Commercial Codes of 1673 (Ordornance sur le Commerce) and 1807 running to the rest of the civil law European bankruptcy laws.[270] Israel Treiman, a Professor of Law, argues that the medieval Continental bankruptcy law relies on the norm of flight by the debtor to unknown parts to obtain rehabilitation.[271] Also, Treiman stated that the English person's house is his "castle and the English had a different norm of 'keeping house' by which no process was executed as long as a debtor remained in his house."[272] Sgard argues that in parallel, the English also developed their system of a mix of common law and statutes, which were transferred to Scotland, Ireland and then the rest of the world.[273] Treiman observed that the English bankruptcy system embodies the taking flight norm derived from Continental law and the "keeping house" English norm.[274] Sgard argues that history offers an endless collection of social mechanisms designed to support contractual exchange, usually involving third-party intervention through a private effort at remedy and, where that fails, exclusive legitimate use of violence through state courts.[275] He concluded that the emergence of full-fledged bankruptcy statutes was *de facto* conditioned by the

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[269] Sgard, *supra* note 1.

[270] *Ibid*.

[271] Israel Treiman, "Escaping the Creditor in the Middle Ages" (1927) 43:2 Law Q Rev 230 at 234–236; Nadelmann, "Global Prohibition Regimes", *supra* note 163 at 498–499 quoting from I A Shearer that in those days, escape abroad was an arduous exile for the fugitive and the pursuing authority considers a departed criminal as a problem solved, his return unlikely and the community ride of a trouble maker; I A Shearer, *Extradition in International Law (Dobbs Ferry, N.Y.: Oceana Pub- lications, 1971)* (Dobbs Ferry, N.Y.: Oceana Publications, 1971) at 7.

[272] Treiman, *supra* note 271; Israel Treiman, "Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law" 52:2 Harv Law Rev 189 at 194.

[273] Sgard, *supra* note 1.

[274] Treiman, *supra* note 272.

[275] Sgard, *supra* note 1.

republican (municipal) constitutional order that allowed formalizing such a complex constitutional rule of interactions.[276]

According to Nadelmann, the collapse of the Ammanati Bank of Pistoja in 1302 and the closure of its branch in Rome leading to panic among its creditors in Rome, primarily clergy, is significant for cross-border insolvency.[277] Pope Boniface VIII intervened by papal order against the bank's debtors, restraining them from making payments without papal authorization. Still, the bank's principal debtors resided in Spain, England, Portugal, Germany, and France outside the jurisdiction of such papal orders.[278] The local creditors in those countries tried to recover against assets there. The Pope offered the bank owners safe passage to Rome, using them and the clergy in those other countries to recover the debts due from abroad to the bank, and transferred them to Rome using the Church's system to pay the majority of the creditors who were clergy in Rome.[279] Nadelmann argued that the clergy in 1302 was lucky because the Pope's influence and structures abroad enabled recovery of the debts to pay debtors in Rome.[280] He stated that no institution exists today (he was writing in 1944), with powers transcending state borders to collect foreign debts.[281] He further argued that if there is no express agreement on cooperation between various countries' courts, cross-border insolvency will rely only on nations' comity, which he said, has proved wholly inadequate.[282]

Fletcher asserts that the Pope's wielded spiritual authority backed by the ultimate sanction of ex-communication averted the potential domino effect of the collapse of the Ammanati Bank

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[276] *Ibid*.

[277] Nadelmann, *supra* note 19.

[278] *Ibid* at 58.

[279] Nadelmann, *supra* note 19.

[280] Kurt H Nadelmann, "Bankruptcy Treaties" in *Confl LAWS Int INTERSTATE* (1972) 299.

[281] Nadelmann, *supra* note 19 at 59.

[282] Nadelmann, *supra* note 19.

by whipping the defaulting rulers of Europe to order.[283] In other words, the Church's norms have a cross-border impact in territories over which the Pope had no sovereign authority.[284]

Fletcher quoted David Graham QC, an English barrister, professor of law and bankruptcy historian, narrating the beheading in 1360 of a banker in Barcelona in front of his bank for failing to honour his clients' accounts.[285] In the 13th and 14th centuries, England's formal procedure for dealing with bankruptcy had not developed. The only method available was strictly within the mercantile community under law merchant based on customary practices and norms.[286] These practices were brutal to the debtor and involved imprisonment and death.[287]

These norms eventually transformed into national civil and commercial law as acts of bankruptcy. Even then, it was only applicable to merchants (in French, commerçant) engaged in some commercial trade or business activity.[288] The UK statutes of 1542 and 1570 on bankruptcy were quasi-criminal.[289] There was no provision for a discharge, and no voluntary bankruptcy and acts of bankruptcy included taking flight from creditors, "keeping house," or fraudulent conveyance.[290] Blackstone commented that the norm considered a delay in payment a dishonesty

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[283] Ian F Fletcher, "International Insolvency: A Brief Historical Sketch" (2007) INSOL World Silver Jubil Ed 6–9.

[284] *Ibid*.

[285] *Ibid*.

[286] *Ibid*.

[287] Douglas Baird, Thomas Jackson & Barry Adler, *Bankruptcy: Cases, Problems, and Materials*, revised third edition ed, University Casebook Series (Foundation Pr, 2001).

[288] Fletcher, *supra* note 283.

[289] 34 & 35 Hen. 8, ch. 4 (1542-43) and 13 Eliz., ch. 7 (1570). Treiman, *supra* note 272; Treiman, *supra* note 271.

[290] Tabb, *supra* note 246 at 8 English law respected the abode of all individuals and a writ could not be executed in the home of an individual rendering the person immune from creditors if he remains at home; See also Treiman, *supra* note 271; Treiman, *supra* note 272.

species, so lenders did not extend credit to individuals as distinct from traders.[291] Later, the law changed to allow a Bankruptcy Commissioner to break into the house of a person "keeping house" to collect assets, and the ear of the debtor cut off.[292] The 1705 Statute of Anne introduced discharge for cooperative debtors and putting uncooperative debtors to death.[293] There was, however, no automatic discharge and further, the law required the creditor's consent for discharge, a procedure that took years to accomplish.[294]

The absorption of merchants into common law was completed under Lord Mansfield in the 18th century, but excluding non-merchants from bankruptcy benefits persisted until 1861 and married women in 1935.[295] The approach to cross-border insolvency or foreign debtors during this period, according to Fletcher, was 'hands-on' or xenophobic.[296] It involved the seizure of other merchants' goods from the same country as the debtor and arrest and detention of the debtor's unsuspecting countrymen until they pay for their absconding countryman.[297] He said life for the international business traveller was fraught with peril and uncertainty.[298] Fletcher concludes that Jabez Henry has a fair claim to being regarded as the founding father of the modern movement to instill internationalist principles into the study and practice of cross-border insolvency law.[299]

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[291] Quoted by Tabb, *supra* note 246 at 9 Tabb also at note 9 provided rich references to materials on American and English bankruptcy history.

[292] *Ibid* at 10.

[293] *Ibid* at 11.

[294] *Ibid* at 10.

[295] Fletcher, *supra* note 283.

[296] *Ibid*.

[297] *Ibid*.

[298] *Ibid*; Nadelmann, “Global Prohibition Regimes”, *supra* note 163 at 481, 498–499; Shearer, *supra* note 271 at 5,7.

[299] Fletcher, *supra* note 283; Fletcher, *supra* note 2.

Early bankruptcy history indicates that society's norms influenced the laws that it pursued or became the law. Engberg-Pederson and Fejerskov argue that norm engagement is a social process inseparable from situations, their history and their likely future shaped by actors and not fixed structures carried around from one locality to the other.[300] Thus, in Africa, the belief that only the community could own land meant that individuals could not acquire private rights in land and could not use the landed property for credit, stultifying the growth of bankruptcy jurisprudence. When the norm was retaliation, relief was against the debtor's person, but the relief could be against the debtor's property when it changed to compensation. When the norm was flight or keeping house, the law did not provide alternative means of discharge from bankruptcy.

Further, when the norm was that a non-trader could not obtain credit, the bankruptcy procedure was unavailable to non-merchants. Merchants generated and enforced the norms for cross-border insolvency in early bankruptcy history up to medieval times. The following section considers the Victorian times and the historical involvement of other non-state entities apart from merchants in setting domestic and cross-border insolvency norms.

1.19 **Non-State Entities and Insolvency in History: Victorian Period**

Markham V Lester, a Professor of History, identified the two most influential groups in insolvency law reform in the Victorian period: the legal profession and the business community; later, civil servants joined the reformers' list.[301] In addition, some groups influenced changes and reform by their opposition to them. Lester quoted McDonagh, stating that administrative revolution during this period is also the product of overcoming, circumventing, or compromising with the opposition.[302]

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[300] Lars Engberg-Pedersen & Adam Fejerskov, "The Difficulties of Diffusing the 2030 Agenda: Situated Norm Engagement and Development Organisations" in Sachin Chaturvedi et al, eds, *Palgrave Handb Dev Coop Achiev 2030 Agenda Contested Collab* (Cham: Springer International Publishing, 2021) 165 at 169.

[301] Markham V Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in the Nineteenth-Century England* (Oxford: Clarendon Press, Oxford, 1995) at 10.

[302] McDonagh, *supra* note 203; Lester, *supra* note 301 at 10.

Lester observes that Victorian concern was confidence in the credit system, which was to be protected and avoidance of tax or consumer defaulting was deprecated to ensure recovery of creditors' losses. There was no concern for the adverse effect of bankruptcy on entrepreneurs taking risks. The reform in this period focused on the creditors' losses occasioned by fraud. Lester argues that the concern was not unfounded, with four to five million pounds (£4-5m) losses annually throughout the nineteenth century. Losses from release from prison and private arrangements were difficult to estimate. Lester estimates the annual total loss of £628m a year and 20% of GDP until early 1890, reducing to 1% after 1890.[303]

Compared with other departments, Lester shows that government expenditure on the British bankruptcy bureaucracy was huge. Besides the bureaucracy, Lester argues that concern over bankruptcy legislation was "one of the causes behind the formation of two important national business and business-oriented organizations. The Associated Chambers of Commerce of the United Kingdom in 1860 and the Institute of Chartered Accountants in 1870."[304] He relied on the record and literature of their early meetings on these issues in arriving at his conclusion.[305]

Lester narrated how Victorian reforms involved both business and the legal profession.[306] The businesspeople or merchants were interested in debtors in prison and insolvent company liquidation, while lawyers made a livelihood from the entire process. Accountants also became prominent during this period as the requirement for financial statements was established by joint-stock company laws.[307] The reaction of lawyers and accountants to reform and government intervention during Victorian times has lessons today as private, professional organizations of

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[303] Lester, *supra* note 301.

[304] *Ibid* at 5–6.

[305] *Ibid* at 5–6.

[306] Lester, *supra* note 301.

[307] Joint Stock Companies Act 1844 c. 110 7 & 8 Vict and Joint Stock Companies Act 1856 (19 & 20 Vict. c. 47)

experts seek to influence norm making and return to private actors as the centre of bankruptcy supervision.[308]

Besides the emergence of professional actors in bankruptcy in addition to merchants, government bureaucracy grew during Victorian times, and Lester sought to determine the extent to which increased government activity affected one of the most significant legal reforms of the period, the reform of the systems of imprisonment for debt, bankruptcy and company winding up. He argues that law reform in the nineteenth century significantly altered the English legal system, including bankruptcy and the courts, criminal law procedural law and company law.

The reforms of nineteenth-century England directly involved the judiciary in the private sector through, for example, the appointment of official receivers, management of the estate of the bankrupt and insolvent companies, among other invasions of the erstwhile domain of merchants. As a result, the role of government tilted between the judiciary and the Board of Trade during this period. Lester focused on the three (3) central legislations of the Victorian era. He sought to understand how those changes tended to increase or decrease government role in administering the imprisonment for debt, bankruptcy and company winding-up systems.[309] First, the *Bankruptcy Act of 1825* allowed a debtor to commence proceedings for bankruptcy, a right previously exclusively enjoyed by creditors, the merchants.[310] Second, the *Bankruptcy Act of 1831* introduced what Lester refers to as "officialism," meaning the government became involved with managing the bankrupts' estate with the court, not creditors appointing official assignees. Lastly, by 1869 the Parliament reversed the system away from officialism due to pressure from the organized business community. Still, it returned to officialism with the *Bankruptcy Act of 1883* and the *Companies Winding Up Act of 1893*. Marcello Gaboardi, an associate professor of law, argues that properly balancing between public and private interests and the role of public and

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[308] Marcello Gaboardi, "The Role of Consent in European Cross-Border Insolvency Proceedings: The Unilateral Undertaking under Article 36 EIRR" (2021) Glob Jurist, online: <http://www.degruyter.com/document/doi/10.1515/gj-2020-0002/html>.

[309] The three legislations were the Bankruptcy Acts 1831, 1869 (32 & 33 Vict c 71) and 1893.

[310] The Bankruptcy Act 1825 Act 6 Geo 4 c16

private actors in the process is one of the most significant and complex challenges presented by modern insolvency law.[311]

The Victorian period also produced significant jurisprudence that is still affecting cross-border insolvency. In *Gibbs & Sons v Societe Industrielle et Commerciale de Metaux,*[312] decided in 1890, the English court held that it was well established that English courts cannot give effect to foreign law as discharging an English obligation to pay money in England as the proper law of the contract must govern. The case also found it impossible to say that another country's laws govern an agreement made in one country. The *Gibbs Rule,* as the case came to be known, is to be understood in the context that in the 19th century, British colonial dominance of world trade was at its height, and most of the creditors in world trade were in England. As a result, the norm in cross-border insolvency was whatever English courts decided as English law had pre-eminence. Therefore, Justice Jabez Henry's decision in *Odwin v. Forbes* to recognize a debtor's foreign discharge under English law significantly deviated from the established norm.[313]

Historically, from the literature, bankruptcy statutes contain norms that may or may not affect behaviour by sanctioning or relieving failure. These statutes affect property rights and market discipline, and hence economic exchange. Consequently, they affect how contracts are structured.[314] For centuries, bankruptcy laws applied only to traders and trader courts administered the norm as a matter of private norms. However, by the nineteenth century, these laws were extended to non-traders and later in the early twentieth century to married women. The state also took an interest in the regulation of bankruptcy in the nineteenth century with officialism. The state became involved with the administration of bankruptcies through state courts and official receivers' appointments. The requirement for a financial statement by trading companies and the

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[311] Gaboardi, "The Role of Consent in European Cross-Border Insolvency Proceedings", *supra* note 308.

[312] *Gibbs & Sons v Societe Industrielle et Commerciale de Metaux* (1890) 25 Q.B.D 399 at 405-407

[313] *Odwin v. Forbes* (1817) 1 Buck 57 (P.C.)

[314] Sgard, *supra* note 1.

courts' role in bankruptcy made non-state parties like accountants and lawyers more involved with the bankruptcy process. These non-state parties began to organize themselves to protect their interest by setting norms for their members' conduct and creating the platform for bankruptcy regulation to be consistent with their interests. This historical reflection has application in consideration of the role of INSOL in shaping the Model Law in the twentieth century. Even now, the challenge is balancing between public and private interest in bankruptcy.

1.19.1 **American Variant to Insolvency History**

Between 1800 and 1898, the United States enacted four (4) major bankruptcy laws.[315] Its bankruptcy system underwent rapid changes from removing its limitation to traders to allowing involuntary bankruptcy by non-traders, introducing voluntary bankruptcy, repealing the laws and reinstating them with generous discharge, moratorium and restructuring.[316] David A. Skeel Jr., an American Professor of Corporate Law, argues that the genius of the *1898 Bankruptcy Act* that brought stability came from the interaction of creditor groups and federalism before the *Act* and the influence of the new bankruptcy bar after the *Act*.[317] Creditor groups drafted the bill that eventually formed the bulk of the law, and their interest was to have a bankruptcy system run by private and not permanent government officials.[318] However, pro-debtor forces existed from the different states and their interaction with the federal government, which Skeel referred to as "federalism" also influenced the *Act*[319] . The compromise was that the law also protected "honest

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[315] Bankruptcy Act 1800 - Ch. 1, 2 Stat 19 repealed by Ch. 6 2 Stat 248; Bankruptcy Act 1841 - Aug 19, 1841, Section 1, 5 State 440; Bankruptcy Act 1867 - March 2, 1867 Section 11, Stat 521 amended in 1874, 18 Stat 182 and repealed in 1878 and Bankruptcy Act 1898 Nelson Act of July 1, 1898 Ch. 541 30 Stat 544; see David A Skeel Jr, "Bankruptcy Lawyers and the Shape of American Bankruptcy Law" (1998) 67 Fordham Rev 497.

[316] *Ibid*.

[317] David A Skeel Jr, "The Genius of the 1898 Bankruptcy Act" (1999) 15:2 Emory Bankr Dev J 321.

[318] *Ibid* at 330.

[319] *Ibid*.

but unfortunate" debtors by granting relief through discharge.[320] Lastly, the lawyers and many other private persons who performed roles under the law worked hard to sustain the law to protect their profession.[321] It follows that private parties such as creditors, pro-debtor groups, and lawyers actively generated the norms that underlay the *1898 Act*.

Despite its British colonial history, American insolvency did not follow the English liquidator (creditor friendly) model because its different states had different economic and cultural histories.[322] Commerce was left within the domain of the states to accommodate those differences. Commercial states like New York and Illinois (northern states) favoured creditor-friendly insolvency laws because they were financial centers with significant creditors. Agrarian states (southern states) preferred debtor favourable insolvency laws.

However, Article 1 Section 8 of the *US Constitution* granted the US Congress the authority to establish uniform laws on bankruptcies throughout the United States.[323] The *US Bankruptcy Act 1898* assumed most debtors were honest but unlucky and deserving of rehabilitation rather than punishment. The approach under the *US Bankruptcy Act* was unlike the English and European systems. This approach is traceable to the American history of adventure and exploitation of the new territory, which engendered an understanding that expeditions can fail because of the harsh terrain. As such, US bankruptcy does not punish market-driven insolvency.[324] Charles Jordan Tabb, a law professor, specializing in bankruptcy, argues that the

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[320] *Ibid* at 328.

[321] Skeel Jr, *supra* note 317.

[322] Donald S Bernstein, "A (Breathless) History of American Insolvency Law" (2007) INSOL World Silver Jubil Ed 17–19; Skeel Jr, *supra* note 317 at 325.

[323] *US_Constitution-Senate_Publication_103-21.pdf* at 10.

[324] Another explanation for this approach obtained in an interview was that because most of the creditors in the great railways financing arrangements were British or foreign, the US approach shifted towards the protection of the debtors who were US entities resulting in a debtor-friendly insolvency system. While we found no empirical proof of this explanation, it reflects the perception of highly knowledgeable authorities in this area. However, from the history accurately rendered by Bernstein, it seems that full debtor in possession took a long time to achieve. Even if the Americans did not like their foreign creditors, the

history of US bankruptcy law indicates that all the laws from 1800 were usually responses to panic or depression except the *1978 Bankruptcy Code*.[325] The US approach suggests that the adventurer gets a second chance after a panic or economic depression. Thus, there was a convergence of interest in the late nineteenth century to resolve insolvency across state lines and debtors ' rehabilitation nationally.[326]

Donald S. Bernstein, an American Bankruptcy expert, argues that reorganization is an aspect of US insolvency law developed in response to the great trans-state railways' failure.[327] Most railways had mortgage bond financing usually secured by a portion of railway tracks funded and held chiefly by British and other companies. In insolvency, the secured parts could not be realized piecemeal because doing so eliminates going concern value resulting in less realization for each creditor. The railway tracks also crossed interstate lines leading to legal difficulties.[328] Therefore, it was necessary to maintain the railroads' operations' integrity to maximize creditor recoveries and protect the public interest. Equitable receivership was a way to hold the assets together, and the company sold as a going concern with the creditors allowed to bid on the credit of their unpaid bonds.[329] They usually won the bid and transformed into owners of the company.[330]

Over time aversion to receivers arose due to abuses of the position and collusion with reorganization committees controlled by large creditors such as investment banks and lawyers, leading to the US Securities and Exchange Commission ("SEC") calling for the appointment of

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creditors were able to use their credit to control the receivers converting their debt into equity to buy over the companies and take control. The appointment of bankruptcy trustees did not improve the situation.

[325] Tabb, *supra* note 246 at 32.

[326] Vern Countryman, "A History of American Bankruptcy Law" (1976) 81:6 Com LJ 226" (1976) 81:6 Com LJ 226; Levinthal, *supra* note 261; Tabb, *supra* note 246; Skeel Jr, *supra* note 317; Bernstein, *supra* note 322.

[327] Bernstein, *supra* note 322.

[328] Tabb, *supra* note 246 at 21–22.

[329] *Ibid*; Baird, Jackson & Adler, *supra* note 287 discussing the concept of equity receivership.

[330] Bernstein, *supra* note 322.

trustees and a role for government regarding the process for public companies.[331] In Chapter X, dealing with public companies, the *Bankruptcy Act 1938*, known as the *1938 Chandler Act*, provides for trustees' appointment. For smaller companies, Chapter XI allowed the management to remain in place. The Chapter XI procedure became more refined and used for even large public companies, with the management remaining in place during the reorganization.

The *US Bankruptcy Code 1978* replaced the *1898 Bankruptcy Act*. It introduced some innovations and consolidated the various existing laws at the time. Some innovations included the upgrade of bankruptcy referees to judges with Article III US Constitution powers without being Article III judges. In addition, it introduced a single chapter for each type of bankruptcy, eliminated involuntary bankruptcy for individuals and made it attractive to file and obtain a discharge. It also removed the role of the SEC during the reorganization. The actors in the passage of the *1978 Code* included the Commission on Bankruptcy Laws of the United States set up by Congress in 1979 and the National Conference of Bankruptcy Judges, who lobbied for different versions of the Code.[332]

The transformation of private norms to public norms was evident in the history of American bankruptcy. Initially, unsecured creditors groups preferred privately supervised bankruptcy, but pro-debtor federalist forces influenced the process leading to the compromise in the *1898 Act.* The bankruptcy Bar became active after the *1898 Act* in preserving and fostering bankruptcy norms and indirectly their profession. However, large creditors hijacked the process leading to complaints by unsecured creditors and eventual discarding of equity receivership and establishing a role for the government through the bankruptcy trustee. Eventually, the concept of debtor possession became entirely accepted in the US. Although the debtor in possession became fully established all across the US notwithstanding the different orientation of different regions of the country, the underlying norm of the US bankruptcy regime remained to provide collective execution against all the assets of the debtor, prevention of fraud on the creditors and

[331] *Ibid*; Tabb, *supra* note 246 at 22; Jacob Trieber, "The Abuses of Receiverships, 19 YALE L.J. 275, 276-77 (1910)." (1910) 19 Yale LJ 275 at 276–277 discussing abuses of equity receivership.

[332] Tabb, *supra* note 246 at 32.

management of the debtor's estate.[333] The opportunity of a second chance to an "honest but unfortunate" debtor was merely a desirable outcome.[334] Thus, US bankruptcy law history points to non-state entities' role in setting the agenda for lawmaking in the US Congress and sustaining bankruptcy norms, and balancing between public and private interests and actors in bankruptcy.

Conclusion

International law, particularly public international law, has moved from domination by states acting as unitary sovereigns to a spectrum where disaggregated units of sovereigns acting as networks and non-state entities play an increased role in formulating and sustaining transnational law. Historically, non-state entities dominated the generation of international private commercial law norms through *lex mercatoria* and cross-border insolvency, forming part of private international law. The incursion of public law into the regulation of cross-border insolvency is a recent phenomenon. The challenge since this incursion is to maintain the appropriate balance between the private and public interest in bankruptcy. States, on the other hand, dominate the generation of norms in public international law. International law has moved from the public towards private areas of law outside the dominion of state sovereignty. Private norms are rapidly expanding and gaining ground not only in international law but also in domestic law.

The Model Law is an instrument of global public governance. However, the participation of non-state entities in the UNCITRAL work process presupposes that the output is the outcome of contestation, compromise, overcoming, opposition and nibbling on “principles” which underlay global norms in the interactions at the norm modelling site. There is a blurring of roles between national, transnational and international law, public and private international law, states, non-state entities and networks in global lawmaking. We understand very little about private institutions’ contribution to global public governance, assuming that states are the only norm makers in multilateral intergovernmental lawmaking environments like UNCITRAL. This study considers the role of INSOL in shaping the UNCITRAL Model Law, which the UN General Assembly adopted in December 1997 following years of articulation by the UNCITRAL Commission and negotiation at

[333] Levinthal, *supra* note 261.

[334] *Ibid*.

the UNCITRAL WGV on insolvency in the context of the tension between the emergence of non-state entities in international lawmaking and the challenge to internal and external sovereignty of states. Understanding the phenomena of receding sovereignty and actors' interaction in public and private international law spaces would anticipate solutions for international relations, organizations, politics, and law.

Between law and norm lies theoretical contestation regarding whether socially held belief or rational choice motivate compliance. Paul Popa, a doctoral candidate, argues that social constructivism ignores some aspects of the relationship of norms with interest and power. However, the latter two cannot be excluded from analyzing the construction and manifestation of norms.[335] The norm life cycle approach navigates the theoretical boundaries of the extremes of thoughts between law and norm and postulates a complete theory for norms evolving into law that applies rationality and social constructs. The life cycle approach was applied to explain the evolution of international human rights, policy and environment, but not international commercial law, especially the UNCITRAL Model Law.

This research utilizes the norm life cycle theoretical framework to observe and understand the development of the UNICITRAL Model Law's norm of cooperation and coordination among state courts and the role of INSOL, a non-state entity, in shaping the norm. This approach is preferred because its framing provides for the different actors' motivations at the different stages of the norm life cycle, allowing the discussion of the actors' political and economic objectives at each stage. It also enables response to the principal research question: why and how did the norm of cooperation and coordination in cross-border insolvency among INSOL members emerge, cascade to an international norm that influenced the UNCITRAL Model Law and became internalized by a critical mass of state actors?

The following chapter describes the research methodology adopted in this research.

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[335] Paul Popa, "Integration of the International Norm" (2018) 16 Res Sci Today 62–71 at 69. *Ibid*.

2. Chapter Two – Research Design and Methodology

Section A - Research Design

2.1 Introduction

This chapter discusses the research design, methodology, and impact of the research. The research method provides the framework of the various techniques utilized in observing the phenomenon under study. This study's research question is different from existing scholarly legal literature. For example, no one has asked how and why INSOL International, a non-governmental body, gained influence in an intergovernmental law-making organization like UNCITRAL to cascade and institutionalize its preferred norm on cross-border insolvency. Block-Lieb and Halliday opened the question of the "origin of invention" when multilateral lawmaking institutions used non-state entities in informal lawmaking when they stated as follows:

> The inventiveness that has been observed in UNCITRAL's informal and temporal adaptations opens up the question of the *origins of invention*. Do they come from UNCITRAL officials, from the Secretariat itself? Are they rational responses to resource scarcity from the UNCITRAL Commission or the international civil servants that serve it?[336]

Kelly also suggested the need for further research on non-state entities' participation in the UNCITRAL work process.[337] Block-Lieb and Halliday tackled the question of the "origins of invention." Unfortunately, Block-Lieb and Halliday limited their consideration to the contribution of state actors, UNCITRAL secretariat staff and non-state entities at the UNCITRAL modelling

[336] Block-Lieb & Halliday, *supra* note 64 at 222.

[337] Kelly, *supra* note 14 at 32–34.

site.[338] Furthermore, they did not consider the role of INSOL in the emergence of the norms before cascading to UNCITRAL. Therefore, this research utilizes an interdisciplinary approach of legal doctrine and socio-legal research methods to tackle the problem of "origins of invention" of the UNCITRAL Model Law by considering the role of INSOL in the emergence, cascade and internalization of the norm that underlies the law.

Sociology of law employs social theories and applies social scientific methods to the study of law, legal behaviour and legal institutions to describe and analyze legal phenomena in their social, cultural and historical contexts.[339] While the legal doctrine limits its application of empirical data to legal texts, fundamental research enables a deeper understanding of law as a social phenomenon, including historical, philosophical, linguistic, economic, social, or political implications.[340] Scholars have argued that to understand the current state of international law, its possibilities and limits, its institutions and how to approach them, we should first examine how these came to be.[341]

Lawrence M. Friedman, an American Professor of Law and Legal Historian, argues that legal history "degenerates into an antiquarian search for origins," and researchers "pay inadequate attention to the culture surrounding their field of interest; consequently, the course of

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[338] Block-Lieb & Halliday, *supra* note 64 at 222–226.

[339] R Banakar & M Travers, eds, *Law and Social Theory*, 2nd ed (Oxford, Hart, 2013); *Introduction to Theory and Method in Socio-Legal Research*, by Reza Banakar & Max Travers, papers.ssrn.com, ID 1511112 (Rochester, NY: Social Science Research Network, 2005). Banakar & Travers, *supra* note; Banakar & Travers, *supra* note.

[340] Mark Van Hoecke, "Legal Doctrine: Which Method(s) for What Kind of Discipline?" in Mark Van Hoecke, ed, *Methodol Leg Res Which Kind Method What Kind Discip* (Hart Publishing, 2011) at 2 discussing the limitations of legal doctrine; Canada's Arthurs Report arguing for fundamental research *Consultative Group on Research and Education in Law, Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada* (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) cited in ; Terry Hutchinson, *Researching and Writing in Law*, 3rd ed (Reuters Thompson, 2010) and also cited in ; Terry Hutchinson & Nigel Duncan, "Terry Hutchinson & Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) Deakin Law Review, 17:1 at 83" (2012) 17:1 Deakin Law Rev 83 at 102.

[341] Alexandra Kemmerer, "'We do not need to always look to Westphalia . . .' A Conversation with Martti Koskenniemi and Anne Orford" (2015) 17 J Hist Int Law 1–14.

history seems full of mysterious randomness."[342] Friedman further stated, "that the living law is a product of our current constellation of social forces, acting upon the data of the past; we can see it, feel it, grasp it. If we could only project this insight backwards into history, how much richer, this would make the study of our immediate legal tradition."[343]

Frederick G. Kempin, a Professor of Business Law, argues that legal history requires more than tracing the development of a concept, principle, or rule but should seek to discover the important junctures in history.[344] He posits that some of these junctures are secular events that required or precipitated the legal change, other junctures involved a new way of looking at the legal doctrine, yet some involved both. Daniel Joseph Boorstin, an American historian, contends that the law is itself a part of history.[345] He argues that legal history should be more concerned with the relationship between legal institutions and the rest of society and less concerned with the professional vocabulary's embryology.[346] According to Jim Phillips, a Canadian professor of legal history and co-editor in chief of Osgoode Society for Canadian Legal History:

> …..[L]egal history provides a deeper understanding of the nature of law…..if legal developments cannot be separated from other historical trends, then a sense of history is vital to understanding the law (or perhaps because), it tends to highlight the limitations of law.[347]

Guided by the above admonitions of scholars, the research utilizes the legal history method to trace the development of cooperation and coordination among insolvency practitioners in cross-border insolvency proceedings and its cascade into a global norm adopted by the UNCITRAL as the Model Law on Cross Border Insolvency. By examining the events around the

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[342] quoted in Frederick G Kempin Jr, "Why Legal History" (1977) 15 Am Bus LJ 88 at 88–89.

[343] quoted from *ibid* at 88–89.

[344] Kempin Jr., *supra* note 342.

[345] D J Boorstin, "Tradition and Method in Legal History" (1941) 54 Harv Law Rev 424 at 434.

[346] *Ibid* at 434.

[347] Jim Phillips, "Why Legal History Matters" (2010) 41:3 Vic U Wellingt Rev 293 at 294.

development of the Model Law, we hope to understand better how it came to be the preferred legal rule for cross-border insolvency regulation. The persuasion techniques convinced states and international institutions to accept the Model Law. It is necessary to determine who was responsible for such persuasion. The research also explores the areas of divergence of the dataset from the norm life cycle theory.

Unlike legal doctrine, the legal history method depends on sources and not rules. Paul du Plessis, a Professor of Roman Law, argues that twenty-first-century lawyers lost faith in history as a source of direct influence on the law due partly to the Marxist view of history as an inevitable and finite progression from past to present, and also, the influence of modern legal theory, which posits that law in the real world is what matters rather than in books.[348] He contends that, for those who follow this view of law to the extreme, history is just one event after another and has much less relevance to modern legal discourse than sociology, politics or economics.[349]

However, this research does not perceive historical events as isolated but can give insight into historical junctures that herald transforming legal changes in norms, principles, concepts, and rules. While doctrinal analysis of the texts of legal instruments such as the UNCITRAL Model Law may give an insight into the norms they project, it would not provide us with the actors who made it possible and their motivations. Further, as there may be many actors at normative modelling and the different stages of the norm life circle, doctrinal analysis of the output of one location being the legal text may not provide a complete understanding of the phenomenon under observation. Also, the legal text and even historical data and sources may not adequately capture the participants' perceptions of who made the law at the time, requiring a research instrument to measure their perception. The research design utilizes the legal history method, which relies on historical data, sources and fieldwork, and a socio-legal method of elite interviews to obtain primary data. It balances these methods with some legal doctrine in a triangulation of historical data, pre-existing interviews and prior records of witnesses' perception and fresh interviews of witnesses to the historical events.

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[348] Paul du Plessis, “Legal History and Method(s)” (2010) 16 Fundamina 64. *Ibid*.

[349] Plessis, *supra* note 348.

2.2 **Area of Study**

The study covers the review of INSOL's role in the shaping of the Model Law. It asks whether INSOL was the norm entrepreneur for cooperation and coordination norms in cross-border insolvency and how it cascaded this norm to a global norm at UNCITRAL and got it internalized by various states through domestic legal adoptions.

2.3 **Limitation**

The research scope is limited to the 1982 and 1997 study periods regarding the first two stages of the norm life cycle, emergence and cascade, and the primary data sought by fresh interviews. However, the events that triggered INSOL's formation in 1982 and UNCITRAL adopting the Model Law in 1997 provides insight into the "origin of invention." On the other hand, the internalization stage requires consideration of events after 1997. After adopting the Model Law and its institutionalization, the subsequent events enable us to determine the relationship between the generation and diffusion of norms and draw inferences on the applicability of the life cycle theory.

UNCITRAL does not have the full transcript of debates at WGV from 1995 to 1997 on the Model Law. However, field research with WGV resulted in access to the partial transcript of the May 1997 session, the last session at which the Model Law was adopted.[350] In addition, there is a summary of proceedings of other sessions in reports sent to the Commission by WGV. After 1997, UNCITRAL commenced fully digital electronic transcribing its session, and those records are available on its website.

The onset of the COVID-19 Coronavirus pandemic in the first quarter of 2020 made it impossible to visit the UNCITRAL library in Vienna for field research for materials not available

[350] United Nations, "Summary Records of the United Nations Commission on International Trade Law for Meetings Devoted to the Preparation of the Draft UNCITRAL Model Law on Cross-Border Insolvency" in *UNCITRAL Year b 1997* (United Nations Publication, 1999) 339.

online on the UNCITRAL website.[351] However, UNCITRAL WGV secretariat staff responded to all requests and held Skype and telephone conferences with the researcher. They also supplied additional materials to the researcher. The researcher made one visit to INSOL headquarters in London for field research. Although INSOL indicated that it is working on creating an archive that would be available to the public and researchers, the project was not in place at the time of this study.[352] The absence of access to the private records of INSOL was a limitation to the research. However, there have been many publications of INSOL since 1982, providing a rich source of secondary materials on INSOL activities.

A critical part of social research is deciding what to observe and what not to observe as the study cannot monitor everything.[353] The process of selecting observations is called sampling. The key to generalization from a sample to a larger population is probability sampling, which involves the vital idea of random selection. Non-probability sampling is any technique of selecting samples in some way not suggested by probability theory.[354] For example, purposive or judgemental sampling is a non-probability sampling technique that involves selecting a representative based on knowledge of a population, its elements, and the study's purpose.[355]

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[351] UNCITRAL Working Group V Secretary Samira Musayeva arranged meeting with other secretariat officials held February 21, 2020 online in preparation for the fieldwork, but the arrangement was aborted by the pandemic. SInce then UNCITRAL WGV secretariat has been supporting this research remotely supplying or directing us to requested materials; See note 174 for discussion on impact of COVID-19 pandemic on international work, cooperation and globalization; Vries, Hobolt & Walter, *supra* note 175 discussing recent wave of protectionalism and responses of international organizations.

[352] At the INSOL/World Bank Africa Round Table held in Maputo, Mozambique October 26, 2018, David Burdette of INSOL announced that INSOL would be setting up a publicly available archive on the organisation. Visit to INSOL Secretariat in London on September 12, 2019 and subsequent submission of list of required documents via email of October 17, 2019 did not receive response.

[353] Earl R Babbie, *The Practice of Social Research*, 14th ed (Boston MA: Cengage Learning, 2016) at 183.

[354] *Ibid* at 186.

[355] *Ibid*.

Babbie argues that non-probability sampling cannot guarantee that the sample is representative of the whole population.[356]

On the other hand, probability sampling provides precise statistical descriptions of the large population, usually involving sophisticated statistics that ensure the sample reflects the same variations within the populations. When the sample does not reflect the population, there is a bias. For example, this can happen when the researcher selects convenient people for the study. Therefore, the sample should be representative of the population and avoid bias if the aggregate characteristic of the sample closely approximates those of the population. However, the sample need not be representative in all respects but only relevant characteristics.

Professor Kristin Luker refers to probability sampling as canonical sociology, arguing that social science research is a voyage of discovery, not verification, so random sampling may not be appropriate.[357] Furthermore, social science research such as elite interviews is not a full-proof random sampling. So, while it cannot be a basis to generalize statistically, it is a basis to generalize logically.[358] The research question has been operationalized, the terms defined, and sampling clarified.

According to Jeffery M. Berry, elite interviews focus on a particular institution's elite and important empirical works on policymaking are based on elite interviews.[359] This study focuses on the elite of specific institutions, such as INSOL, UNCITRAL and IBA. The elements of the study were i) persons; ii) participating between 1982-1997; iii) participation in cross-border insolvency practice; iv) INSOL members; v) IBA members; vi) attendance at UNCITRAL 1992 Congress; vii) UNCITRAL Joint Colloquium 1994, 1995, or 1997 participants, and viii) UNCITRAL Working

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[356] *Ibid* at 190.

[357] Kristin Luker, *Salsa Dancing into the Social Sciences: Research in an Age of Info-glut* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2008) at 46.

[358] *Ibid* at 44.

[359] Jeffrey M Berry, "Validity and Reliability Issues in Elite Interviewing" (2002) 35:4 PS Polit Sci Polit 670–682 at 679.

Group Session participants between 1995-1997.[360] High or Low GDP states were not part of the elements of the study.

Also, the researcher cannot guarantee that every element that meets the theoretical definitions laid down has a chance of being selected. Even where a list of elements exists, they can be incomplete. For example, the WGV 19th and 20th sessions report did not list the attendees.[361] Only the participant states, observer states, and international organizations were listed. The only attendees named in those reports were Kathryn Sabo (Canada) and Mr. Ricardo Sandoval (Chile). Also, the partial summary transcript for the 21st session only named speaker participants of the proceedings such as Jernej Sekolec, Kathryn Sabo, Neil Cooper, Gerold Herrmann, Jay Westbrook, Daniel Glosband, and Wisit Wisitsora-at (Thailand).[362]

Preliminary interviews enabled a list of potential candidates for elite interviews. The elite interviews' purpose was to complement the secondary data and seek perception to explain the available texts and archival data. The interview selection and method details are discussed below under Research Instrument 2.12 and Selecting Interviewees 1. Suffice to mention that interviews took place with all available, qualified and willing interview candidates like all purposive interviews. The response from the population met the statistical minimum and provided valuable primary data. Besides, many population members had participated in other previous interviews or written their perception of INSOL's role in the evolution of the UNCITRAL Model Law. These materials provided an additional source of primary data and formed a crucial pillar of the research triangle.

2.4 **Theoretical Frame**

[360] See Elite Interview Plan in Appendix I

[361] UNCITRAL Working Group V, "Report of the working group on insolvency law on the work of its nineteenth session (New York, 1-12 April 1996) (A/CN.9/422)" in *U N Comm Int Trade Law Yearb Vol XXVII 1996* (New York: United Nations, 1998) 148; UNCITRAL, "Report of the Working Group on Insolvency Law on the work of its twentieth session (Vienna, 7-18 October 1996) (NCN.9/433)" in *U N Comm Int Trade Law Yearb Vol XXVIII 1997* (New York: United Nations Publication, 1999) 45.

[362] UNCITRAL, "Report of the Working Group on Insolvency Law on the work of its twenty-first session (New York, 20-31 January 1997) (A/CN.9/435)" in *U N Comm Int Trade Law Yearb Vol XXVIII 1997* (New York: United Nations Publication, 1999) 72.

The prism from which the research will observe the phenomenon under study is the norm life cycle approach. The approach postulates three stages of the norm life cycle: norm emergence, norm cascade, and norm internalization.[363] The study, therefore, analyses and presents the data in the same format. The first stage considers how the norms of cooperation and coordination underlying the UNCITRAL Model Law emerged and whether INSOL was the norm entrepreneur. The second stage considers how the norm cascaded into a global norm at the UNCITRAL norm modelling site. Finally, the third stage considers how the global norm became internalized through adoption and diffusion in different states' domestic laws. At each stage, the research identifies the actors and their roles. However, the observation of Hadden and Seybert on the limitation of the norm life cycle approach to the study of norm evolution led to tracking of norm definition, particularly at the cascade stage to enable assessment of norm acceptance by a change of behaviour following institutionalization of the norm.[364] In addition, Hadden and Seybert's study of norm definition in the global sustainable development agenda analyzed the speakers at UN Conferences on sustainable development.[365] Also, Albert Hirschman, a professor of political economy, found that members of an organization could express their level of satisfaction or dissatisfaction with the organization through their voice, exit, or loyalty.[366] Consequently, researchers analyze words spoken to gain insights into the perceptions and beliefs of the members of an organization.[367] This study uses this frame to explore the UNCITRAL WGV participants' perceptions of the Model Law during the debate over its provisions and adoption.

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[363] Finnemore & Sikkink, *supra* note 7 at 896. *Ibid*.

[364] Hadden & Seybert, *supra* note 9. *Ibid*.

[365] Hadden & Seybert, *supra* note 9.

[366] Albert O Hirschman, *Exit, voice, and loyalty: Responses to decline in firms, organizations, and states* (Cambridge MA: Harvard University Press, 1970).

[367] Kentikelenis & Voeten, "Legitimacy challenges to the liberal world order", *supra* note 61; Hadden & Seybert, *supra* note 9; Hirschman, *supra* note 366.

Fernandes and Pathak using the TWAIL approach, argue that the UNCITRAL Model Law is a harmonization agenda of the Global North.[368] They show that India would eventually adopt the Model Law through state practices like committee recommendations and judicial decisions facilitating cross insolvency.[369] They argue that the country has little choice being "impotent" because of World Bank and IMF conditionalities and Ease of Doing Business ratings.[370] They exposed internal inconsistencies in adopting the Model Law by Global North states protecting their local interests.[371] They suggested that India apply the TWAIL approach in adopting the Model Law, so local interests are protected without heed to the Model Law's harmonization objection.[372]

This research shows that the Model Law has a more limited objective of cooperation and coordination among state courts, and harmonization was merely a desirable consequence if states achieve sufficient internal consistency. While Fernandes and Pathak's study shows that state practice can lead to internal inconsistency in Global North states, this research also indicates internal contradictions in the Global South countries like Uganda with reciprocity requirements and South Africa with a Minister's designation requirement. The Minister has designated no state under South African law.

Since this research focuses on the role of non-state entities in global lawmaking and not that of states, and the TWAIL approach deals with the part of Third World states in international legislation, a deeper TWAIL analysis was not considered necessary for this work.

2.5 **Research Question**

Why and how did the norm of cooperation and coordination in cross-border insolvency proceedings among INSOL members emerge, cascade to a global norm that influenced the

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[368] Fernandes & Pathak, *supra* note 10.

[369] *Ibid*.

[370] *Ibid*.

[371] *Ibid*.

[372] *Ibid*.

UNCITRAL Model Law on Cross-Border Insolvency 1997 and became internalized by a critical mass of state actors?

The norm life cycle approach enables us to respond to the research question.

2.6 Research Theses

(a) Thesis Statement One

The legal uncertainty and frustration experienced by INSOL members in cross-border insolvency adversely affected their interest, motivating them to organize and cooperate and coordinate among their members and transform the norm into a global norm adopted in the UNCITRAL Model Law on Cross-Border Insolvency using socialization and persuasion of state actors at UNCITRAL.

(b) Alternate Thesis Statement One

The legal uncertainty and frustration experienced by INSOL members in cross-border insolvency did not adversely affect their interest, nor motivate them to organize and cooperate and coordinate among their members and transform the norm into a global norm adopted in the UNCITRAL Model Law on Cross-Border Insolvency using socialization and persuasion of state actors at UNCITRAL.

(a) Thesis Statement Two

INSOL between 1982 and 1997 preferred the limited objective of cooperation and coordination among state courts as the basis for the UNCITRAL Model Law on Cross-Border Insolvency because it would avoid a long-protracted state-controlled process of unification of insolvency laws that would have depended for effectiveness on state parties over whom it had no control or influence.

(b) Alternate Thesis Statement Two

INSOL between 1982 and 1997 did not prefer the limited objective of cooperation and coordination among state courts as the basis for the UNCITRAL Model Law on Cross-Border

Insolvency, nor concerned about avoiding a long-protracted state-controlled process of unification of insolvency laws that would have depended for effectiveness on state parties over whom it had no control or influence.

2.7 **Research Design**

The research design is based primarily on the legal history method. Historical data from archival material constitute the first pillar of the research triangle. Existing interviews form the second pillar. However, since archival materials may not capture participants' perceptions of historical events, the research is supplemented by an elite interview that captures additional primary data of the perception of interview subjects, completing the triangle.

A portion of the available historical data is the record of interviews of vital witnesses to the historical event, which provided crucial primary data that strengthened the elite interviews.[373] One challenge of the research design was that some of those involved in the founding of INSOL or who participated in the UNCITRAL Model Law project between 1982 and 1997 was no longer available to be interviewed. Thus, the existing interviews or previously written recollections of such unavailable participants form a crucial pillar of the research triangulation.[374]

The research focuses on the role of non-state actors at the UNCITRAL insolvency norm-making site. The focus of the study is not the state actors. Although the research observes a power imbalance among the state actors, it considers that subaltern interviews of disadvantaged state actors would detract from the research objective, which is to understand the role of non-state actors in making global public norms.[375] Further, since the interview is purposive and

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[373] Stephen Adamson, "INSOL International: A Brief History from Unlikely Conception to Unique Maturity" (2007) INSOL World Silver Jubil Ed 45–49.

[374] The relevant UNCITRAL Commission and WGV secretariat staff between 1992 and 1997 are all retired and located in different countries. Some are for personal reasons unable to participate. The same applies to INSOL officials. However, some of the most active participants at the study period were still available and were interviewed. The details of the analysis of the respondents are in Chapter 6.

[375] For overview of circumstances for use of subaltern interview to hear alternative or oppressed voices see "Subaltern Studies: A Conversation with Partha Chatterjee | Cultural Anthropology", online: <https://journal.culanth.org/index.php/ca/subaltern-studies-partha-chatterjee>.

focuses on obtaining participants' perspectives, it would be challenging to select subaltern interview candidates who did not participate in the process. However, among states that participated in WGV sessions between 1995 and 1997, the research design provided equal opportunity for low GDP states to be drawn in the elite interview sample. Still, there was no response [see paragraph 2.12 below].

Section B – Research Methodology

2.8 Research Method

Doctrinal and Legal History Method

UNCITRAL Commission publicly available records, including records of proceedings, working papers and reports of its congresses, colloquia and Working Group V proceedings, were reviewed. The research obtained historical data from several sources. INSOL publicly available data and other INSOL records obtained through preliminary interviews, field and desk study provided primary archival data. In addition, the books, journals, websites and publications on the subject matter offered secondary data on the UNCITRAL work method and other theoretical and doctrinal perspectives that the study considered.

The research scouted for private archives but could not access any relevant archives. Some interview respondents indicated that they had already donated their archives or their parents to specific universities, but these related to local insolvency practice. The field research conducted at the INSOL London office did not yield any different outcome from existing secondary data. INSOL was yet to catalogue its archive and retrieve any available official documents from its early founders. The COVID-19 pandemic prevented physical field research at the UNCITRAL Secretariat in Vienna. However, the UNCITRAL WGV secretariat provided archival documents

remotely through email and generously dealt with research requests through Skype and telephone meetings.[376]

Elite Interview and Narrative Research

The elite interview and narrative research method allowed the participants to tell their oral history stories. The narrative inquiry was by interviewing the participants using the Elite Interview Plan[377] attached as Appendix I to this dissertation and approved by the Human Participants Review Subcommittee of the University's Ethics Review Board. Preliminary research and interviews identified a list of actual participants in INSOL and UNCITRAL global insolvency engagement during the study period. The list included participants at the Cape Cod meeting of 1982 that led to INSOL's formation, the early executives, and staff of INSOL, Insolvency Practitioners Association of UK (IPA) members, UNCITRAL Commission and WGV secretariat staff. Others were participants at UNCITRAL Congress of May 1992 in New York, the UNCITRAL INSOL Colloquium of April 1994 in Vienna, and the UNCITRAL INSOL Judicial Colloquium of March 1995 in Toronto. In addition, the list included delegates at WGV sessions between October to December 1995, when cross-border insolvency was referred to WGV and December 1997, when the Model Law was adopted. Finally, the list included insolvency practitioners involved in cross-border insolvency work between 1982 and 1997 or IBA delegates at WGV from 1995 to 1997.

The research risked suffering from one of the potential limitations of the narrative study because many participant populations were no longer available due to time's effluxion. Nevertheless, willing subjects who could give perspectives not captured in existing historical data

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[376] "www.bloomberg.com", online: <https://perma.cc/QG5M-NGM2> The Coronavirus which broke out in Wuhan China December 2019 had been declared a pandemic by March 12, 2020 and impacted the stock market, travel, health, safety and the world economy significantly. World Bank Group and INSOL, Global Guide: Measures adopted to support distressed businesses through the COVID-19 crisis (INSOL International and World Bank Group, 2020) for interactive map and guide on responses of different countries to the pandemic; *World Bank Group and INSOL, Global Guide: Measures adopted to support distressed businesses through the COVID-19 crisis* (INSOL International and World Bank Group, 2020) for interactive map and guide on responses of different countries to the pandemic. See also; note 174.

[377] Herbert J Rubin & Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Thousand Oaks CA: Sage Publication) at 69.

were available and participated in the elite interview. As Michael Quinn Patton, an American Sociologist and Evaluation Consultant, asserts, elite interviews "allow us to enter into the other person's perspective."[378]

The research considered the appropriate approach for obtaining the additional data through fresh elite interviews. Patton proposed three approaches to collecting qualitative data through open-ended interviews: informal conversational interview, general interview guide approach and standardized open-ended interview.[379] Another challenge with interviewing is structuring the questions and dealing with issues of validity and credibility. Patton argues that the fundamental principle of qualitative interviewing is to provide a framework within which respondents can express their understandings in their terms.[380] Apart from the open-ended interview, interviewing can be semi-structured using purposive sampling.[381] Jeffrey M. Berry, a Professor of Political Science, argues that elite interviews commonly apply to elites in an institution chosen at random and subjected to the same interview protocol composed of structured or semi-structured questions.[382]

This research utilized elite interviews to obtain qualitative data to understand the perspectives of key actors in INSOL and those who adopted the Model Law. Interviewing enabled the study to gain insight into how the norm of cooperation and coordination emerged and came to form part of cross-border insolvency regulation in UNCITRAL in the manner that it did since we are unable to observe the thoughts, feelings and intentions of participants fully from the texts in archival materials and doctrinal study,

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[378] Michael Quinn Patton, *Qualitative Evaluation and Research Methods*, 2nd ed (Newbury Park, CA: Sage Publication, 1990) at 278.

[379] *Ibid* at 280.

[380] *Ibid* at 290.

[381] Ana Aliverti, "Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-related Offences" (2012) 21(4) Soc Leg Stud 511–527 Semi-structured interviewing is also referred to as elite interviewing.

[382] Berry, *supra* note 359 at 679. *Ibid*.

Choosing interview subjects could be problematic but should match how the research subject is defined.[383] Herbert J. Rubin, a Professor Emeritus of Sociology and Irene S. Rubin, a Professor of Public Administration, argue that "getting only one side of an argument is not sufficient."[384] Instead, a balanced and complete view of the arena is necessary.[385] Consequently, interview subjects' choice included participants from other non-state entities such as the IBA, Committee J, that pursued a competing norm of harmonization through the MIICA proposal for a convention on cross-border insolvency. Given the study's focus, there was no need to consider interviewing those who did not participate in the emergence of the norm or its cascade to UNCITRAL, as the subaltern studies interview method may suggest.[386]

Consequently, the interviewees were selected based on their knowledge, expertise and experience from a population involved with or participated at INSOL, IBA, UNCITRAL and cross-border insolvency practice and adjudication during the study period. We drew the sample for interviews from this population. All members of the population had an equal chance of responding. All interviews were transcribed and anonymized as well as manually coded for analysis. The interview notes were anonymized, research data edited to remove primary identifiers, and there was no personal information of research subjects in the research data except where they consented in writing. These were to maintain and guarantee confidentiality and anonymity.

Although confidentiality enjoys optimum priority, the witnesses may wish the public to hear them in memorial research. In a sense, this research is a memorial to all those who worked hard to realize the Model Law.[387] One of the critical benefits of the narrative research elicited through interviews is that it enabled vital community members to recall INSOL's role in developing the

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[383] Rubin & Rubin, *supra* note 377 at 65.

[384] *Ibid* at 69.

[385] *Ibid*.

[386] note 375.

[387] Elizabeth S Bird & Fraser M Ottanelli, *The Asaba Massacre: Trauma, Memory, and the Nigerian Civil War* (Cambridge University Press, 2017) at 216 discussing the importance of memory recall in narrative research.

norm on cooperation and coordination in cross-border insolvency proceedings shaping the Model Law.[388] Consequently, some interview subjects agreed to the researcher disclosing their names.

Contextual Analysis and Reconstruction

Based on available historical data, both primary and secondary, and interviews (existing and fresh), the study performed contextual analysis and reconstruction of the three stages of norm evolution: norm emergence, norm cascade and norm internalization. Reconstruction involved telling the story relying on archival material, historical data and interviews (existing and fresh), and testing and exploring the data accumulated to support or prove the norm life cycle theory's applicability. This method enabled contextual reconstruction. The difference between legal doctrine and legal history is that while the former considers only the law's text to be analyzed, the latter examines other data sources and text to achieve contextual reconstruction. Archival data reviewed include UN and UNCITRAL documents, INSOL publications on its formation and celebration of its relationship with UNCITRAL, documents, books, notes, interviews, journals, newspapers, magazines, the web, and other historical documents sources for contextual analysis.

Koskenniemi argues that we should ensure that contextualization does not create an artificial border between the past and the present.[389] Instead, he suggests that legal intellectual work on the past should be a narrative technique directed to maximal effect in the present and impact that engages the reader with the complexity of the history – including past individuals –to make us think about the complexity of the present.[390]

This dissertation presents contextual analysis and reconstruction in Chapters 3, 4 and 5 using the three life cycle stages of emergence, cascade and internalization. Chapter 3 focuses on 1982 to 1991 and deals with INSOL's formation and the emergence of cooperation and

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[388] Jo Woodiwiss, "Challenges for Feminist Research: Contested Stories, Dominant Narratives and Narrative Frameworks" in *Fem Narrat Res - Oppor Chall* (London: Palgrave Macmillan, 2017) arguing that narrative research enabled sex workers in China recall memory that was otherwise suppressed.

[389] Kemmerer, *supra* note 341.

[390] *Ibid*.

coordination. Chapter 4 focuses on 1992 to 1997 and deals with INSOL engagement with UNCITRAL and the cascade of cooperation and coordination in cross-border insolvency into a global norm with UNCITRAL as the site for normative modelling. Chapter 5 deals with the adoption by states of the UNCITRAL Model Law and the internalization of cooperation and coordination. Chapter 6 is the findings and conclusion.

2.9 **Operationalization**

Finnemore and Sikkink argue that norms' existence or strength is separate from the actual behavioural changes in the life cycle research's operationalization.[391] Also, state behaviour is different from non-state entity behaviour.[392] They assert that norms produce social order and stability by channelling and limiting choices through shared beliefs, ideas, and expectations, making the world structure orderly and stable.[393] They contend that as ideas change, norms shift, and the system transforms micro-practices by turning them into new norms.[394] Hadden and Seybert argue for a need to track norm definition over time to understand norm dynamism.[395]

The study seeks to understand the role of INSOL in shaping the Model Law, as reflected in the two research thesis statements set out earlier [paragraph 2.6 above]. Identifying the variables in those statements enables their measurement. The variables are as follows:

Theses Statement 1

a) There was legal uncertainty and frustration amongst cross-border insolvency practitioners.

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[391] Finnemore & Sikkink, *supra* note 7 at 892.

[392] *Ibid*.

[393] *Ibid* at 894.

[394] *Ibid*.

[395] Hadden & Seybert, *supra* note 9. *Ibid*.

b) Private insolvency practitioners organized, cooperated and coordinated amongst themselves under the private international organization of insolvency practitioners, INSOL.

c) Socialization and persuasion of state actors at multilateral institutions like UNCITRAL led to the cascade INSOL norm.

The statement suggests a positive relationship between the experience of INSOL members of legal uncertainty and frustration in cross-border insolvency and their desire to organize, cooperate and coordinate. Also, both variables have a positive relationship with their ability to socialize and persuade state actors at UNCITRAL to adopt the Model Law.

Theses Statement 2

a) INSOL developed a limited objective of cooperation and coordination among state courts in cross-border insolvency.

b) Insolvency practitioners at the time perceived the alternative of modernization and harmonization of global insolvency law through treaty as protracted and uncertain.

c) INSOL and private insolvency practitioners lacked control of the treaty-making process and so was unattractive, preferring the easier route of a Model Law instead.

The theses suggest that INSOL's decided to pursue a limited objective of cooperation and coordination rather than harmonization because of the perceived challenge of seeking harmonization through treaty. Treaty making was a protracted process over which, as a non-state entity, it would have less influence. The study used a mixed socio-legal method to measure the variables and their relationships. The primary data used in observing the relationships among the variables emanated from historical and archival materials reviewed. Existing interviews and historical materials provided access to participants' perceptions in the early evolution of the norm, many of whom are no longer available to participate in a fresh interview. Also, new elite interviews provided further primary data of participants' perceptions of cross-border insolvency during the study period. In addition to the primary data, the research reviewed secondary data from books, journal articles and internet research. The data elicited analyses and conclusions on the variables and their relationships as presented in Chapter 6. The following section identifies the key operational terms or variables for this research.

2.10 **Definition of Key Concepts**

Access: standing to pursue legal remedies in a state.

Accountability: how a regime is controlled by those it serves.

Administration: means the UNCITRAL Working Group V Secretariat and staff.

Altruistic: values, causes and motivations not driven by self-interest but by empathy and ideation.

Cross-border Insolvency: inability to meet debt obligation, including proceedings in different states for liquidation, restructuring or discharge of debts. The term is limited to corporate insolvency and is used interchangeably with bankruptcy. Also, such insolvency must involve liability or assets located in more than one state.

De-globalization: means the relocation of law from international to the domestic forum and de-integration of the world economy through tariff barriers and impediments on capital flow.

Delegates: means the official state representatives of members with voting rights at UNCITRAL Working Group V members.

Frustration: causing annoyance or upset because of inability to change or achieve something.

Globalization: means the process of increasing integration of the world economy with the primary objective of the breakdown of impediments that clog trade and capital flows among countries relying on four forces for development, that is, migration of labour; international trade and rapid movement of capital; telecommunication and integration of financial markets.[396]

[396] "DHL Global Connectedness Index 2018: The State of Globalization in a Fragile World" S A Altman, P Ghemawat & Philip Bastian, (2018); Contractor, *supra* note 175; Saval, *supra* note 175.

Global Governance: means international norm or rulemaking involving states, intergovernmental institutions and private actors in agenda setting, lobbying and rulemaking.

Hardship: adversity, or something difficult or unpleasant that must be endured or overcome.

Harmonization: the process by which diverse elements are combined or adapted to each other to form a coherent whole while retaining their individuality and implies creating a relationship of accord or consonance.[397] After an extensive foray into the etymology of the word harmonization, Martin Boodman, a Canadian legal scholar in defining the term, asserts that harmonization of law arises only in the context of comparative law and significantly, in conjunction with inter-jurisdictional private transactions to facilitate cross-border transactions.[398] He argues that harmonization is redundant in any other legal context being superfluous in any particular legal system and subsumed in its internal consistency.[399] However, Edgar Bodenheimer discusses that even within domestic systems, doctrine, such as advanced directives or scholarly work by academic writers, has a stamp of creativity that can render it a source of unification or harmonization.[400]

Impact: measurable indexes of change: economic, social, or political.

Influence: affecting the character, development, or behaviour without exerting force or direct exercise of command.

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[397] Boodman, *supra* note 117 at 702.

[398] *Ibid* at 702–703.

[399] *Ibid* at 703.

[400] Edgar Bodenheimer, "Doctrine as a Source of the International Unification of Law" (1986) 34 Am J Comp Supp 67.

Intergovernmental or Multilateral Organizations: are the highly institutionalized international state-determined entities that possess actor quality.[401]

Interest: presumes that states, non-state entities and Multinational Enterprise Groups ("MEGs") are rational unitary actors and act in their self or geopolitical interest using norms and law as tools to enhance their power.[402]

Justification: the explanation of the source of legitimacy of a regime.

Law or Rule: is the required and compelled standard of behavioural compliance.

Legitimacy: is the perception that authority to act is appropriately obtained and vested in the international organization enabling its effectiveness through compliance by those to whom its non-self-enforcing rules apply.

Modified Universalism: state courts should cooperate, to the maximum extent possible, with the laws of the jurisdiction of the main bankruptcy proceeding, except where the domestic jurisdiction has a compelling reason to apply its domestic laws.[403]

Motivation: means what causes (intrinsic and extrinsic causes) an actor to pursue a cause, repeat a behaviour or follow a direction.

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[401] Pattberg, *supra* note 87 at 50.

[402] Hathaway, *supra* note 149; Edward Hallett Carr, *The Twenty Years' Crisis: 1919-1939*, 2nd ed (Macmillan, 1946); Hans J Morgenthau, *Politics Among Nations*, 3rd ed (Knopf, 1966); Hans J Morgenthau, "Positivism, Functionalism, and International Law" (1940) 34 Am J Intl L 260.

[403] *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 Privy Council Appeal No 0040 of 2014

Multinational Enterprise Groups (MEGs) or (MNEs): defined by Mevorach as two or more commercial entities located in different states but controlled or coordinated by contract and ownership.[404]

Non-Governmental Organizations ("NGOs"): are non-state, civil society organizations, usually non-profit, involved in issue-specific transnational rule systems.[405]

Non-state entities: means non-members of the United Nations who exercise power not based on sovereign power.

Norm: means socially constructed and shared standard of appropriate behaviour for actors with a given identity[406] or a rule of conduct based on interaction amongst states, including the fairness or otherwise of those rules.[407]

Observers: means accredited Non-Governmental Organizations (NGO), non-state entity and non-member state representatives at UNCITRAL or working groups possessing no voting rights.

Output: reports, guidelines, research, conferences, colloquium, regulations, certification, etcetera of private or public governance institutions.

Outcome: change in behaviour of those targeted by private or public governance institutions, for example, by adopting Model Law, compliance or other forms of acceptance.

Persuasion: the action or fact of getting someone to do or believe something or a set of beliefs.

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[404] I Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press, 2009) at 31.

[405] Pattberg, *supra* note 87 at 3.

[406] Finnemore & Sikkink, *supra* note 7.

[407] Hathaway, *supra* note 149 at 481–483.

Power: means authority, formal or informal, to allocate resources or make decisions.

Politics: means the process of acquisition of power.

Private Governance: a form of socio-political steering, in which private actors are directly involved in regulating- in the form of standards or more general normative guidance- the behaviour of a distinct group of transnational actors, in most cases corporations and other business actors, but also states.[408]

Private Governance Institutions: means private entities who can constrain transnational actors' behaviour through rules and standards.

Protracted: meaning lasting longer than usual or expected.

Participation: means involvement with UNCITRAL Working Group V proceedings, playing a part in, or being associated with those proceedings.

Reciprocity: the practice among states of exchange of mutual benefit, especially privileges granted by one state or organization to another, such as recognizing the validity of foreign judicial orders.

Recognition: acknowledging the existence, validity, or legality of foreign orders and judgments and in the context of cross-border insolvency with or without the requirement for reciprocity.

Regime: a set of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.[409]

Shape: The form, fashion, character, or organization something takes.

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[408] Pattberg, *supra* note 87 at 14.

[409] Krasner, *supra* note 165.

State: means members of the United Nations.

State actors: those who exercise state sovereign powers, whether as a unitary or disaggregated unit.

Sovereignty: means the exclusive authority and power of a state to govern and make law within a given territory.

Socialization: means the process of persuading state actors to adhere to a norm.

Territorialism: means states exercising jurisdiction over enterprises and individuals established within their territory and dealing with assets and liabilities within the state's territory.

Universalism: state courts can exercise jurisdiction over the assets of an insolvent wherever located.

Uncertainty ranges from lack of certainty to an almost complete lack of conviction or knowledge, especially about an outcome or result.

2.11 **Subject and Plan of the Research**

This study's subjects are INSOL, UNCITRAL Commission and its WGV, IBA Committee J, state delegates, observers, and secretariat staff of WGV, insolvency practitioners, and similar professional associations involved or interested in cross-border insolvency during the study period. The variables to be tested on these subjects are legal uncertainty and hardship and the relationship with motivation to organize, coordinate and cooperate in cross-border insolvency. Also, how those influenced other variables such as output, outcome, impact, knowledge, interest and resources in the international lawmaking process of UNCITRAL WGV during the study period. However, to prevent a lurking variable capable of distorting the data, we will also consider IBA

Committee J and its influence on WGV on insolvency because scaling up and other active non-state participants at UNCITRAL may affect the outcome of the research.[410]

The research acquired primary data using the legal history method from the records and archives of UNCITRAL, INSOL International and other institutions. Other historical sources include books, existing interviews, newspaper publications, public records and the internet. Field research at UNCITRAL Secretariat in Vienna conducted remotely gave access to additional data from UNCITRAL WGV that was challenging to access online. INSOL's David Burdette announced that a publicly accessible archive would be made available to researchers and the public.[411] The field research's form and nature at UNCITRAL were affected by the COVID-19 pandemic [paragraph 2.3]. A preliminary interview visit to INSOL did not yield additional documents outside those publicly available.[412]

All the materials we identified as relevant to the study were accessible either on UN or UNCITRAL publicly accessible sites, documents and yearbooks or published as documents in reputable journals. The researcher accessed INSOL publications, but the absence of the private records of the executive's early meetings deprived the research of metrics for assessing the other available materials as to how the organization functioned in the early days. However, the absence of INSOL early records did not affect the study because INSOL had the wisdom of recording and

[410] Babbie, *supra* note 353; Brody Sandel & Adam B Smith, "Scale as a lurking factor: incorporating scale-dependence in experimental ecology" (2009) Forum (Genova) 1284–1291 arguing that scale is a 'lurking' variable: one which influences the relationship between two or more variables that are not usually understood to be scale-dependent and suggesting explicit consideration in ecology research ; Brian L Joiner, "Lurking Variables: Some Examples" (1981) 35:4 Am Stat 227–233.

[411] He made the announcement at INSOL World Bank African Round Table on Insolvency in Maputo Mozambique in October 2018

[412] The researcher visited INSOL offices in London on September 12, 2019 for preliminary interview, but the meeting did not yield access to INSOL unpublished archives. Respondents indicated that early records were kept personally by executive members because at the early stages the structures for central retention of data had not been established between formation in 1982 and 1997. However, since other secondary data exists on the early period of INSOL this did not affect the research.

recalling the events in its silver jubilee celebration.[413] In addition, the elite interview captured facts such as emotions and values not found in the historical data. Chapters Three to Five of this dissertation presented the primary data, which, in turn, formed the basis for the contextual reconstruction of the three stages of the evolution of the norm of cooperation and coordination.

The literature review captured the UNCITRAL work method's debate and its role as the site for norm modelling [Chapter One paragraphs 1.10 to 1.17]. International insolvency has been grappling with a solution for regulating cross-border insolvency, and some have described it as insoluble.[414] UNCITRAL exists at the intersection between global public governance and private institutions in global governance. The research explored the role of INSOL in the emergence of the norm of cooperation and coordination in cross-border insolvency proceedings and its cascade to a global norm, including the micro factors that enabled it to play that role in shaping the Model Law. The literature review hopefully showed how this research fits into the debate. Contextual reconstruction helped understand the historical context for private institutions' role in global norm-making and why INSOL as norm entrepreneur influenced and shaped the Model Law. The research conclusion considers the extent of application of the norm life cycle theory in explaining the role of INSOL in global insolvency norm making, including any diversion from the approach indicated by the data analyzed.

2.12 **Research Instrument**

1.1 *Qualitative Interviewing*

[413] Adamson, *supra* note 373; Jenny Clift, "A view from the other side" (2007) INSOL World Silver Jubil Ed 58–59; Neil Cooper, "A Tale of Two Organisations INSOL International and United Nations Commission on Trade Law" (2007) INSOL World Silver Jubil Ed 56–57; "Chronology of INSOL International" (2007) 36 INSOL World Silver Jubil Ed; David Graham QC, "The Cross-Border Scene: Pre-INSOL" (2007) INSOL World Silver Jubil Ed 10–12; Richard Gitlin, "The History of Group of Thirty-Six" (2007) INSOL World Silver Jubil Ed 52; Ron Harmer, "Up and Over Down Under- The Australian Insolvency Law Reform Experience" INSOL World Silver Jubil Ed 36.

[414] Donna McKenzie, "International Solutions to International Insolvency: An Insoluble Problem" (1997) 26:3 U Balt Rev 15.

Qualitative data could capture participants' perspectives, emotions, and values in the making and shaping of the Model Law. The collection of qualitative data was by way of an elite interview. The interview approach was structured or semi-structured interviews.

1. *Selecting Interviewees*

Sample selection was from insolvency practitioners related to this study's subjects [paragraph 2.8]. Because of the somewhat specialized nature of the inquiry, a randomized selection of interviewees was not feasible. The researcher attended INSOL/World Bank African Round Table on Insolvency in Maputo, Mozambique, between 25th and 26th October 2018 and met with INSOL and UNCITRAL WGV officials, insolvency judges from Europe, and international insolvency practitioners. They provided valuable pointers for archives, materials, and interview candidates.

On March 27, 2019, the researcher met with two potential elite interview subjects at the School of Law, St John's University, New York, and conducted a preliminary interview to proceed with the research and obtain historical materials. The researcher also attended INSOL Annual Conference in Singapore between the 1st and 4th April 2019 and met with other potential subjects of the elite interview and long-standing INSOL officials and writers on the subject matter.[415] Finally, the researcher met one of the research subjects at the International Insolvency Institute ("III") annual conference in Barcelona, Spain, in June 2019 and conducted a preliminary interview.

They all responded positively to the request for suggestions on interview subjects and directed the researcher to a list of about fifteen (15) potential interview candidates. Many of those on the list are retired UNCITRAL officials, previous INSOL officials, academics, delegates, observers at WGV, insolvency practitioners, scholars and IBA members. Apart from the potential interviewees suggested by others, desktop research also disclosed the names of interview

[415] Neil Cooper & Rebecca E Jarvis, *Recognition and Enforcement of Cross-Border Insolvency - A Guide to International Practice* (Chichester: John Wiley & Sons Ltd, 1996) publishing the original study of thirty (30) countries on which the Harmer/Flaschen report was based. Evan D Flashen & Ron Harmer, "Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies: Expert Committee's Report on Cross-Border Insolvency Access and Recognition March 1995" (1996) 5:2 Int Insolv Rev 139–161 The Harmer/Flaschen report was graciously published with editorial comment in the International Insolvency Review.

subjects from their role in the practice of cross-border insolvency before the formation of INSOL or in the development of cooperation and coordination models and participation in UNCITRAL and WGV work process. As a result, the desktop research generated an additional list of ten (10) potential interview candidates to make a twenty-five (25) total population for elite interviews.

An American cross-border insolvency practitioner and active member of INSOL sent the researcher a copy of the INSOL World Silver Jubilee edition, an invaluable source of primary data of existing interviews. In addition, the researcher received the monograph of Jenny Clift and Neil Cooper on 20 years of INSOL and UNCITRAL Collaboration as a courtesy from a passionate supporter of this study.[416]

A challenge with narrative research is locating interview subjects. However, the goodwill of UNCITRAL, INSOL, various professors and professional colleagues assisted the researcher in finding interview subjects. Unfortunately, time and age were constraining and conspiring factors against elite interviews. As a result, many potential research subjects passed on during the study. Professor Ray Warner of the Faculty of Law at St John's University, New York, graciously opened the floodgate of access to the research subjects and interview participants. He provided the researcher with the opportunity of a global law fellowship, which placed the researcher in the American Bankruptcy Institute class on cross-border insolvency facilitated by top insolvency practitioners and judicial officers.

The criteria of using the IBA Committee J membership between 1982 and 1997 for selecting one subject for the elite interview and ensuring different points of view also improved the measurement's validity and reliability and prevented any lurking variables [see paragraph 2.11 above]. A preliminary interview discussion with an interview subject, who eventually participated in the elite interview, disclosed that he represented the IBA at UNCITRAL during the study period.[417]

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[416] *INSOL International and UNCITRAL: Celebrating 20 years of collaboration* (London: INSOL International, 2014).

[417] Preliminary interview held at School of Law St John's University Queens New York on March 27, 2019.

The population consisted of the list developed following initial research and preliminary interviews of about twenty-five (25) subjects who met the criteria of involvement with cross-border insolvency and INSOL, UNCITRAL and IBA between 1982 and 1997. The population was also the sample size. Six (6) subjects participated in the interview, indicating a twenty-four percent (24%) sample size response.

2. *Sampling Technique*

Besides the limitation of logic rather than the statistical probability of elite interviews mentioned by Luker, Berry notes other constraints such as poorly constructed questions and the interviewer's skill. Other limitations of elite interviews are validity issues such as appropriateness of the measuring instrument, the sampling frame and reliability. In this case, since the population set is small, all population members were selected and invited to participate, thereby giving an equal chance of being part of the sample. Random selection is beneficial for large population sampling and not for a small population set of 25 for this research, where matching is preferred. In addition, the researcher made an effort to contact all eligible members of the population, so there was no sampling interval.

In the end, the elite interviews, in line with the caution of Rubin and Rubin, characterized the different viewpoints it wanted to measure. The first was INSOL leadership; the second was those of the norm leader, and the third was those of the alternate norm entrepreneur, the IBA. Others were the perception of cross-border insolvency practitioners who participated in UNCITRAL Congress, Colloquia, WGV sessions between 1982 and 1997. The interview criteria and Elite Interview Plan capture these elements.

Since the sampling technique was by elite interview, the plan was to reach the entire population for a response. The researcher sent emails soliciting an interview to the twenty-five (25) selected subjects, and four (4) responded and completed the elite interview process. The researcher interviewed two (2) subjects during preliminary interviews held at conferences between 2018 and 2019, making a total of six (6) respondents. Other responses suffered interview mortality resulting in discontinuance because the respondents did not complete the process. One (1) respondent to the preliminary interview declined participation in the elite interview though he agreed that the research could utilize the data he gave during the preliminary interview. Another

preliminary interview respondent in Barcelona consented to the use of his short but significant response. The Final Coded Sample Directory of the sample population is in Appendix A.[418]

3. *Instrumentation: Interview*

The interview questions' design elicited respondents' perceptions of the phenomenon, the research subject. Therefore, the inferences and analysis from the interviews are based on the following assumptions.

1. The respondents informed consent and willingness to respond to the questions to the best of their ability.
2. The information supplied in the interviews is true and unbiased.

4. *Validity of Instrumentation*

The elite interview plan was subjected to content validation by the Project Supervisor and the Ethics Approval Board and approved as valid for data collection.

5. *Reliability of Instrumentation*

To ensure that the instrument was error-free, those interviewed were only individuals involved in cross-border insolvency practice between 1982 and 1997. The key questions posed to the respondents tested the research question and thesis statements and were asked more than once in different forms during the interview.

6. *Procedure for Data Collection*

There were two stages of the interview. The first stage was the preliminary interviews between October 2018 and June 2019 in Maputo, New York, Singapore and Barcelona. Over ten (10) respondents participated in the preliminary interview. The preliminary interview helped sharpen the research question and focus. Therefore, the data collected during the preliminary

[418] For analysis of the data from the Elite Interview see paragraph 6.2 below. Also Appendix B is the summary of elite interview respondents.

interview do not form part of the following data presentation and analysis, except where they corroborate the data from the elite interview and are utilized in the contextual analysis and reconstruction, as were facts derived from other sources. Two (2) of the respondents to the preliminary interview also participated in the elite interview, and two agreed that the researcher utilized their preliminary interview data.

The second stage of elite interviews was conducted face to face [One (1)], via telephone [One (1)], via Skype [One (1)] and Zoom and telephone [One (1)]. Four (4) respondents from a population and sample size of twenty (25) for the elite interview made 16% response to the elite interviews. The response was considered reasonable, given the sample size. The four (4) respondents include the two who participated in the preliminary interview. Two (2) other respondents to the preliminary interview provided valuable primary data on the research subject. The combined responses from both the elite and preliminary interviews were six (6) responses out of the twenty (25) population, making a total response of 24%.

The response of the population/sample of 6 provided a sampling ratio of 24%. It is trite that not all sample members, in this case, the same as the population, would respond or participate in elite interviews or surveys. Babbie argues that response rates have been dropping over time for all surveys, particularly mail surveys.[419] For instance, telephone survey rates dropped from 72 to 60 percent between 1979 and 1996 and the General Social Survey (GSS) using personal survey experienced response rates of between 73.5 and 82.4 percent between 1975 and 1998. It dropped to 70 between 2000 and 2002.[420] However, Luker notes that survey research is different from social science research, such as elite interviews.[421] Survey research is expensive, so the questions, subject and respondents have to be exact. Perception studies, on the other hand, are complex and more flexible.

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[419] Babbie, *supra* note 353 at 273.

[420] *Ibid* referring to these statistics.

[421] Luker, *supra* note 357 at 42.

The reasons for the 24% response rate of the elite interview for the population sample size of 25 are the refusal to participate and the inability to contact respondents. Some of the reasons include retirement from international institutions or universities where they worked and relocation abroad without a forwarding address or a forwarding address, email or telephone, and lack of response upon contact despite several efforts by the researcher and research assistant. In addition, desk research indicated that many respondents had passed or were chronically ill during the research period. By the lower rate of responses compared with the GSS response, the research may suffer from limitations on generalization from the data of those that responded. However, as pointed out earlier, GSS survey research is canonical science and different from social science research based on logical probability, not a statistical probability. Also, this research's sampling frame and operationalization led to logical generalization, thereby eliminating the researcher's chances of conscious or unconscious bias affecting the elite interviews. This research is interested in not the distribution of a population across categories as in classical science but analyzing the categories involved.[422] Also, the elite interview is part of a research triangle. The other pillars of the triangle, existing interviews and historical data, complete the research triangulation, improving the probability that the generalizations from the data reflect the perceptions of the population sampled.

Section C – Research Impact

2.13 **Research Impact**

While there is some academic work on the role of multilateral institutions like UNCITRAL and the World Bank in global norm-making in insolvency laws, there is a paucity of research on private institutions' contribution. Again, much academic work articulates private institutions' role and influence in global public governance and private global governance in areas such as human rights policy, environment, internet, and accounting standards but not in insolvency. This research seeks to fill the gaping interstice.

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[422] *Ibid* at 48.

The life cycle approach will enable us to understand the origin of the norm that INSOL pursued at the UNCITRAL normative modelling site leading to the UNCITRAL output of the Model Law. The macro and micro factors that led to the successful informal lawmaking relationship between INSOL and UNCITRAL provide lessons for developing global norm-making principles. This research will better determine how non-state entities shape and influence global norm-making by intergovernmental, multilateral state institutions.

The outcome of this study would form the basis to query both the UNCITRAL work method and the norm life cycle theory. First, the study will determine whether the norm life cycle theory is capable of general application in areas of international commercial law outside its narrow confines of international human rights and policy. Second, given current knowledge of the broad spectrum of private global governance, the study will consider whether INSOL blazed the early trail of private participation in global governance.

2.14 **Expected Research Conclusion and Application**

According to the Jomati Report, since 1970, cross-border investments have increased tremendously, driven by global demand for natural resources and retail business expansion.[423] It follows that the insolvency of a company that has operations across borders will affect creditors in other jurisdictions and involve insolvency laws of those other jurisdictions. In addition, the mobility of individuals and their assets has reached lightening proportions with improvement in transportation and Internet, Communication and Technology ("ICT").[424] Besides, multinational companies' structure has substantially changed for several reasons ranging from regulatory to a business imperative from the single entity operating cross border to complex multinational enterprise groups ("MEGs") with various integration levels.[425]

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[423] Jomati Consultants LLP, *After the Golden Age: The New Legal Era* (Jomati Consultants LLP, 2012).

[424] Altman, Ghemawat & Bastian, *supra* note 396; Contractor, *supra* note 175; Joseph E Stiglitz, *Making Globalization Work* (London New York: W W Norton & Company, 2006).

[425] Mevorach, *supra* note 404.

The Model Law deals with legal issues arising from cross-border insolvency and the inadequacy of private international law's standard rules. It enables cross-border insolvency to overcome the conflict of norms previously prevalent in bankruptcy laws, with different states seeking to project their norm outside their territorial jurisdiction. Adopting the INSOL inspired norm of cooperation and coordination among state courts in insolvency proceedings avoids potential conflicts and channels attention to collaboration without the need for forced harmonization of laws of different states. Although the Model Law's adoption has not resolved all issues associated with cross-border insolvency, it may corroborate the norm life cycle theory. In addition, the study may give insight into how effective global norms can be developed and gain shared acceptance.

Martha Louise Minow, an American Professor of Law, developed a field guide for researchers.[426] Using the Minow field guide, this research emphasizes two legal scholarship methods: policy analysis and study of the legal institutions, systems, and actors in developing cross-border insolvency law. Policy analysis will enable the presentation of the relationship between INSOL and UNCITRAL and the intersection between multilateral law-making and private governance in international relations. The study explores and explains how future global regulation can gain shared acceptance by states and private global governance entities in the face of the recent retreat to protectionism away from globalization.[427] As Minow pointed out, research offers an opportunity for historical, anthropological, sociological or economic analysis of legal actors or institutions' behaviour, often exposing complexity, gaps between theories and practice, dynamics, and layers of meaning and effects of legal ideas and phenomenon.[428]

The research advocates for law reform requiring a rethinking of the framework for global regulation to be more inclusive of non-state entities without risking the sovereign preserve of state entities allowing both the private and public sectors significant role in norm definition recognizing norm dynamism in the life cycle of global norms as norms transform into rules and laws. In this

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[426] Martha Minow, "Archetypal Legal Scholarship: A Field Guide Journal of Legal Education, Volume 63, Number i (August 2013)" (2013) 63:Number 1 J Leg Educ 65–69 note 116 above. *Ibid* note 116 above.

[427] Contractor, *supra* note 175.

[428] Ibid

regard, the study examines that data to determine how the three stages of the norm life cycle interact. It also addresses the power imbalance among states and how this affects norm-making at emergence and cascade stages and norm diffusion at the internalization stage. Finally, it considers whether the life cycle approach adequately explains the power imbalance among states.

The motivation for choosing this research area is to add to the body of knowledge that collectively will bring greater certainty to cross-border insolvency law and global norm making. In addition, the research outcome will assist other non-state entities in developing and pursuing the cascade of their norms to regional and global norms using the template of INSOL and understanding the norm life cycle approach and its limitations.

Hopefully, this research could prompt INSOL International and UNCITRAL to refocus toward a more productive engagement of low GDP states in norm definition and pursue private-driven solutions to the current challenges of cross-border insolvency. The output of this research will be helpful for application by both institutions. The research design ensures constant engagement with UNCITRAL and INSOL but with adequate independence by the researcher, a member of INSOL who has attended several UNCITRAL Working Group V sessions as an observer. The independence of the research maintains the credibility of the work.

The study will contribute to our understanding of the evolution of norms and principles and the intersection between substantive law and the role of non-state actors like INSOL in shaping public international law and domestic law in cross-border insolvency, an essential aspect of international commercial law. The study also observes the role of private institutions in developing transnational insolvency regulation using the norm life cycle approach to explain findings from primary data and historical and archival materials.

By understanding the forces and processes that shape cross-border insolvency, we can anticipate future regulation and encourage the generation of alternative approaches to those outcomes. However, we underestimate non-state actors' role in norm emergence, cascade to global norms, and diffusion, and therefore undervalue their relevance in global lawmaking. The study seeks to accurately locate the non-state entity as a significant factor in global public governance. It draws generalizations based on observation of the formation and growth of INSOL

and its role in the UNCITRAL work process leading to the adoption and diffusion of the Model Law.

The study’s theses postulate that non-state entities' ability to organize, provide leadership and resources directly relates to their ability to influence global lawmaking by generating norms, cascading them to global rules and ensuring their internalization as states' domestic norm. Also, knowledge and socialization skills enabled non-state entities to persuade states to become norm leaders and followers. Finally, non-state entities participating in state-based multilateral agencies' lawmaking process allow such agencies to achieve legitimacy and be accountable given the limited scope for justification of multilateral agencies under international law.

3. Chapter Three – INSOL as Norm Entrepreneur in Norm Emergence

Section A – Why INSOL became the Norm Entrepreneur

3.1 Introduction

When UNCITRAL decided to hold a Congress in New York in May 1992 on the topic of "Uniform Commercial Law in the Twenty-first Century," it did not consult INSOL, which professes membership with expertise in corporate turnaround and insolvency. Instead, it engaged with the IBA, whose Carlos Zeyen delivered the keynote address at the event, observing the lack of harmonization in bankruptcy and insolvency proceedings in general.[429] The UNCITRAL Congress triggered consideration of harmonization and modernization of insolvency laws with the IBA proposal for a Model International Insolvency Cooperation Act (MIICA) as its linchpin. The MIICA modelled the *US Bankruptcy Code* s.304-306 and universalism and reciprocity principles.[430] Universalism in insolvency is the concept that state courts can exercise jurisdiction over the assets of an insolvent wherever located in the world. Recognition is the practice of states extending validity within their territory to the acts of another sovereign, usually on a reciprocal basis. Universalism pitches against the opposing concept of territorialism that sovereign acts are limited to the territory of the sovereign. The tension between universalism and territorialism provided the background for UNCITRAL and INSOL involvement in global norm-making in cross-border insolvency.[431]

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[429] UNCITRAL Commission Secretariat, *Uniform Commercial Law in the Twenty-First Century - Proceedings of the Congress of the United Nations Commission on International Trade Law New York, 18-22 May 1992* (New York: United Nations) at 153–155.

[430] For details on US Bankruptcy Code s.304 see Krause, Janovsky & Lebowitz, *supra* note 74; For details on MIICA and proposal to work with IBA, see UNCITRAL Commission Secretariat, *supra* note 16.

[431] The next section of this chapter discusses the spectrum between territorialism and universalism.

According to one interview respondent, professional associations such as INSOL and the IBA, like companies, are always looking for businesses to engage them.[432] The same logic applies to multilateral institutions.[433] Thus, UNCITRAL engagement with insolvency was, in part, the outcome of its search for an area of work.[434] INSOL became more actively involved with engaging and collaborating with UNCITRAL on the insolvency agenda immediately after the 1992 UNCITRAL Congress.[435] INSOL's limited objective was an alternative norm of non-reciprocal recognition, access, relief, cooperation, and coordination among state courts. INSOL's ideas gained sudden prominence and, by 1997, were adopted as the Model Law.[436] The output of UNCITRAL also shifted from universal treaty-making anticipated under MIICA to the model law approach of a menu of domestic adoption options.

Finnemore and Sikkink argue that one way to recognize a norm when we see one and understand the dynamics of how it came to be shared or agreed upon is by examining the life cycle of the norm.[437] Since the Model Law's approach gained prominence over the IBA's MIICA norm, understanding the actors who changed the narrative would enable a better perception of the dynamics of global norm making and the role of non-state entities in global public governance. Therefore, this chapter examines the role of the INSOL, a non-state entity and federation of insolvency experts, in the emergence of the norm of cooperation and coordination among state courts, which the next chapter show became reflected in the Model Law. A deep dive into INSOL processes and methods explains the generation of the norm and establishes without doubt INSOL as the norm entrepreneur for the Model Law.

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[432] June 17, interview in Barcelona

[433] Block-Lieb & Halliday, *supra* note 92.

[434] *Ibid*

[435] In Chapter Four the process of cascade of INSOL norms to UNCITRAL is discussed in greater details.

[436] UNCITRAL Commission Secretariat, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (UNCITRAL).

[437] Finnemore & Sikkink, *supra* note 7 at 892.

The chapter uses contextual reconstruction to present the data from the formation of INSOL in 1982 to the commencement of norm cascade to the UNCITRAL regime in 1995. It reviews the available historical and empirical data to examine and test whether it corroborates the first stage of the norm life cycle and determines the "origin of invention" of the norm of cooperation and coordination among insolvency practitioners in different countries, leading to a tilt to cascade upon shared acceptance. In addition to historical data, the study examined primary data available from the existing, preliminary, and elite interviews and recollections of knowledgeable persons involved with cross-border insolvency or INSOL and UNCITRAL during the study period.[438]

Finnemore and Sikkink argue that change at each stage of the norm life cycle "is characterized by different actors, motives, and mechanisms of influence."[439] Non-state entities private actors such as INSOL played a more dominant role at the emergence stage. In contrast, the United States and other state actors may have played a significant role at the cascade stage as norm leaders and followers at UNCITRAL and the United Nations. The study shows that INSOL was the norm entrepreneur for limited cooperation and coordination among state courts. On the other hand, the MIICA proposal of the IBA is based on universality and harmonization norms inspired by *US Bankruptcy Code* s.304-306.

One area of divergence between the data considered and the life cycle approach is in the motivation of the norm entrepreneur. Finnemore and Sikkink argue that ideational commitment is the main motivation of the norm entrepreneur, and the norm or ideas they promote may have "no effect on their well-being."[440] However, this study found that though norm promoters' motivation is ideational, their self-interest is also a contributing motivator. The uncertainty of the outcome of managing cross-border insolvency as well as the frustration and hardship experienced by practitioners, debtors and creditors in cross-border insolvency motivated the formation of INSOL

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[438] Elite interviews will enable the key members of the community to recall memory of historical experiences: Woodiwiss, *supra* note 388; Rubin & Rubin, *supra* note 377 The preliminary interview assisted the research design as well as provided valuable recollections by subjects.

[439] Finnemore & Sikkink, *supra* note 7 at 895.

[440] *Ibid* at 898.

as the platform for agitation for new norms and eventual promotion of a limited regulatory intervention based on cooperation and coordination among state courts as the basis of regulation of cross-border insolvency. Before contextual reconstruction of the events relating to the generation of the INSOL norm, it is apt to consider the theoretical tensions in cross-border insolvency norms and their blurring over time.

3.2 Cross-border Insolvency Norms: the blurring

3.2.1 Universalism and Territorialism

Richard Gitlin and Evan Flaschen, both private American legal practitioners, argue that as long as merchants deal with credit, some cannot repay their creditors and become multinational debtors in international transactions.[441] Most states' insolvency laws treat creditors equally subject to priority issues. Still, it is not easy to maintain the same standard across state borders, and a treaty solution is challenging to achieve.[442] Moreover, different states adopt different approaches to insolvency. Some states have laws that are creditor friendly favouring liquidation of the debtor.[443] Other states are debtor-friendly, favouring the rehabilitation of the debtor.[444] Gitlin and Flaschen argue that almost all states favour applying their local laws to foreign creditors and refuse to subject local creditors to foreign jurisdiction creating a dilemma for cooperation in cross-border insolvency.[445]

Theories and doctrines seek to explain or deal with the dilemma of cross-border insolvency. The doctrine that recognizes the state's law where insolvency proceedings

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[441] Richard A Gitlin & Evan D Flashen, "The International Void in the Law of Multinational Bankruptcies" (1987) 42:2 Bus Lawyer 307–325 at 307.

[442] *Ibid* at 308; John D Honsberger, "The Negotiation of a Bankruptcy Treaty" in *Bankruptcy Present Probl Future Perspect* Meredith Memorial Lectures, 1985 (McGill University, Faculty of Law, 1986) cited by Gitlin and Flaschen at p.308 note 3; Nadelmann, *supra* note 19.

[443] UK and most European states before recent reforms under EU.

[444] The US has the leading debtor focus bankruptcy system.

[445] Gitlin & Flashen, *supra* note 441 at 308 and 309; See also, Manfred Balz, "The European Union Convention on Insolvency Proceedings" (1996) 70 AmBanker LJ 485.

commenced as applicable in every other state is called the "universality theory."[446] Gerard McCormack, a Professor of International Business Law, argues that fairness among creditors in different states requires a single bankruptcy, ideally with a universal application where all creditors are entitled to and required to prove their claims.[447] This way, the location of a creditor does not become a disadvantage.[448] There is, however, a distinction between the unity of proceedings and universalism. Universalism is about synchronized collection and distribution, even with separate proceedings in different states.[449]

According to Gitlin and Flaschen, the contrasting "territoriality theory" does not recognize insolvency laws beyond a state's border.[450] Instead, states exercise authority over enterprises established within their territory. Their courts deal with the assets and liabilities of the enterprises within their jurisdiction. This concept is known as territorialism.[451] One of the ardent proponents of territorialism is Lynn M LoPucki, a distinguished Professor of Law. LoPucki and Zumbro argue that applying state law by state courts and the use of protocols could resolve the bankruptcy

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[446] Gitlin & Flashen, *supra* note 441 at 309.

[447] Gerard McCormack, "Universalism in insolvency proceedings and the common law" (Oxford, U.K.) 32:2:325, 2012 Oxf J Leg Stud, online: <www.heinonline.org/HOL/Page?handle=hein.journals/oxfjls32&div=18&start_page=325&collection=journals> at 326.

[448] *Ibid* quoting Lord Hoffman in Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Pic) [2006] UKPC 26, [2007] 1 AC 508 [16]-[17].

[449] *Ibid* at 327; J L Westbrook, "Multinational Enterprises in General Default: Chapter 15, ALI Principles, and The EU Insolvency Regulation" (2002) 76 Am Bankr LJ 1, 34 at 10–12.

[450] Gitlin & Flashen, *supra* note 441 at 309.

[451] Ibid pp. 71-74; Jay Lawrence Westbrook, "Multinational Financial Distress: The Last Hurrah of Territorialism" (2006) 41 Tex Int Law J 321 at 328–329; E S Adams & J Fincke, "Coordinating cross-border bankruptcy: how territorialism saves universalism" (New York) 15:1:43-[88], winter 2008/2009 Columbia J Eur Law; E J Janger, "Virtual territoriality" (New York) 48:3:401-441, 2010 Columbia J Transnatl Law.

challenges of multinational groups.[452] Gitlin and Flaschen contend that most states' policy that their insolvency laws apply universally while foreign insolvency laws apply territorially (no extraterritorial jurisdiction), lies at the very heart of the difficulty in attaining international bankruptcy cooperation.[453]

A company, business entity, or multinational enterprise group's insolvency that touches or crosses state boundaries, generates legal tensions. According to Irit Mevorach, a Professor of International Commercial Law, cross-border insolvency of multinational enterprise groups engages at least four legal pressures.[454] These are entity law, enterprise law, territorialism and universalism. Entity law is the domestic law under which the corporate legal fiction is established and sustained.[455] Enterprise law refers to the different national approaches to corporate entity regulation following the growth of enterprise groups who exploit the gap between commercial reality and the various legal infrastructure.[456] Mevorach further asserts that access to state courts for judicial relief in insolvency depends on the jurisdiction, which depends on business enterprises' entity principle.[457]

There are advantages and criticism of universalism and territorialism, respectively. McCormack argues that universalism reduces cost because of single rather than multiple proceedings and increases the ability to deal with the enterprise as a single going concern but

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[452] L M LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy" (2000) 98 Mich Law Rev 2216; L M LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" (1999) 84 Cornell Rev 696, 750; L M LoPucki, "Universalism Unravels" (2005) 79 Am Bankruptcy Law J 143; L M LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (University of Michigan Press, 2005); Paul H Zumbro, "Cross-border Insolvency and International Protocols - an Imperfect but Effective Tool" (2010) 11:2 Bus Law Int 157–169.

[453] Gitlin & Flashen, *supra* note 441 at 309 It is to be noted that they were writing in 1987 long before UNCITRAL engaged in the cross-border insolvency project with the UNCITRAL Congress in New York in 1992.

[454] Mevorach, *supra* note 404.

[455] Ibid at p.38

[456] Ibid at pp.32 & 48

[457] Ibid at p.59

retains grey areas around eligibility and priority.[458] Frederick Tung, a Professor of Law, contends that universalism exposes foreign creditors to proceedings that may be unfamiliar, language barriers, insufficiency or absence of notice and logistical nightmares compared with local proceedings.[459] On the other hand, territorialism could breed national chauvinism and discrimination against foreign creditors.[460] Jay Westbrook, a distinguished Professor of Law and a proponent of universalism, describes territorialism as the "grab rule" by which a state court grabs a company's assets to settle local creditors' claims.[461]

Given the tensions, dilemmas and conflicts generated by the application of universalism and territorialism, hardly any state adheres strictly to either of those concepts.[462] Between both extremes are other ideas like modified universalism, cooperative territorialism, universal proceduralism[463] and contractualism.[464] There is a debate about whether the UNCITRAL Model Law and EU Insolvency Regulation adopt universalism, cooperative territorialism or modified universalism. LoPucki argues that the Model Law seeks to impose universalism on state courts.[465] At the same time, McCormack describes the EU Insolvency Regulation as an "essentially territorial system with universalist pretensions" because of the many exceptions to applying a uniform rule to realize and rank debts in the main proceeding.[466] Westbrook argues that what is

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[458] McCormack, *supra* note 447 at 328.

[459] F Tung, "Is International Bankruptcy Possible?" (2001) 23 Mich J Int Law 31. *Ibid*.

[460] McCormack, *supra* note 447 at 328.

[461] Westbrook, *supra* note 451 at 322.

[462] McCormack, *supra* note 447 for detailed discussion of the application of the concepts in the US, UK and EU law as well as under the UNCITRAL Model Law on Cross-Border Insolvency.

[463] J L Westbrook, "A comment on universal proceduralism" (2010) 48:3 Columbia J Transnatl Law 503–518. *Ibid*.

[464] Look Chan Ho, "A Matter of Contractual and Trust Subordination" (2004) JIBLR 494. *Ibid*.

[465] LoPucki, *supra* note 452.

[466] McCormack, *supra* note 447 at 339.

needed are constructive ideas for advancing toward universalism, "not an endless repetition of the difficulties in the way."[467]

3.2.2 ***Public and Private International Law***

Gitlin and Flaschen offered three means to achieve international bankruptcy cooperation: treaty or convention, multinational cooperation or bilateral cooperation.[468] They, however, argued that a convention was not feasible at the time they wrote.[469] They reasoned that bankruptcy was a matter of private international law, and the state had no direct interest in the extraterritorial effect of bankruptcy on the general body of creditors.[470] They relied on Honsberger's contention that states do not negotiate treaties unless government (public) interest matters.[471] The corollary of this argument is that bankruptcy is a question of status and, therefore, an issue of personal law regulated by domicile or domestic law.[472]

The distinction between public and private interest as a motivation for negotiating treaties is not persuasive for two reasons. First, Nadelman chronicled how the British Empire's interest directed the UK not to participate in the Bankruptcy Convention's negotiation promoted by The Hague Conference, thereby showing that bankruptcy was not just a matter of private interest.[473] Second, Gitlin and Flaschen mentioned the irony of the lamentation of Honsberger on the conclusion of treaties by states to protect private interest against double taxation with no treaties

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[467] Westbrook, *supra* note 451 at 337.

[468] Gitlin & Flashen, *supra* note 441 at 322–323.

[469] *Ibid* at 322.

[470] *Ibid* at 310.

[471] *Ibid*; Honsberger, *supra* note 442 at 10.

[472] Nadelmann, *supra* note 19 at 84 quoting commentary of Dr Burgin on draft Convention submitted to ILA; *Bankruptcy and the Liquidation of Companies and the Need of an International Convention*, by Leslie E Burgin, 33 (Stockholm: International Law Association, 1924).

[473] Nadelmann, *supra* note 19 at 85–87.

concluded against concurrent bankruptcy proceedings.[474] In other words, states also conclude treaties to protect private interests.

A better explanation of the anomaly is the absence of norm entrepreneurs to push the case for global norm-making in insolvency at the time. For instance, taxation has established sub-sovereign networks that relate to each other, and there is awareness among unitary state sovereigns of the economic impact of taxation.[475] However, in the bankruptcy area, the officials in many states were private officials who worked based on fees and were not part of the sovereign. In states where bankruptcy officials were state officials, they were part of the court structure and not the executive. They, therefore, had no leverage to establish cross-border networks.

Gitlin and Flaschen recognized the need for norm entrepreneurship when they emphasized the critical role practitioners could play through lobbying to focus various governments' attention on the need for international bankruptcy cooperation.[476] They called on American practitioners to reach out to practitioners in other states to persuade them to adopt a framework for recognition, relief and cooperation similar to the US Bankruptcy Code (1982) *s*.304. In particular, they commended the invitation for US practitioners and organizations to join INSOL International.[477] At the time of their study in 1987, Gitlin and Flaschen did not anticipate UNCITRAL as the site for normative modelling on cross-border insolvency. However, their support for strategic engagement with INSOL was to prove fortuitous.

3.2.3 ***Unilateral, Bilateral, Multilateral Treaty or Model Law***

[474] Gitlin & Flashen, *supra* note 441 at 324 quoting; Honsberger, *supra* note 442 at 46.

[475] "Fiscal federalism network - OECD", online: <https://www.oecd.org/tax/federalism/> an example of transgovernmental tax network. *Ibid* an example of transgovernmental tax network.

[476] The organizations they identified as relevant were the international committees of the American Bar Association (ABA), the American Bankruptcy Institute (ABI) and the National Bankruptcy Conference.

[477] Gitlin & Flashen, *supra* note 441 at 322.

Another debate is on the legal technology to realize the legal framework for international cross-border insolvency regulation. Gitlin and Flaschen exhaustively examined the US attempt at unilateral cooperation by enacting *s*.304 of the US Bankruptcy Code in 1982.[478] They commended the law as a unilateral effort by the US Congress to grant recognition, access and relief to a foreign representative in cross-border insolvency and the first step in international bankruptcy cooperation.[479] However, they noted that it would not help achieve the objective unless other states adopted a similar law.[480]

One school of thought suggests that, perhaps, a treaty would offer a more effective solution to cross-border insolvency regulation. Gregor Baer, an active IBA member, argues that the idea of an insolvency treaty is not new and began in 1894 when The Hague Conference on Private International Law first started work on a Bankruptcy Convention.[481] He argues that an international insolvency convention under United Nations auspices is the most (and perhaps, only) effective means of achieving a competent and reliable regime for coordinated and cooperative international cross-border insolvency regime, particularly for multinational corporate groups. UNCITRAL Working Group V has concluded considering the model law on managing enterprise groups in cross-border insolvency, and the UNCITRAL Model Law on Enterprise Group Insolvency published.[482] The additional output of UNCITRAL on enterprise groups and others areas of bankruptcy is perhaps, an implicit admission that the original Model Law and Part Three of the Legislative Guide are inadequate to address cross-border insolvency. This raises questions

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[478] Gitlin & Flashen, *supra* note 441.

[479] *Ibid* at 322.

[480] *Ibid*.

[481] Gregor Baer, "Towards an International Insolvency Convention: Issues, Options and Feasibility Considerations" (2016) Vol. 17 No.1 Bus Law J p.5. *Ibid*.

[482] UNCITRAL, *UNCITRAL Working Group V (Insolvency Law) Fifth-first session Facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions: Note by the Secretariat A/CN.9/WG.V/WP.146* (United Nations, 2017); UNCITRAL Commission, *UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment* (Vienna: United Nations, 2020).

about why INSOL restricted its initial effort to the Model Law. Another view is that the Model Law approach still left some challenges of cross-border insolvency unaddressed.

Historically, bankruptcy statutes contain norms that may or may not affect behaviour by sanctioning or relieving failure. If the bankrupt is abroad or has assets outside the state's territorial jurisdiction, the state's bankruptcy law could apply beyond the state. In that case, its norms on bankruptcy may come in conflict with those of another state.

Nadelman chronicled the effort at using treaties to manage cross-border insolvency challenges by giving an extraterritorial effect to a bankruptcy declared by a court having jurisdiction under the treaties.[483] He analyzed treaties from medieval times to when he was writing in 1944 and argued that while civil law countries have been successful with treaties, common law countries have not between themselves and between them (common law) and civil law countries.[484] He attributed the common law position to Britain's role as an imperial power that did not want to be bound by a treaty where it otherwise had influence.[485]

There were significant differences in the resolution of jurisdiction, choice of law, relief available, protection of local creditors, and realization of moveable and immovable properties even where there were treaties. Treaties were primarily bilateral, and multilateral treaties were challenging to negotiate and implement.[486] Nevertheless, Nadelmann suggests that bilateral agreements were a way forward, in addition to recommending the setting up of an international agency on international trade law relying on the proposal at that time for the set-up of what became the UN which allowed for the creation of specialized agencies under Proposal 11(2)b.[487]

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[483] Nadelmann, *supra* note 19. *Ibid*.

[484] Ibid

[485] Ibid

[486] Nadelmann, *supra* note 19; see also Honsberger, *supra* note 442 at 10 and 46; quoted by Gitlin & Flashen, *supra* note 441 at 310, 325.

[487] Nadelmann, *supra* note 19 at 93. *Ibid*.

Treaties are challenging to enforce because of the absence of a central enforcement mechanism and inherent voluntariness, but as Hathaway argues, treaties still influence state behaviour.[488] Hathaway contends an interplay exists between a state's decision to commit and comply as they both influence each other, and treaties shape what states do in two ways: legal enforcement and collateral consequences. She argues that the reaction of domestic and transnational actors and other states to state action affects, among other things, foreign investment, aid donation, international trade, internal political support, and political contributions. These reactions, hence, create powerful incentives for states to commit and comply with treaties.[489] While Hathaway's integrated theory of international law seeks to explain why states commit to a convention, it does not explain why states adopt the Model Law approach rather than treaty-making as a means of creation of law intended to have a cross-border effect.

Nadelman correctly identified the complication of a treaty solution. In a world divided into empires, insolvency was a delicate area to achieve consensus and harmonization. In hindsight, Block-Lieb and Halliday have listed various outputs for providing international commercial law ranging from treaties or conventions to model laws and legislative guides.[490] The Model Law approach overcomes the treaty adoption process's complexity because it is non-binding and not based on reciprocity. Since the Model Law is not binding on any state, its operation depends entirely on how it is locally enacted. According to Ian Fletcher, a Professor of International Commercial Law and Queens Counsel, the pragmatic strategy of the Model Law is to "generate a persuasive tidal wave of support for a limited, but functionally important, series of provisions to be incorporated into their national law by as many states as can be induced to do so."[491] Mevorach

[488] Hathaway, *supra* note 149.

[489] Ibid

[490] Block-Lieb & Halliday, *supra* note 64.

[491] Ian Fletcher, "'Better late than never': the UNCITRAL Model Law enters into force in Great Britain" (2006) Volume 19:No. 6 Insolv Intell 86–93.

asserts that for the UNCITRAL Model Law to become practically significant, it should be adopted within national legislation in as many countries as possible.[492]

3.3 Tracking Norm Emergence

In examining how the norms INSOL promoted emerged, the study reviews INSOL's rules, methods, processes, and decisions. However, as Borgen pointed out, norms can be generated and transmitted by an organization's methods and processes rather than by its decisions, rules and regulations.[493] In this connection, the researcher agrees with Borgen that the norm entrepreneur's rules and decisions may not embody a norm. Still, its methods and practices may encourage behaviour from which a norm emerges.

Consequently, the study tracked the "origin of invention" of the Model Law by reviewing existing literature, historical data and interviews, which provided the participant's perceptions of INSOL's norms and how they arose.[494] For example, in a preliminary interview, an official of INSOL indicated that INSOL does not enforce cooperation and coordination among its members but merely provides a platform for communication and exchange between them.[495] On the question of whether there was a formal code requiring cooperation and coordination among INSOL members enforced by a mandatory referral system among members, a respondent retorted, "No, not that I recall. I don't think anyone used the word referral. The concept of referral was not what this was all about. So, I don't think we had a code or referral; it was about building a network so that you could deliver, really."

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[492] Mevorach, *supra* note 404 at 30.

[493] Borgen, *supra* note 86.

[494] The research is ongoing and preliminary interviews have been concluded and formal interviews scheduled. Respondents have consisted of INSOL and IBA officials as well as state delegated at UNCITRAL Working Group V

[495] Interview held on April 1, 2019 in Singapore with INSOL official during INSOL Singapore 2019 Conference.

INSOL members join the organization to deliver better service to their clients and attract more work. INSOL provides the network for those who give out cross-border work to be familiar with those who want that work and reassure each other that they refer work to those who know how to perform the work.[496] A respondent stated that:

> …when building INSOL; relationships need to be built. For example, if I had a case that required me to be involved in multiple countries, which did happen on many occasions, I needed to know the professionals in those countries that I could rely on so that I could be an effective professional. Furthermore, I need to know the laws of those countries so I could do so semi-intelligently. So INSOL, in addition to driving the law and model law, still allowed us to get to know other professionals, not by the concept of referrals but whom you can call on in those other countries that can execute for you in those emergencies, who's knowledgeable about cross-border, you can rely on. So, we got to know each other so we could be more effective if we were representing the courts or our clients, private clients, in getting something done.
>
> So, it was not like a referral service. It was how you build a product with very little law and very little treaties you basically rely on people, and you need to find people. Let's assume you have a case with 50 countries, which we did have a few cases, and I can't remember how many in Maxwell, but there were many countries involved, and in many cases, we had multiple countries involved. So, you have multiple countries, and someone comes to you and says this is going to fall apart because we have an integrated system, and we can't let these parts get liquidated and go out of business—you need to know whom to call so you can build the framework to execute in a country. **The function of INSOL informally was that we all grew together in knowledge and relationships, and that allowed us to represent our clients**.[497] **[Emphasis supplied]**

In other words, INSOL methods and processes generated coordination and cooperation among cross-border insolvency practitioners. These nuances are examined in detail using historical data in other sections of this chapter. At the cascade stage, a respondent actively

[496] Interview held in Toronto with March 26, 2020

[497] Interview of February 13 and 17, 2020

involved as an observer at UNCITRAL WGV but not at the emergence stage was unaware of INSOL's contribution to the emergence of the norm or their motivations.[498] Also, he did not perceive that INSOL had any significant role at the cascade stage. While some respondents gave credit for the norm to INSOL, others thought it was the handiwork of state delegates at UNCITRAL WGV that produced the norm that underlay the Model Law.[499] It is for clearing the doubt of who the norm entrepreneur was that this chapter goes to great length to show through a historical excursion on the documents and archival materials that INSOL was the norm entrepreneur that generated the norm that formed the basis for the UNCITRAL Model Law.

3.4 **Cross-Border Norms in History Pre-Twentieth Century**

Historically bankruptcy statutes contain norms that may or may not affect behaviour by sanctioning or relieving failure [paragraph 1.18 to 1.19 above for detailed history].[500] Bankruptcy laws also affect powerfully property rights, market discipline, and hence economic exchange.[501] Consequently, they affect how contracts are structured.[502] For centuries, as a matter of private norms, bankruptcy laws applied to traders only and were administered by trader courts.[503] The norms applied in the early history of bankruptcy in Europe were private norms among the traders. Most of the norms were creditor friendly and frowned upon debtors who failed to meet their credit obligation and upon whom they visited severe wrath from fellow traders and the state through

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[498] The question of how the norm cascaded is discussed in the next chapter but the interviews from which data was obtained were held at St John's University New York in March and April 2019, INSOL Conference in Singapore April 3, 2019, III Conference in Barcelona on 17th June 2016, Fordham Law School New York February 5, 2020, and via telephone, Skype and Zoom on February 13, 14, and 17 and March 26, 2020.See para 3.7.5 above on the research instrument, C Appendix III and D Appendix IV below.

[499] Interviews at St John's University New York in March and April 2019 and III Conference in Barcelona on 17th June 2016

[500] Sgard, *supra* note 1.

[501] *Ibid*.

[502] *Ibid*.

[503] *Ibid*.

laws and practices that encouraged reliefs like lynching and imprisonment. The historical position in China was not much different as bankruptcy norms favoured creditors and discouraged relief for debtors until the twenty-first century.[504] The United States developed different norms based on its peculiar history of adventure, exploration and exploitation of the new territory on shared values which allowed genuinely failed debtors a second chance.[505] US bankruptcy laws, therefore, reflected a more debtor-friendly norm that allowed for complete discharge and restructuring.[506]

In the 19th century, bankruptcy laws in Europe and the United Kingdom were extended to non-traders and later in the early part of the 20th century to married women.[507] Also, the state took an interest in regulating bankruptcy with officialism. The state became involved with the administration of bankruptcies through state courts and the appointment of official receivers.[508] The requirement for a financial statement by trading companies and the courts' role in bankruptcy made non-state parties like accountants and lawyers more involved with the bankruptcy process.[509] As a result, these non-state parties organized themselves to protect their interest by setting norms for members and creating the platform for bankruptcy regulation to be consistent

[504] Alan C W Tang, "Development of the Practice of Bankruptcy in China" (2007) INSOL World Silver Jubil Ed 20–25; John Lees, "Insolvency Regime of the People's Republic of China" (2007) INSOL World Silver Jubil Ed 81–82; Charles D Booth & William S Richardson, *Japan & China (including Hong Kong): Introduction to the Tools Available for Corporate Rescue & Cross-Border Insolvency, American College of Bankruptcy College of Bankruptcy Course on International Bankruptcy* (American College of Bankruptcy, 2018); S J Arsenault, "The westernization of Chinese bankruptcy: an examination of China's new Corporate Bankruptcy Law through the lens of the UNCITRAL Legislative Guide to Insolvency Law" (Carlisle, Pa.) 27:45-[94], 2008 Penn State Int Law Rev.

[505] Bernstein, *supra* note 322.

[506] *Ibid*.

[507] Fletcher, *supra* note 283.

[508] Lester, *supra* note 301.

[509] *Ibid*.

with their interests.[510] One of the pre-twentieth-century bankruptcy challenges was balancing public and private actors' roles in managing bankruptcies.[511]

The historical development of cross-border insolvency norms differed depending on the state involved. States like the United Kingdom could enforce their norm abroad in new territories.[512] Although civil law states embrace the treaty approach (based on reciprocity) as the basis for cross-border insolvency regulation, the UK common law approach predominates English court jurisdiction.[513] The *Gibbs Rule* of the 19th century elicits a better understanding in this context as most world trade creditors at the height of British colonial dominance of world trade were in England.[514] As a result, the cross-border insolvency norms in the UK dominated common law. Whatever English courts decided had pre-eminence where English law was the governing law, which was the case in most cross-border contracts at that time.

Justice Jabez Henry's decision recognizing the discharge of an English law governed debt when he sat as judge in a foreign colonial court applying Dutch/German law as the applicable law of the contract was, therefore, a significant deviation from the established norm. No wonder Fletcher and Graham credit Jabez Henry as the founding father of the cross-border insolvency modern movement to instil internationalist principles into the study and practice of insolvency law

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[510] *Ibid* at 10 Lester identified two groups that were most influential in insolvency law reform in the Victorian period: the legal profession and the business community, later civil servants joined the list of reformers.

[511] Lester, *supra* note 301; Gaboardi, "The Role of Consent in European Cross-Border Insolvency Proceedings", *supra* note 308 arguing that new EU regulations giving preeminence to consent of creditors and debtors rather than court appointed officials has tiled the balance back in favor of private actors.

[512] Nadelmann, *supra* note 19. *Ibid*.

[513] Nadelmann, *supra* note 19. *Ibid*.

[514] *Gibbs & Sons v Societe Industrielle et Commerciale de Metaux* (1890) 25 Q.B.D 399 at 405-407 held that it was well established that English courts cannot give effect to a foreign law as discharging an English obligation to pay money in England as the proper law of the contract must govern and it is impossible to say that a contract made in one country is to be governed by the laws of another country.

by his courageous decision.[515] Jabez Henry's publication about cross-border insolvency is also the earliest in the field.[516]

The actors in bankruptcy norm emergence before the twentieth century were traders, states, and professional associations. There is a tension between the territoriality approach to cross-border insolvency law limiting bankruptcy orders to state sovereign territory and the universalism or internationalism enabling bankruptcy orders to affect the physical area outside state sovereignty.[517] The motivation of the various actors differed. The traders were eager to facilitate international trade and commerce. However, given the English dominance of global business in the ninetieth century, many traders were comfortable with English law having a universal application, but not vice versa[518]. States were unwilling to allow foreign bankruptcy orders to affect their territory except on a reciprocal basis determined by treaties, most of which were bilateral.[519] Professional associations such as accountants and lawyers were mainly concerned with developing domestic norms during this period. [520] However, Fletcher points out that English courts led the way in broad strokes in developing cross-border insolvency

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[515] See the decision of Jabez Henry in Odwin v Forbes (1817) 1 Buck 57 (P.C.)referred to in Fletcher, *supra* note 283; See also footnote 28 in I Fletcher, "'L'enfer c'est les autres': evolving approaches to the treatment of security rights in cross-border insolvency" (Austin, Tex.) 46:3:489-512, 2011 Tex Int Law J at 495; For details of the Odwin v Forbes case see Ian F Fletcher, *Insolvency in Private International Law*, 2nd ed (2005) at 17–23; See also, Fletcher, *supra* note 2.

[516] Jabez Henry, *Outline of Plan of an International Bankruptcy Code for Commercial States of Europe* (1825); See also David Graham QC, "Discovering Jabez Henry, Cross-Border - Insolvency Law in the 19th Century" (2001) 10 Int Insolv Rev 153–166. Henry, *supra* note; See also Graham QC, *supra* note.

[517] For short comparative discussion of pro and con of universalism and territorialism, see Fletcher, "L'enfer c'est les autres", *supra* note 515 at 495–498.

[518] Justice Hildyard analyzed the tension under English law in this interest case "Bakhshiyeva v Sberbank of Russia & Ors [2018] EWHC 59 (Ch) (18 January 2018)", online: <https://perma.cc/JM3A-7D2T>.

[519] Nadelmann, *supra* note 19. *Ibid*.

[520] Lester, *supra* note 301.

jurisprudence in the late eighteenth century with decisions like those in *Solomons v. Ross.*[521] This case recognized a Dutch bankruptcy vesting order ahead of an English unsecured creditor judgement execution process and followed by others like the decision in *Odwin v. Forbes.*[522]

Section B – How INSOL became the insolvency Norm Entrepreneur

3.5 Twentieth Century Cross-Border Insolvency Norms

3.5.1 Pre-INSOL Twentieth Century Cross-Border Insolvency Norms

By the twentieth century, the world had changed. There had been two world wars, and the United States had risen to prominence, taking over from Britain as the dominant world power.[523] Alongside, the rise of communism and socialism in China and Russia (Soviet Union) forced many European states to embrace some form of command economy and the welfare state to hedge against the risk of an internal revolution.[524] Most of the British and other European colonies had gained independence. Territorial boundaries had become rigid. Norms such as comity were now,

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[521] (1764) 1 Hy. Bl.131n, 126 E.R. 79, also reported in Wallis and Lyne, Irish Chancery Rep.59 (note) (1839). See also Jollet v. Deponthieu (1769) 1 Hy. Bl. 132n, 126 E.R. 80 (Camden LC). Citation of both cases from footnote 9 in Fletcher, *supra* note 2.

[522] (1817) 1 Buck 57 (P.C.)

[523] John Darwin, *The Empire Project: The Rise and Fall of the British World System, 1830 -1970* (New York: Cambridge University Press, 2009); See book review M Hampton, "The empire project: The rise and fall of the British world-system, 1830-1970" (2011) 46:1 Can J Hist 226–228; Roy Douglas, *Liquidation of Empire: The Decline of the British Empire* (New York: Palgrave Macmillan, 2002); See also book review H T Frazer, "Liquidation of empire: The decline of the British empire" (2004) 33:2 Clio 229–235.

[524] For the debate between legal formalism and the functionalist schools of thought on whether the role of government extends to the welfare of the people A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 7th ed (London: Macmillan, 1908) at 308'[t]he words "administrative law"…are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation'; Gus Van Harten, Gerald Heckman & David Mullan, *Administrative Law Cases, Text and Materials*, 6th ed (Toronto: Emond Montgomery Publications, 2010) at 6–9; Collen M Flood & Lorne Sossin, *Administrative Law in Context*, 2nd ed (Toronto Canada: Emond Montgomery Publications, 2013) at 11–16. For the debate between legal formalism and the functionalist schools of thought on whether the role of government extends to the welfare of the people Dicey, *supra* note at 308'[t]he words "administrative law"…are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation'; Harten, Heckman & Mullan, *supra* note at 6–9; Flood & Sossin, *supra* note at 11–16.

more than ever, required to access foreign territories in cross-border insolvency.[525] Otherwise, reliance must be on a treaty and reciprocal enforcement of a judgment, usually restricted to a final money judgment and not insolvency orders. Thus, cross-border insolvency had become frustrating and full of a legal minefield. This background provides the milieu from which INSOL came to be.

3.5.2 Remote and Immediate Causes for Establishment of INSOL

UK Causes

The history of the establishment of INSOL is in two phases. The first is the remote causes, and the second is the immediate causes. In terms of the former, the birth of INSOL is attributable to its mother association, the Insolvency Practitioners Association ("IPA") of the United Kingdom. However, the study also found that as US companies became global companies, some US insolvency practitioners anticipated that these companies' bankruptcy could affect debtors and assets located abroad. This understanding led US practitioners to push towards creating or associating with an international organization facilitating cross-border insolvency.[526] The latter

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[525] S Moore, "Cenargo: A Tale of two courts, comity and (aleged) Contempt!" (January 2004), online: <http://www.iiiglobal.org/downloads/country/USA/Articles/30_cenargo.pdf>; G McCormack, "COMI and COMITY in UK and US insolvency law" (London) 128:140-159, 2012 Law Q Rev; Richard Fisher & Maja Zerjal, "Comity, COMI and anti-suit injunctions: Kemsley before the English and US courts" (Hertfordshire, U.K.) 11:3:187-192, 2014 Int Corp Rescue; L P Harrison, "Commentary: Madoff and the search for comity abroad" (London) fourth quarter 2009. p. 18-19 INSOL World; Elizabeth Buckel, "Curbing comity: the increasingly expansive public policy exception of Chapter 15" (Washington, D.C.) 44:3:1281-1311, 2013 Georget J Int Law; John J Chung, "In re Qimonda AG: the conflict between comity and the public policy exception in Chapter 15 of the Bankruptcy Code" (Boston, Mass.) 32:91-121, 2014 Boston Univ Int Law J; E J Janger, "Reciprocal comity" (Austin, Tex.) 46:3:441-458, 2011 Tex Int Law J; S Sandy & T Richard, "The Cenargo Case: A Tale of Conflict, Greed Contempt, Comity and Costs" *INSOL World - Fourth Quart* (2003) 33; Rhona Schuz, "The doctrine of comity in the age of globalization: between international child abduction and cross-border insolvency" (Brooklyn, N.Y.) 40:1:31-108, 2014 Brooklyn J Int Law, online: <http://brooklynworks.brooklaw.edu/bjil/vol40/iss1/2>; Andrew Godwin, Timothy Howse & Ian Ramsay, "The inherent power of common law courts to provide assistance in cross-border insolvencies: from comity to complexity" (Chichester, U.K.) 26:1:5-39, 2017 Int Insolv Rev; R Levin, J L Garrity & S Power Johnston, "The Madoff feeder fund cases: chapter 15, comity, and related bankruptcy issues" (Albany, N.Y.) 25:1:67-91, 2012 NYSBA Int Law Pract; K J Beckering, "United States cross-border corporate insolvency: the impact of Chapter 15 on Comity and the new legal environment" (Dallas,Tex.) 14:281-311, spring 2008 Law Bus Rev Am.

[526] Interview of February 13 and 17, 2020.

causes are traceable to the events before the liberalization of the UK economy and the UK's accession to the European Union.

IPA was formed in 1961 and incorporated in 1973, starting as a discussion group for accountants specializing in insolvency and growing in numbers and stature as the body for members of the United Kingdom's insolvency profession.[527] Following the enactment of the *Insolvency Act 1986*, based on the Cork Report's recommendation for a statutory authorization regime for practitioners, the IPA became designated one of seven recognized professional bodies that authorize and regulate insolvency practitioners. Furthermore, it proudly asserts that it is the only body whose membership is solely involved in insolvency administration or insolvency-related work or interested in insolvency.[528] The IPA further claims it was instrumental in forming the Society of Practitioners of Insolvency, now Association of Business Recovery Professionals (R3 – Rescue Recovery and Renewal). This separate organization coordinates the seven professional bodies representing insolvency practitioners and provides training and technical guidance and advice.[529]

Although the IPA made no formal claim of its instrumentality in the establishment of INSOL, an examination of its public record against the records of INSOL indicates cross membership and early contribution of its members to the leadership of INSOL.[530] Gerry Weiss was a past General Secretary of INSOL and the IPA Chairman between 1966 and 1967. Richard Turton was the IPA Chairman between 1974 to 1975 and INSOL President between 1985 and

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[527] "A Brief History of the IPA - Insolvency Practitioners Association", online: <https://www.insolvency-practitioners.org.uk/about/history-of-ipa>.

[528] *Ibid*.

[529] *Ibid*.

[530] "IPA Past Presidents - Insolvency Practitioners Association", online: <https://www.insolvency-practitioners.org.uk/about/past-presidents>; Stephen Adamson, "INSOL International: A Brief History From Unlikely Conception to Unique Maturity" (2007) INSOL World Silver Jubilee Edition 45 Data on cross leadership synthesised from Chronology in INSOL World Silver Jubilee Edition and information on past presents and chairmen of IPA on their website.

1989. Stephen Adamson was the IPA President from 1989 to 1990 and INSOL President between 1993 and 1995. Adamson recorded that:

> The first conference of what was to become INSOL International was held at Hyannis Port, Cape Cod, Rhode Island,[531] [Sic] USA, in 1982. In that year, the Insolvency Practitioners Association (IPA) in the UK was celebrating its 21st year. Richard Turton, as a Past President of the IPA and also the established organiser of its conferences, with the Council of the IPA, decided that there should be a "coming of age" party. To differentiate it from other conferences, it was decided to hold the conference across the "pond". Further, to make it more significant, it was also agreed that outstanding members of (what has become to be called) the insolvency "profession" from other countries should be invited.[532]

It is irrefutable that the Cape Cod, Massachusetts conference attributed as the first conference of INSOL was not an INSOL conference, but instead an IPA conference that held "across the 'pond.'" Furthermore, INSOL was not created at the Cape Cod meeting but at the subsequent meeting held in New York in the Fall of 1982, where representatives of the three founding associations of UK, Canada and US insolvency practitioners were present.[533] David Mork recalled that "[U]pon the conclusion of that meeting, the charter for INSOL International was formed, signed by the parties, and we were off and running as a worldwide association."[534] Adamson further recorded as follows:

> It was decided in the autumn of 1982 at a meeting held in New York that INSOL should hold conferences into the future but probably only once every four years. The meeting was attended by Richard Turton and George Auger (UK), Leonard Salter, Sheldon Lowe and David Mork (USA) and Ian Strang (Canada). Subsequently, Garth MacGirr (Canada, President from 1989-1991) played a significant role in the formation of INSOL. …it was clear to them that world trade was beginning to become global and that practitioners

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[531] Cape Cod is in Massachusetts USA and not Rhode Island, USA. This error may be attributed to printers' devil.

[532] Adamson, *supra* note 373 at 45.

[533] The associations were AIRA (then the NAAI) for the US practitioners, IPA for UK and CIA of Canada. There were also two Australian practitioners in attendance at Hyannis Port for the IPA organized conference and INSOL was formed after the conclusion of the conference David Mork, "Memories of INSOL" (2007) INSOL World Silver Jubil Ed 53.

[534] *Ibid*.

> needed to talk to each other to understand how the various jurisdictions worked and how they could come up with varying solutions to essentially the same international economic problems. The founding organisations each agreed to provide "seed corn" grants of about US$2,500.[535]

The liberalization of the world economy in the 1970s and early 1980s led to increased cross-border insolvency cases on both sides of the Atlantic, spurring INSOL and the emergence of cooperation and coordination. The prior command-and-control economy of the United Kingdom led to rising levels of personal taxation and the fleeing of many taxpayers abroad.[536] Due to increased bankruptcies, insolvency practitioners' appointment as trustees and liquidators over the estate of absconding taxpayers increased. David Graham QC, a staunch INSOL member, argues that the absence of automatic discharge in the UK at that time meant UK insolvency practitioners had to negotiate with fleeing debtors abroad. The insolvency practitioners needed to understand the various jurisdictions and develop local contacts to locate those debtors and facilitate the negotiations.[537] He also asserts that the corporate scene witnessed significant UK companies' collapse with operations and assets abroad, raising the challenge of access to those assets abroad.[538] He said:

> For a decade or so before the birth of INSOL in 1982, English practitioners were increasingly required to handle cases with a substantial cross-border element. The work fell into two broad categories comprising respectively advice regarding the affairs of absconding individual debtors and, in the corporate sphere, the seizure and preservation of assets located in foreign jurisdictions. The opportunities for travel led to the formation of enduring friendships with colleagues abroad and membership of organisations like the Commercial Law League of America.[539]

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[535] Adamson, *supra* note 373 at 46.

[536] Graham QC, *supra* note 413 at 10.

[537] Graham QC, *supra* note 413.

[538] *Ibid*.

[539] *Ibid* at 10.

One of the then young members of INSOL at its formation in 1982 who later became its President indicated that his interest in cooperation and coordination in cross-border insolvency commenced before the formation of INSOL.[540] He was involved with two transactions that informed his interest. The first was an East African airline liquidation in the 1970s. Many countries refused to recognize his appointment as the liquidator leading to an inability to realize the assets in those countries, an experience he found frustrating.[541] The second was his arrest in Singapore during his effort to realize a debtor's assets located in Singapore based on a Hong Kong liquidation order against the debtor. The relevant Singaporean officials could not contemplate how a person could realize assets in their territory based on a foreign insolvency order.[542] Also, Neil Cooper, an INSOL delegate at UNCITRAL, recalled that cross-border insolvency practitioners "were all getting frustrated at the lack of progress with cross-border cooperation."[543]

European, Asian, Middle East and African Causes

Added to the specific UK insolvency crisis and the globalization of American companies were other immediate causes for generating the norm of cooperation and coordination in the 1970s and early 1980s. Apart from the challenges encountered in countries in Africa and Asia, corporate group insolvency was beginning to rear its head in Europe at the time. According to Graham, UK practitioners were "greatly handicapped by the virtual absence of any informed and regular discussion of their subject" when it came to corporate collapses of famous companies, which "precipitated a scramble by creditors for assets in countries such as France and Germany ahead of any formal insolvency proceedings."[544] Graham provided examples of Rolls-Royce, Credit Bank of Geneva with UK branch office and British-Israel Bank with assets in New York, all insolvency cases where jurisdictional issues arose. He also discussed the British Eagle airline

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[540] Interview held on the 3rd of April 2019 during INSOL Singapore Conference

[541] *Ibid*

[542] *Ibid*

[543] Cooper, *supra* note 413 at 56.

[544] Graham QC, *supra* note 413 at 10.

dispute over monies held by the International Air Transportation Association ("IATA"), the airline clearinghouse based in Canada.[545]

United States Causes

"Across the pond," around the same period of a decade before the formation of INSOL, American practitioners, for entirely different reasons, were showing interest in cross-border insolvency. US insurance companies provide most long-term finance in the US domestic market. As a result, practitioners represented these companies in related finance and insolvency cases in the domestic market. The majority of beneficiaries of such finance were US multinational companies whose operations abroad grew in the 1970s. According to an interview respondent:

> Somewhere in the 70s it occurred to me that finance was going to become international quickly, and **…..**So as a part of the American Bar Association, ….. we undertook to write a book about international insolvency where we studied the laws of many other countries. ……..That was the first experience. Then, INSOL became my passion and working with the marvellous Stephen Adamson, Richard Turton, Ian Strang and Neil Cooper, remarkable people who had a passion, and this then became the vehicle for the pursuit of cross-border insolvency. And the rest is history.[546]

Another American respondent and former US bankruptcy judge reminiscence as follows:

> In the 1970s, Gitlin authored "The Void in International Insolvency Law," there were few cross-border insolvency cases and very little consideration of these issues. It was costly because separate insolvency proceedings would have to be open in every jurisdiction where there was property, and there was a minimal spirit of cooperation. For example, in *Felixstowe Dock & Railway Co. v. U.S. Lines Inc*, I was involved as Creditor's Committee counsel, and the UK Judge in denying recognition of US Chapter 11 proceedings felt that "cooperation was out of the question." The spirit of cooperation has changed enormously since then.[547]

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[545] Graham QC, *supra* note 413.

[546] Interview of February 13 and 17, 2020

[547] Interview of February 5, 2020

The ABA's Section of International Law and Practice and the Committee on Creditors' Rights, Insolvency, Liquidation and Reorganizations of the International Bar Association, otherwise known as Committee J, collaborated based on long-standing international affiliation on pursuing a solution to the "remarkable gap" in insolvency for any multi-national situation.[548] The IBA asserts that it is the foremost organization for international legal practitioners, bar associations and law societies.[549] The IBA's establishment in 1947, shortly after the UN's creation, was out of the conviction that bar associations could contribute to global stability and peace through the administration of justice.[550] The IBA claims to have considerable expertise in assisting the global legal community and, through its global membership, improving the development of international law reform and shaping the legal profession's future throughout the world.[551] As part of the IBA reform effort on bankruptcy, they supported the ABA study of various insolvency systems. Gitlin and Mears published a book on the study outcome in 1989 titled *International Loan Workouts and Bankruptcies,* long before the INSOL study for UNCITRAL.[552] A respondent explained the rationale for the book when he stated:

> I was dealing with national bankruptcies at the time in the 70s. I realized we would be expected to know international insolvency law. I decided I would get a head start on that. So, I became really active and started learning and published the book "International Loan Workouts and Bankruptcies," a long project we did on behalf of the International Bar Association. It was Rona Mears and me, and it was one of the first books on cross-border

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[548] Gitlin & Flashen, *supra* note 441 at 323.

[549] "IBA - About the IBA", online: <https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx?gclid=Cj0KCQjw7sz6BRDYARIsAPHzrNIHmqtOcNaR2msoqTv--hu15pFMZCSZ2qRaBZvHlhO40jMDaT4hLHkaAvZCEALw_wcB>.

[550] *Ibid*.

[551] *Ibid*.

[552] Richard A Gitlin & Rona R Mears, *International Loan Workouts and Bankruptcies* (London: Butterworth Legal Publication, 1989); INSOL study of 1994 was published as Cooper & Jarvis, *supra* note 415.

bankruptcy, where we had articles for this. So, I started early on trying to understand the state of play of cross-border well before 1982.[553]

The cooperation between the ABA and the IBA led to a consensus that the best way to fill the gap identified in cross-border insolvency was by applying and adopting s.304 of the *US Bankruptcy Code* as the standard for international bankruptcy regulation. In addition, the MIICA adopted by the IBA Committee J and projected at UNCITRAL as the norm that should underlay modernization and harmonization of international law on cross-border insolvency resulted from the collaboration between ABA and IBA.

The Convergence

Between 1982 and 1986, INSOL engaged in an intensive reach-out program to invite American and Canadian insolvency practitioners to its membership. In 1986 or thereabout, the "International Bankruptcy Subcommittee of the Business Bankruptcy Committee of the ABA Section of Corporation, Banking and Business Law" unanimously voted to accept (subject to ABA approval) an invitation to join INSOL International, an international group of lawyers, accountants, and other professionals engaged in bankruptcy and insolvency practice."[554] The formation of INSOL offered another opportunity for international cooperation to American insolvency practitioners, including some members of the ABA interested in filling the gap in international cross-border insolvency regulation. Even the ABA members who welcomed affiliation with INSOL already believed that the solution was a universal application of s.304 *US Bankruptcy Code,* a universalist-inspired approach to cross-border insolvency regulation.

Whatever the divide, American practitioners' passion was ultimately for a workable solution. Applying Hadden and Seybert's model for tracking norm definition, it is easy to observe the Americans' shift in norm definition over time.[555] The American position shifted from exporting to the world the US concept of the uniform application of US bankruptcy norms to a more

[553] Interview held on February 13 and 17, 2020.

[554] Gitlin & Flashen, *supra* note 441 at 323.

[555] Hadden & Seybert, *supra* note 9.

pragmatic objective of cooperation and coordination among state courts. The shift in norm definition is attributable to the norm contestation process. This process forced US bankruptcy norms to confront the challenges of treaty adoption and the competing norm of INSOL, which sought to avoid the treaty challenge and preserve the interest of states that were not prepared to adopt US-style debtor in possession and extensive reorganization provisions.

For instance, as previously observed, despite the existing relationship between the ABA and IBA Committee J, leading to the successful collaboration on the Gitlin and Mears study, the International Bankruptcy Subcommittee of the Business Bankruptcy Committee of the ABA Section of Corporation, Banking and Business Law parted ways with the International Committee of the same ABA by voting to affiliate with INSOL.[556] Also, opinion leaders in the ABA like Gitlin and Flaschen, early leaders in cross-border insolvency, changed their support from s.304 *US Bankruptcy Code* inspired IBA-sponsored MIICA to the INSOL-sponsored Model Law of limited cooperation and coordination by state courts. The nostalgia with MIICA continued even after the norm definition had shifted to the Model Law. An American respondent said the following about MIICA:

> Yeah, I thought it was a good effort. We were dealing in a space where everyone was trying to find a solution; the MIICA effort was valuable. The problem with treaties is that it takes so long to get approved. Model law you can tell by the number of countries that adopted them you can do it much quicker.[557]

3.5.3 Formation of INSOL

According to President Adam Harris, INSOL was formed in New York in 1982 with a vision to be a global association with membership in every country and leadership in exchange of information, ideas, and experience on insolvency.[558] The formal formation was in the autumn of

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[556] Gitlin & Flashen, *supra* note 441 at 323.

[557] Interview held on February 13 and 17, 2020.

[558] "INSOL - Home Page", online: <https://perma.cc/5MSK-Y8WB>.

1982, after the Hyannis Port, Massachusetts conference. The first President of INSOL was a Canadian, Ian Strang. INSOL functions primarily through the volunteering of its members but has a small core of career staff who run its operations.[559]

INSOL was not an organization with large membership at its formation in 1982. Indeed, it was a "nicely unorganised, free flowing and highly entertaining gathering of insolvency practitioners."[560] The success of such a motley group that led to the Model Law was a feat which Ron Harmer described as "a remarkable achievement that, back in 1982 in Hyannis Port, Cape Cod, very few might have imagined possible."[561] Stephen Adamson, INSOL president, 1993 and 1995, recalls that in the early days following his appointment as treasurer in 1985 and after some months of not receiving the organisation's books, he asked to see them from the previous treasurer and got the response "What books?"[562] As a result, keeping books and auditing the books of accounts by INSOL commenced after 1985.

The seeds for the eventual success of INSOL as a norm entrepreneur were laid firmly at the time of its formation despite the seemingly chaotic nature of the initial structure. Borgen's postulation that norms arise from an organization's methods and process and not necessarily from the organization's decisions or rules found expression in INSOL.[563] Pattberg argues that the interaction between macro and micro factors determines the extent of a private actor's influence in global norm making.[564] Further, Krasner observed that norms could generate a regime.[565] Thus,

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[559] There were over 10500 (ten thousand five hundred) members in over 90 (ninety) countries as at 2018 "INSOL - membership", online: <https://www.insol.org/membership>; note 413 By 2006 INSOL had achieved 8500 membership . There were over 10500 (ten thousand five hundred) members in over 90 (ninety) countries as at 2018 ; note 413 By 2006 INSOL had achieved 8500 membership .

[560] Harmer, *supra* note 413 at 39.

[561] *Ibid*.

[562] Adamson, *supra* note 373 at 48.

[563] Borgen, *supra* note 86.

[564] Pattberg, *supra* note 87. *Ibid*.

[565] Krasner, *supra* note 165.

understanding the methods and processes of INSOL and micro factors within the organization enables us to determine how the norm of cooperation and coordination was generated within INSOL and transmitted to its members without formal rules on cooperation and coordination.

3.5.4 Relationships and Network as Steppingstone for Norm Creation

According to Ian Strang, its first President, the first critical and vital step to building INSOL and its success was the commitment, passion, and bonding among members of the early Council of INSOL and their spouses and significant others.[566] Maurice Moses, the co-editor of INSOL World, the magazine/journal published by INSOL, also commented that "[T]here is no doubt that in the early stages, and to a large extent today, INSOL has been the reason for many enduring friendships amongst practitioners throughout the world."[567] In his recording of those early days, Adamson stated that Richard Gitlin, the President between 1991 and 1993, "believes that it was imperative in the early days that the early starters devoted an amazing amount of time and passion to INSOL. He is not sure that it would have been possible without the involvement of the spouses and that it is now much more difficult for this to happen."[568] In other words, over time, the involvement of spouses reduced significantly.

A respondent stated that "individuals with talent, commitment and strategy and purpose can make a profound contribution for both the law and their clients. However, notwithstanding the work over the years on improving cross-border relationships and procedures, there are still many gaps in the system to be filled by creative, knowledgeable and smart lawyers." The above comment summarises the bases for the intervention of legal, accounting, and other practitioners who passionately, for ideational reasons mixed with pursuit of their self-interest, formed or joined INSOL as the platform for leadership and participation in global norm-making in cross-border insolvency. Their vision, talent, commitment, creativity, knowledge, passion, relationships were variables that led to the formation and ensured sustenance of INSOL.

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[566] Adamson, *supra* note 373 at 46.

[567] *Ibid*.

[568] *Ibid*.

These expressions of personal emotion are difficult to capture in the official documents of INSOL.[569] By undertaking the INSOL World Jubilee Edition project, INSOL gave access to many of its key formative actors' excellent memory recall. The Adamson interview and conference call record and the various articles by many participants in the formative process recalling their perspective in the publication provided a rich repertoire of existing interviews and recollection that formed one of the research triangulation pillars. Although the study was unable to access the private records of INSOL because they are essentially non-existent, including the Council records for the formative period, the existing interviews and recollections made up for the gap.[570] The study observed that INSOL officially maintains a secrecy policy on the details of its work with UNCITRAL in line with the British business and political secrecy strategy of its founding fathers, otherwise known as the Chatham House Rules.[571] Indeed a potential interview respondent who is a previous official of INSOL at the relevant study period indicated that he could not participate in the elite interview because the Chatham House Rules applied to the work they did with UNCITRAL during the study period.[572] INSOL has indicated that it would soon make its archives publicly accessible.[573] In addition to the existing interview, a supplemental elite interview

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[569] Michael Quinn Patton, *Qualitative Evaluation and Research Methods*, 2nd ed (Newbury Park, CA: Sage Publication, 1990) at 278 assert that "We interview people to find out from them those things we cannot directly observe. ….The fact of the matter is that we cannot observe everything. We cannot observe feelings, thoughts, and intentions. We cannot observe behaviours that took place at some previous point in time. We cannot observe situations that preclude the presence of an observer. We cannot observe how people have organised the world and the meanings they attach to what goes on in the world. We have to ask people questions about those things. The purpose of interviewing, then is to allow us to enter into the other person's perspective.." .

[570] Interview with INSOL official September 12, 2019.

[571] Adamson, *supra* note 373 at 46 stating that the British wished that INSOL conferences are not held in the UK so as not to give the impression of British dominance of the organization .

[572] The Chatham House is the independent British Institute of International Affairs. Its objective is to encourage informed public debate on issues of foreign policy and world peace. It developed the Chatham House Rules on confidentiality to encourage free and robust discussions. Consequently, the Institute disclaims any views expressed at its debates as not representing its own view and should not be quoted by others as well Williams Wallace, "Chatham House at 70: To the 1990s and Beyond" (1990) 46:5 World Today 75–77.

[573] David Burdette of INSOL made the announcement at INSOL ART in Maputo, Mozambique in October 2018. INSOL has stated publishing recent executive council minutes on its website but compared with UNCITRAL, INSOL is still secretive about its processes.

conducted provided further data on respondents' emotions and perceptions, not otherwise found in the written records and existing interviews reviewed. The elite interview drew attention to American insolvency practitioners' role in the history of cross-border insolvency around the early period before and after the formation of INSOL.

3.5.5 Management Structure and Membership Offerings

Other factors aside from members' friendships and relationships propelled INSOL's success. The organization's effective management enhanced its market leadership in insolvency knowledge mobilization. In 1998, during Gordon Marantz's (Canada) presidency, INSOL established an office in London with a small core of dedicated professional staff led by Executive Director Claire Broughton.[574] INSOL sustained the enthusiasm for its establishment. INSOL quickly organized the next conference after the Hyannis Port, Cape Cod IPA conference in Monte Carlo in 1985. The Monte Carlo conference was referred to as the Second World Congress because the Cape Cod conference was presumed the First World Congress.[575] The Third World Congress was held in Vancouver in 1989. The Fourth World Congress was held in Melbourne, Australia, in 1993. It is safe to conclude that the pattern of holding world congresses every three to four years became established within INSOL. Still, as members' interest grew, INSOL in 1991 introduced regional conferences to improve opportunities for members' interaction and exchange of ideas. In 1991, three regional conferences were held in New York, USA, Melbourne, Australia and Nice, Italy. INSOL had the capacity and followed through on its vision to hold regular conferences.

Besides members' passion, solid secretarial support, conferences, and congresses, some other initiatives helped position INSOL as the thought leader in cross-border insolvency and the marketplace to exchange and match insolvency knowledge and professionals located across borders. For example, after the initial euphoria of personal relationships developed through close personal contact between members in small congresses and meetings had evaporated, INSOL

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[574] Adamson, *supra* note 373 at 48.

[575] As shown early Cape Cod was more of an IPA conference to which perhaps the world was invited and so not the first conference making it a misnomer to refer to the Monte Carlo Conference as the second when indeed it was the first true INSOL Conference.

realized that membership growth meant devising other means of maintaining communication among members. As a result, a member's directory was instituted, distributed free to members and published annually. It is a comprehensive list of members and contains the complete business address of members, including contact numbers and email addresses. INSOL described the purpose of the directory as the "focal point of reference for organisations and individuals working in the business-rescue and insolvency profession in over 80 countries worldwide."[576]

INSOL in 1994 formed the INSOL Lenders Group, made up of top bankers, to get bankers to be more involved with INSOL to enable the organization to tap from their knowledge and experience. The initiative yielded excellent dividends in engaging with the banking community on a global approach to multi-creditor workout, which is now in its second edition.[577] As a result, both the Bank of England and the World Bank group recommend the *INSOL Statement of Principles for Global Approach to Multi-Creditor Workouts I and II*.[578] Other INSOL initiatives on knowledge leadership include engagement with UNCITRAL, which commenced in 1992, ten years after INSOL's formation.

3.5.6 Measuring INSOL Members Cooperation and Coordination

Measuring the extent of cooperation and coordination among INSOL members is fraught with difficulty and queried as to its relevance to any discussion on UNCITRAL Model Law. INSOL is not a formal referral network and did not keep any data of such cooperation and coordination. Further, from the preliminary interview of INSOL officials, INSOL does not have any formal rules

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[576] INSOL International & World Bank Group, *Africa Round Table 25-26 October 2018 - Multinational insolvencies in an African context* (INSOL International, 2018) at 25.

[577] The INSOL Global Approach to Multi-Creditor Workout was eventually published in 1999 and has been the gold standard template for restructuring where there are multi-creditors. See INSOL International, *INSOL Statement of Principles for Global Approach to Multi-Creditor Workout II* now in its second draft following the success of the maiden edition . The INSOL Global Approach to Multi-Creditor Workout was eventually published in 1999 and has been the gold standard template for restructuring where there are multi-creditors. See INSOL International, *INSOL Statement of Principles for Global Approach to Multi-Creditor Workout II* now in its second draft following the success of the maiden edition .

[578] INSOL International, *The 2019 INSOL Directory - The comprehensive directory of restructuring, insolvency and bankruptcy professionals throughout the world* (London: GTI Media in partnership with INSOL International) at 11.

on referrals, cooperation, and coordination among its members.[579] Referral networks are formal administrative structures or networks through which professionals refer work to each other in confidence and the expectation of a return reference. The network maintains the members' and market's trust by ensuring compatibility and enforcing quality control.[580] They also exchange marketing materials and management ideas and communicate the benefits of the network to their clients.[581] They keep records of referrals among their members to justify the organization's value to their members.[582] Referrals are an essential means of overcoming the challenge of providing service to a client outside the geographical area of practice, such as in another state. A referral system can benefit the client and the practitioners involved.[583]

Although INSOL does not have a formal code mandating referral or requiring members to report referrals or cooperation among its members, there is evidence that INSOL actively encourages referrals among those members whose competence it could vouch.[584] However, it is not clear when the practice of active referral commenced, and INSOL does not maintain a database of referrals made. The absence of this data presents challenges for the researcher. Besides, many insolvency practitioners are also lawyers, and there are issues of confidentiality and privilege of communication, making it challenging to collect the relevant data.

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[579] Interview with INSOL officials during the Singapore INSOL Conference April 3, 2019.

[580] Aimee Bissonette M, "Lawyer Referral Networks" (1993) 50:4 Bench Bar Minn 29.

[581] *Ibid*.

[582] *Ibid* at 30.

[583] Bissonette, *supra* note 580; Mary Lokensgard, "Part 3: Care and Feeding of Your Referral Network." Wisconsin Lawyer, vol. 88, no. 7, July/August 2015, pp. 16." (2015) 88:7 Wis Lawyer 16; Carol Schiro Greenwald, "Strategic Referral Relationships Enhance Growth" (2015) 87:5 N Y State Bar Assoc J 14.

[584] The INSOL Fellows Group set up in October 2007 is a forum for active referrals as members who have undertaken the INSOL Fellowship course trust the competence of members of the group and frequently request INSOL to circulate their need for foreign counterpart to work with which INSOL obliges: INSOL International, *supra* note 122 at 15 for more on the INSOL Fellows.

Nevertheless, INSOL members openly admit that the friendship and relationship has facilitated their work and reduced the frustration of working on cross-border insolvency.[585] Notwithstanding that INSOL officials assert that the organization merely provides a forum for exchanging knowledge and cooperation and does not insist on a norm of cooperation and coordination, respondents admit that one of the benefits of membership is meeting those who give out work and knowing those to refer job abroad.[586] For example, a Canadian respondent explained how he leveraged INSOL conferences to meet US practitioners involved in the distressed asset business. He said:

> To be very blunt, lawyers going to conferences are using it as a client development opportunity, so if your clients are distressed debt investors in the United States, many lawyers do this work. …... Many decisions of whom to retain as counsel were not being made in Canada.[587]

Borgen explains this phenomenon.[588] INSOL methods and processes produced the norm even if not officially acknowledged as part of the rule book of INSOL. Borgen showed that methods and processes could generate norms, and norms do not necessarily result from decisions or enforcement of those decisions.[589] Norms develop as people engage with a specific process. While Borgen wrote in the context of international human rights tribunals and their impact on states' behaviour, there is no doubt that the same principle applies to INSOL methods and processes and the emergence of the norm of cooperation and coordination in cross-border insolvency.

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[585] Interview of April 2019 in Singapore

[586] Interview with INSOL official April 3, 2019, in Singapore. See interview of February 5, 13, 14 and 17, 2020 as well as that of March 26, 2020.

[587] Interview of March 26, 2020

[588] Borgen, *supra* note 86.

[589] *Ibid*.

Studies in psychiatry indicate that the decision on the referral of patients can be formal or informal.[590] Formal referral relies on official discussions, routines, and officials' practices, while informal referral could arise from cultural triggers and employee and personal networks.[591] Formal and informal referrals interact to form a social network approach for social control of work based on supervisory or self-referrals.[592] The same logic is applicable in cross-border insolvency work referral. Even if INSOL has no formal referral system, political, economic and cultural events, including those that led to the formation of INSOL and the subsequent network of personal relationships built among members, triggered the norm. An American respondent put it in context as follows:

> Let's assume you have a case with 50 countries, which we did have a few cases, and I can't remember how many in *Maxwell,* but there were many countries involved, and in many cases, we had multiple countries involved. So, you have multiple countries, and someone comes to you and says this is going to fall apart because we have an integrated system, and we can't let these parts get liquidated and go out of business—you need to know whom to call so you can build the framework to execute in a country. The function of INSOL informally was that we all grew together in knowledge and relationships and allowed us to represent our clients…….. So, I don't think we had a code or referral. It was about building a network so that you could deliver, really.[593]

As discussed earlier, there were limitations of the available data on cooperation and coordination among INSOL members.[594] Notwithstanding the limitations, the writings, recordings and interviews of INSOL members provided incontrovertible proof of actual cooperation and coordination among the practitioners themselves using the opportunities created by INSOL

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[590] William J Sonnenstuhl, "Understanding EAP Self-Referral: Toward a Social Network Approach" (1982) 11:2 Contemp Drug Probl 269.

[591] *Ibid*.

[592] *Ibid*.

[593] Interview held on February 13 and 17, 2020.

[594] For instance, the absence of clear referral rules and regulation or INSOL handbook on cooperation and coordination for its members

membership. Aside from referral of work in cross-border insolvency cases given differences in approaches by courts of different states, practitioners needed to transform the cooperation and coordination among themselves into cooperation and coordination among state courts. This transformation revealed the genius of INSOL. Finnemore and Sikkink's admonishment that we can only understand norm evolution if we understand how they came about provides the imperative for enquiring into INSOL methods and practices that generated cooperation and coordination among members. The following section considers how INSOL developed cooperation and coordination among state courts.

3.5.7 Cooperation and Coordination Among State Courts

Two cases illustrate the frustration of practitioners and complications arising from states refusing to recognize other states' insolvency regimes while insisting on their insolvency process's universal application. In *Felixstowe Dock and Railway Co v US Lines Inc Freightliners Ltd v US Lines Inc,*[595] the defendant, a US shipping company with worldwide operations undergoing Chapter 11 bankruptcy in the US, applied for Mareva injunctions obtained against it in the UK to be set aside on the ground of international comity. The defendant argued that the English Court should recognize the US Bankruptcy Court's order and allow it to govern the disposition of the defendant's assets in England, including dealing with the claimant's claim under that order. The other grounds for the application were that the injunctions by retaining assets in England prevented their administration according to the Chapter 11 Scheme. If the injunctions continued, the plaintiffs would gain priority over other creditors. The plaintiffs argued that it was for the English Courts to deal in the insolvency context with the disposition of assets in England. The Mareva injunctions were ancillary to claims properly brought by English companies regarding debts incurred by the defendant in England. The plaintiffs further argued that the continuance of the Mareva orders would not give the plaintiffs any priority over other creditors.

[595] [1989] 1 QB 360, [1988] 1 All ER 77, [1989] 2 WLR 109, [1987] 2 Lloyd's Rep., Queen's Bench Division (Commercial Court)

On the contrary, the discharge of the Mareva injunctions would cause the plaintiffs serious prejudice, including, as initially contended, the risk of exposing themselves to contempt proceedings in the USA and wasted legal costs in England. Accordingly, the English court refused to recognize the US Bankruptcy Court order. It held that although the US Chapter 11 procedure was a significant circumstance, it could not properly be treated as an overriding consideration to accord to it any paramountcy or dominance over all other circumstances.

The other significant development of the pre-cooperation period was the collapse of *Funds of Funds* in 1970. According to a respondent, the first international coordination effort was due to the *Fund of Funds* international liquidation proceedings.[596] This fund had operations in many countries worldwide, and the liquidators had to go from country to country, opening up proceedings in each country to realize the assets for the fund.[597] Indeed, that was the story of Bernard "Bernie" Cornfeld, "the entrepreneur who founded Investors Overseas Services, a financial conglomerate [also set up *Fund of Funds* in 1962] that became a powerful but controversial force in the mutual fund industry before its spectacular collapse in 1970."[598] Mr. Cornfeld faced many challenges, as did his creditors. He and his company were various litigation subjects, including data fraud and tax evasion.[599] In *Securities and Exchange Commission v. Vesco, et al.,*[600] the SEC sought by its November 1972 complaint against 42 individual and corporate defendants, including Vesco and IOS, a receiver's appointment. However, this request

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[596] Interview held on March 26, 2020 via Zoom.

[597] *Ibid*

[598] Diana B Henriques, "Cornfeld, Bernard ('Bernie') | Encyclopedia.com", online: <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/cornfeld-bernard-bernie> For detailed history of the Funds of Funds and IOS saga, see the discussion of Judge Werker in Cornfeld v. Investors Overseas Services, Ltd., 471 F. Supp. 1255 (S.D.N.Y. 1979).

[599] *Cornfeld v. Investors Overseas Services, Ltd.,* 471 F. Supp. 1255 (S.D.N.Y. 1979); *Bernard Cornfeld, Appellant, v. Commissioner of Internal Revenue, Appellee*, 797 F.2d 1049 (D.C. Cir. 1986) (Tax Court Matter); *United States of America, Plaintiff-appellee, v. Bernard Cornfeld, Dba Grayhall, Inc., Defendant-appellant*, 563 F.2d 967 (9th Cir. 1977) (Data fraud).

[600] 358 F. Supp. 1186 (CES)

was withdrawn "in favor of an arrangement whereby the financial affairs of IOS-related companies would be wound up in the jurisdictions where they were incorporated" because of a cooperative international effort to wind-up the IOS-related companies equitably and practically through an intergovernmental committee set up by the US, Canada, Luxembourg, Netherland Antilles.[601] The choice taken in resolving the *Funds of Funds* collapse was administrative cooperation among sovereign executive units as the courts could not provide a solution for a coordinated liquidation of the group.

The absence of cooperation and coordination among state courts due to their different insolvency approaches led to frustration for insolvency practitioners seeking to realize assets located abroad or achieve restructuring with the assets abroad as part of a going concern. This situation meant hardship for both creditors and debtors. Their outcome in cross-border insolvency depended on the asset's location rather than the enterprise's financial condition. Consequently, insolvency practitioners recognized the need to organize themselves to influence the global norm and, eventually, policy in this area. They began by forming a more specialized organization with broader appeal outside legal practitioner organized under the IBA Committee J and ABA. The study found a direct correlation between INSOL's formation and practitioners' need to avoid hardship and frustration for themselves and their clients.

The conditions that incubated the establishing of INSOL also determined the norms it enunciated. The "origin of invention" of the norms pursued at UNCITRAL lay in INSOL methods and processes. Consequently, under stage 1 of the norm life cycle, norm emergence, time, and space are devoted to generating the norms of cooperation and coordination from INSOL methods and processes. Respondents provided corroborative evidence of the cooperation and coordination norm's existence as a way of overcoming the hardship and frustration and INSOL's appeal to its membership as the right platform for non-state entity involvement in global norm making in cross-border insolvency.[602] The private effort of insolvency practitioner climax with the

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[601] *Cornfeld v. Investors Overseas Services, Ltd.,* 471 F. Supp. 1255 (S.D.N.Y. 1979, footnote 4

[602] Interviews at St John's University New York in March and April 2019 and III Conference in Barcelona on 17th June 2016. Also, telephone interview of February 13 and 17, 2020 and Zoom interview of March 26, 2020.

achievement of a protocol in the *Maxwell Communication Case*,[603] even though one respondent involved with the case as counsel to one of the US creditors was not sure if the legal issue decided in the case was attributable to INSOL.[604] The respondent stated as follows:

> I do not think Maxwell case was affected by the principles of cooperation, EXCEPT Maxwell's sons filed in the US to be debtors-in-possession……. I am not sure if the legal issues were affected by INSOL or III. …. They did sign the protocol in terms of cooperation [*Maxwell Communication plc* case]. This was an important step forward in adopting principles because basically identical plans were adopted in both jurisdictions. It was a very important step forward in cooperation.[605]

In other portions of the interview, the same respondent admitted that "INSOL and III have contributed to promoting the spirit of cooperation."[606]

In terms of the *Maxwell* cases' impact, Westbrook argues that the follow-up case *Barclays Bank v Maxwell Communication* brought the issue of cooperation properly into focus.[607] He argues that the UK *Barclays* case seeking to prevent the joint administrators and examiner in the US and UK *Maxwell* cases from challenging a payment to some creditors as a preference was more significant than the main *Maxwell* cases.[608] He contends that the decision refusing the injunction "seems to confirm the UK's interest in cooperation in transnational cases, especially in cases such as this in which the United States had deferred first and most generally."[609] The deference of the

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[603] In re *Maxwell Communication Corp. plc* 170 B.R. 800 (1994); 186 B. R 807 (1995) and 93 F.3d 1036 (1996), 29 Bankr.Ct.Dec. 788.

[604] Interview in New York, February 5, 2020

[605] *Ibid*

[606] *Ibid*

[607] Jay Lawrence Westbrook, "Comment: A More Optimistic View of Cross-Border Insolvency" (1994) 72:3 Wash Univ Law Q 947–953 at 950; Barclays Bank PLC v. Homan, [1993] BCLC 680, [1992] BCC 757.

[608] *Ibid* at 951.

[609] *Ibid* Barclays Bank PLC v. Homan, [1993] BCLC 680, [1992] BCC 757.

US and UK courts to each other in the *Maxwell* and *Barclays* cases cemented the foundation of cross-border cooperation and coordination among state courts before the intervention of UNCITRAL. The following section considers how cooperation and coordination among state courts climaxed in the *Maxwell Communication Corp. Plc* case before the cascade of the norm to the UNCITRAL norm modelling site.

3.5.8 The Maxwell Communication Corp. plc Case

One of the interview respondents, an INSOL member who later became its President, asserted that cooperation and coordination in cross-border insolvency cases developed among INSOL members even before the *Maxwell Communication* case.[610] INSOL grew amid already existing cooperation and coordination norm, blossoming with INSOL.[611] The *Maxwell* case was merely the climax of such cooperation and coordination. Some interview respondents were involved with the *Maxwell* case in different capacities, acting for UK and US creditors or as an official appointed by the court. One respondent served as counsel for one of the creditors in the US case and later became a US Bankruptcy judge. The study found that many of the participants in the *Maxwell* cases were INSOL members, such as Evan D. Flaschen, who was junior counsel in Richard A. Gitlin's law firm and was part of the team that represented the US examiner. Judge Tina L. Brozman, who presided over the US case and Justice Leonard Hoffman (now Lord Hoffman), who presided over the UK case, became active participants in INSOL Judicial Colloquium, UNCITRAL conferences and congresses on insolvency.

Stephen Adamson and Maurice Moses, in their editor's column in INSOL World Jubilee Edition, argue that the *Maxwell* case was an excellent illustration of "where the strength of relationships between judges and practitioners resulted in one of the first cross-border protocols to enable the smooth implementation of complex insolvencies in different jurisdictions."

Evan D. Flashen, junior counsel to the US examiner in the *Maxwell* case, said:

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[610] Interview held April 3, 2019 INSOL Conference Singapore.

[611] *Ibid*

> Maxwell started out as a recipe for disaster, with different Courts, different management regimes, different Insolvency objectives and different cultures all conspiring in favor of a transatlantic meltdown. In truth, cooperation and the Protocol started out as the least likely choices in Maxwell, but they proved to be the only choices that ultimately made sense for maximizing value while preserving the integrity of two Courts and two systems. …….created a model that has been the standard ever since for cross-border cooperation and value maximization in multinational restructuring proceedings.[612]

From the historical and primary data obtained from existing interviews and the study's elite interview and review of the methods and processes of INSOL, the norm of cooperation and coordination existed among INSOL members before the *Maxwell Communication* case. As earlier observed, the *Maxwell* case climaxed the norm of cooperation and coordination among international insolvency practitioners, with INSOL members playing a pivotal role.[613] All the crucial practitioners involved in that case, such as the US examiner,[614] the Joint Administrators,[615] creditors lawyers[616]and even the *amicus,*[617] were either INSOL or IPA (UK) members. The prior existing relationships of trust and cooperation established through the cross-border practice of the critical participants in the *Maxwell* case facilitated by the INSOL methods and processes enabled them to negotiate the first protocol on cooperation and coordination, averting confrontation between the courts of the UK and the US. Westbrook, an INSOL member and highly respected and revered US bankruptcy professor, wrote a review of the Bankruptcy Court decision

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[612] Evan D Flashen, "How the Maxwell Sausage Was Made" (2007) INSOL World Silver Jubil Ed 34–35. *Ibid*.

[613] In re Maxwell Communication Corp. plc 170 B.R. 800 (1994); 186 B. R 807 (1995) and 93 F.3d 1036 (1996), 29 Bankr.Ct.Dec. 788

[614] Richard Gitlin who was INSOL President 1991-1993

[615] Andrew Mark HOMAN, Colin Graham Bird, Jonathan Guy Anthony Phillips and Alan Rae Dalziel Jamieson, its Joint Administrators

[616] Two of our respondents represented UK and US creditors in the *Maxwell Communication Corp. Plc* case

[617] Prof Jay Westbrook

in the *Maxwell* case. The US Court of Appeal relied upon Westbrook's opinion in its affirmation of the decision of the US Bankruptcy Court not to exercise jurisdiction based on comity since most of the creditors were in England, thereby deferring to the UK Court. [618]

INSOL had a proof of concept for a model law approach that grounded its recommendations to UNCITRAL in the *Maxwell Protocol*. The methods and processes of INSOL generated the norm of cooperation and coordination among its members and encouraged the subsequent use of Protocols among state courts. Collaboration and coordination enabled INSOL members to overcome the hardship and frustration experienced in their cross-border insolvency practices. The climax of acceptance of the norm was the Protocol in the *Maxwell Communication Corp plc.,* US Chapter 11 bankruptcy and UK Administration cases. [619] The US Bankruptcy Court and UK High Court approved the *Maxwell Protocol* negotiated by the US examiner and UK joint administrators in January 1992. [620] The *Protocol,* "left the English in charge of the case, but provided the US Examiner with a right to consult and object." [621]

Consequently, a harmonized Restructuring Plan and Scheme of Arrangement was agreed upon and approved simultaneously in the US and UK cases. [622] The outcome in the *Maxwell case* contrasts sharply with that in *Felixstowe Dock and Railway Co v US Lines Inc Freightliners Ltd v*

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[618] Westbrook, *supra* note 72.

[619] In re *Maxwell Communication Corp. plc* 170 B.R. 800 (1994); 186 B. R 807 (1995) and 93 F.3d 1036 (1996), 29 Bankr.Ct.Dec. 788.

[620] Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators (the "Maxwell Protocol") In re Maxwell Communication Corp., No. 91-15741 (TLB) (Bankr. S.D.N.Y. Jan. 15, 1992) Stacy A Lutkus, *COURT-TO-COURT COMMUNICATION IN CROSSBORDER INSOLVENCY CASES* (New York: International Insolvency Institute, 2018) at 1.

[621] Westbrook, *supra* note 607 at 950.

[622] Confirmation Order, In re Maxwell Communication Corp., No. 91B15741 (TLB) (S.D.N.Y. July 23, 1993) *ibid* at 951 note 15. The US Examiner Richard Gitlin and most of the lawyers involved with the matter were INSOL members. It made negotiations easier.

US Lines Inc,[623] in which Hirst, J, refused to recognize the US Chapter 11 Bankruptcy proceedings even on the ground of comity. The *Maxwell* case set the foundations for the eventual court to court communication, cooperation and coordination, and insolvency practitioners' cooperation and coordination of insolvency proceedings across borders.

3.5.9 The Maxwell Communication Corp Plc *Protocol*

Stacy A Lutkus, a New York Attorney, argues that "[t]he *Maxwell* Protocol represents a first in cross-border insolvency cases" and allowed for a company's successful reorganization with 80% of its assets in the US and majority of its debts in the UK.[624] The US court-appointed examiner was mandated to "harmonize the two proceedings as to permit a reorganization under US law which would maximize the return to creditors."[625] Recalling the *Maxwell* case, a respondent who was intimately involved stated as follows:

> The first cross-border case where we had to find a solution of serious magnitude was the *Maxwell* case where the banks caused an administration procedure to be filed in London, and Mark Holman of PriceWaterhouse was appointed the administrator, and the banks were prepared to take over and liquidate and had lost patience with Maxwell. However, the company's management felt that they could reorganize and do better than that and filed Chapter 11 in the United States. Judge Brozman was the judge in the United States, and Lord Hoffman was the UK judge. Justice Hoffman issued an order to the management to stand down cause the administrator had all power, and if they did not, they would be subject to potential criminal liability. Judge Brozman issued a comparable order under Chapter 11, requiring the administrators to stand down under the United States' stay process. We found two or three billion dollars of assets of a company in a stalemate where no one could function

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[623] [1989] 1 QB 360, [1988] 1 All ER 77, [1989] 2 WLR 109, [1987] 2 Lloyd's Rep., Queen's Bench Division (Commercial Court)

[624] Stacy A Lutkus, *COURT-TO-COURT COMMUNICATION IN CROSSBORDER INSOLVENCY CASES* (New York: International Insolvency Institute, 2018) at 2; Jay Lawrence Westbrook, "Comment: A More Optimistic View of Cross-Border Insolvency" (1994) 72:3 Wash Univ Law Q 947 at 950 making the same argument.

[625] Lutkus, *supra* note 620 at 2.

> to protect the assets. So, Judge Brozman appointed the examiner who invited Mark Holman, administrator, on the weekend, and we said: "we can't let this happen. It would be irresponsible if this happened". We had no legal system to rely on cross-border treaties, so we had to design our own convention before the courts, so my associate Emmett Flaschen and I devised a protocol where we basically divided up the responsibilities between the UK system and the American legal system based on the power of the judge in the UK and the power of the judge in the US. We divided up the responsibilities of the administrator in the UK. The protocol basically allowed the administrator to run the company from day to day, but he could not make big decisions without my consent, and we had to work together to do a plan, and after a year and a half, we made a plan and got out of Chapter 11. It was probably one of the fastest, most successful processes. We proved that an imperfect system could be made to work.[626]

Another respondent who acted as counsel to a US creditor asserted that the *Maxwell* case was "an important step forward in adopting protocols because identical plans were adopted in both jurisdictions. It was a very important step forward in cooperation."[627] Westbrook described the *Maxwell Protocol* as a monument to cooperation.[628] Lutkus concludes that the "*Maxwell* Protocol fostered truly integrated reorganization proceedings, which, in turn, maximized efficiency and minimized disputes among all case constituents – debtors, creditors and the tribunals."[629]

The scope of cooperation based on the use of protocols has expanded since the *Maxwell Protocol.* It now incorporates court-to-court communication through statutory schemes and guidelines provided by various non-state international bodies such as the IBA, the International Law Institute (ILI) working with American Law Institute (ALI) and Judicial Insolvency Network

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[626] Interviews of February 13 and 17, 2020

[627] Interview of February 5, 2020

[628] Westbrook, *supra* note 607 at 950.

[629] Lutkus, *supra* note 620.

(JIN).[630] After examining the protocol regime, Paul H. Zumbro, a New York Attorney, argued that protocols could help address cross-border insolvency's significant substantive and procedural complexities.[631]

From the viewpoint of norm dynamism, by 1995, the Council of the IBA adopted IBA Cross-Border Insolvency Concordat (the "Concordat"), which provided guidelines for protocols. The Concordat was a significant shift from the harmonization mantra of the MIICA towards the cooperation and coordination norm. Observation of the historical events leading up to the adoption of the UNCITRAL Model Law offer opportunity to understand the changes in norm definition by tracking the shifting positions of norm entrepreneurs.[632] Therefore, the following section considers what happened at the global level at UNCITRAL in 1992. The same year INSOL preferred norm of cooperation and coordination reached its climax in the Maxwell Communication Corp plc case with the adoption of the Maxwell Protocol January 1992.

3.5.10 UNCITRAL May 1992 Congress in New York

INSOL practically jumped into the fray of normative modelling at UNCITRAL in the summer of 1992 following the UNCITRAL May 1992 Congress on Uniform Commercial Law in the Twenty-first Century held in New York in May 1992, soon after the *Maxwell Protocol*. Carlos Zeyen, an IBA Luxembourg member, observed the lack of harmonization in bankruptcy and insolvency proceedings and called for work on harmonization.[633] Zeyen's address and other experts' comments like Carl Felsenfeld, an American Professor of Law and Manual Olivencia Ruiz, a Spanish Professor of Law in response, drew attention to the risk of the unbridled pursuit of harmonization and advocating limited engagement, spurred INSOL interest. The 1992 Congress sparked the urgency of INSOL's meeting with UNCITRAL even though INSOL had a long-term

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[630] For detailed discussion of the various effort at use of protocols and the common protocol terms, see Zumbro, *supra* note 452; Lutkus, *supra* note 620.

[631] Zumbro, *supra* note 452 at 157, 169.

[632] Hadden & Seybert, *supra* note 9. *Ibid*.

[633] Clift, *supra* note 413; See also UNCITRAL Commission Secretariat, *supra* note 429 at 153–155.

global leadership plan in insolvency. At the Congress, Felsenfeld joined Carlos Zeyen to propose that UNCITRAL consider future work on international bankruptcy. However, Felsenfeld did not like the focus of Zeyen on harmonization rather than cooperation and coordination, suggesting engagement in a limited sense of dealing with assets located abroad.[634] Manuel Ruiz also suggested working only on a few areas of importance in international bankruptcy.[635]

The world of insolvency practitioners vigorously responded when they realized the direction of the IBA proposals was inconsistent with their experience and norm. Professor Felsenfeld, who drew attention at the UNCITRAL Congress to the need for any work on cross-border insolvency to focus on assets abroad in bankruptcy, had a relationship with INSOL. The excerpt below from Clift and Cooper's monograph confirms that Felsenfeld discussed his ideas with INSOL officials, though, from other data, it is not clear whether there were direct discussions between him and Gitlin or related independently UNCITRAL and INSOL officials.

> 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.[636]

The exhaustive summary report by way of the Commission's Note to the UN General Assembly dated 23rd June 1993 on the outcome of the May 1992 UNCITRAL Congress in paragraph 54 set an objective of harmonizing insolvency law. The harmonization objective of paragraph 54 came after paragraphs 47, and 48 discussed the IBA MIICA proposal, suggesting work with other international organizations as consultants without mentioning INSOL.[637] The presentation at the UNCITRAL Congress of May 1992 by Carlos Zeyen on unification was a wake-up call for INSOL. By the middle of that year, INSOL had engaged UNCITRAL in preliminary

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[634] UNCITRAL Commission Secretariat, *supra* note 429 at 158.

[635] *Ibid* at 274.

[636] note 416 at 1.

[637] UNCITRAL Commission Secretariat, *United Nations Commission on International Trade Law YEARBOOK Volume XXIV: 1993* (New York: UNCITRAL, 1994) at 248.

discussions on working together. One account states that Felsenfeld accompanied the INSOL President Richard Gitlin to the first INSOL engagement with UNCITRAL in 1992, formally establishing contact with UNCITRAL Commission.[638] By another account, a respondent could not recall that Felsenfeld accompanied Gitlin on the visit to Gerold Hermann, the UNCITRAL Commission secretary-general, and Gitlin had direct contact with Hermann.[639] Neil Cooper confirmed that Richard Gitlin instigated the initial ideas for collaboration with UNCITRAL.[640] There is no doubt that Carl Felsenfeld, who cautioned about the direction of UNCITRAL at the May 1992 Congress, felt sufficiently concerned, as did the President of INSOL at the time Richard Gitlin to engage with UNCITRAL on an alternative approach. Felsenfeld and Gitlin may have approached UNCITRAL independently since respondents could not recall their working jointly despite allusion to that effect in some available historical data.[641] Notwithstanding, Gitlin and Felsenfeld were committed INSOL members and worked hard to realize the triumph of their preferred norm. Felsenfeld attended the Vienna Colloquium of 1994 and was part of the evaluators' panel that summarized the colloquium presentations.[642]

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[638] note 416 at 1.

[639] See interviews of February 13 and 17 2020.

[640] Cooper, *supra* note 413.

[641] Interview notes, February 13 and 17, 2020. Spirited Effort to contact Prof Felsenfeld was not successful despite assistance by his former university law school, Fordham Law School.

[642] Other members were Lord Justice Hoffmann and Gordon Marantz, QC note 68 at 3 It is not clear whether the Vienna Colloquium of April 1994 was the first judicial colloquium. In the Chronology of INSOL International published in the INSOL World Silver Jubilee Edition in 2007, the Vienna Colloquium was described as the "First Joint INSOL/UNCITRAL Judicial Colloquium" and the 1995 colloquium in Toronto as the "Second Joint INSOL/UNCITRAL Judicial Colloquium". This was confirmed by an interview Respondent who attended the Vienna colloquium and affirmed it was a judicial colloquium. But at p.3 Clift and Cooper stated that "....the first of an ongoing series of multinational judicial conferences, held in Toronto, Canada in March 1995..."

INSOL understood the need to engage and nudge the decision-makers within UNCITRAL through a complex socialization process for UNCITRAL and state delegates.[643] Neil Cooper surmised the effort at establishing collaboration with UNCITRAL as follows:

> I was fairly new to the board of directors of INSOL in the early '90s when Dick Gitlin shared his ideas about working with UNCITRAL. …….-he and his successor President, Stephen Adamson, could see the potential for collaboration with an organization as important as UNCITRAL. We were all getting frustrated at the lack of progress with cross-border cooperation. Projects such as the MIICA of the International Bar Association were great ideas but were never likely to be adopted as law.[644]

Besides remaining in the background and acting quietly, INSOL recognized the capacity gap at UNCITRAL and offered to provide secretarial support by deploying Cooper to assist the WGV secretary, Jernej Sekolec.[645] The truth seems to lay around that INSOL engaged with UNCITRAL immediately after the May 1992 UNCITRAL Congress and greatly influenced the Commission's Note on the 1992 Congress even though it did not influence the Congress itself, as it had no formal representation at the Congress. Recalling the collaboration between INSOL and UNCITRAL, Clift and Cooper stated that:

> 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 has been involved with UNCITRAL have

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[643] Richard Thaler & Richard Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008); Adamson, *supra* note 373 at 46 Adamson stated that INSOL strategy on building enthusiasm was the wish of the British members to avoid prominence by not hosting the conferences till 2001 .

[644] Cooper, *supra* note 413.

[645] Adamson, *supra* note 373 discussing the strategy of keeping British involvement quiet to encourage other states to participate in INSOL and its project; Annex III Guidelines on UNCITRAL Rules of Procedure and Work Method United Nations, "Report of the UNCITRAL Forty-Third Session (21 June - 99 July 2010) to the General Assembly A/65/17 - E", online: <https://undocs.org/en/A/65/17> at 101–103 The guideline eventually adopted by UNCITRAL in 2010 confirmed the sensitivities which INSOL strategy understood and overcame during the study period when UNCITRAL had no formal procedural rules or work method.

> 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.[646]

An analysis of the above statement of Clift and Cooper indicates the inevitable inference that while UNCITRAL Secretariat had acquired remarkable skill in the twenty years to when they were writing, in preparing the Note to the Commission in 1993, the Secretariat relied on the expertise of INSOL that had the original idea. The second inference is that INSOL recognized the need for a global platform for norm cascade, and UNCITRAL provided that platform. The above deductions are consistent with the norm life cycle approach [See paragraph 1.16 above]. Such data also enable the determination of the "origin of invention," the missing gap identified by Block-Lieb and Halliday when multinational institutions engage with non-state entities in global lawmaking.[647] Block-Lieb and Halliday suggest that the invention's origins were within UNCITRAL Secretariat and interaction among the secretariat, state delegates and non-state entities at UNCITRAL.[648] This study shows that the norm's origins were traceable to the norm emergence stage before the norm cascade to the WGV of UNCITRAL for debate and adoption.[649] Therefore, Block-Lieb and Halliday's explanation did not solve the problem of determining the origins of the invention. We now understand that the origins of the norms UNCITRAL adopted by our knowledge of how they emerged through the norm entrepreneurial activities of INSOL.

Having engaged with UNCITRAL successfully as its preferred international non-state partner organization with expertise in cross-border insolvency, INSOL had to deploy the resources required to support its norm cascade. The following section discusses how INSOL mobilized resources and built consensus around its preferred norm before its cascade to WGV.

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[646] note 416 at 3.

[647] Block-Lieb & Halliday, *supra* note 64 at 222–224.

[648] *Ibid*.

[649] See also, Chapter Four below for discussion on whether the debates at WGV significantly altered the INSOL norms that were cascaded for adoption.

3.5.11 Mobilizing Support and Resources

Although engagement with UNCITRAL commenced immediately after the May 1992 UNCITRAL Congress, INSOL formally presented the opportunity to work with UNCITRAL to its conference in Melbourne, Australia in the following year,1993, and obtained the approval of the strategy.[650] Stephen Adamson also reported progress with UNCITRAL on developing cross-border insolvency rules to INSOL members through its newsletter announcing the agreement on the hosting of joint colloquia.[651] INSOL knew that it needed a war chest to engage with significant international insolvency projects. The UNCITRAL Model Law project on cross-border insolvency turned the first and, perhaps, the most meaningful. So, when Jack Butler suggested the idea of a Group of Thirty-Six made up of major professional firms to be involved in financing significant projects that will make a difference to global insolvency, Richard Gitlin, the then-president, bought the idea and implemented it.[652]

3.5.12 INSOL UNCITRAL 1994 Colloquium

By November 1993, UNCITRAL had chosen INSOL as its preferred non-state partner of experts to work on its insolvency agenda leading to Adamson's announcement in INSOL Newsletter of joint colloquia with UNCITRAL.[653] Clift said of this as follows:

> Such was the support for possible work on insolvency law that by the time of the Commission in 1993 an issues paper on cross-border insolvency had been prepared. The Commission requested a further study on the desirability and feasibility of developing rules for cross-border insolvencies.[654]

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[650] note 416 at 1.

[651] Clift, *supra* note 413 at 58.

[652] Gitlin, *supra* note 413.

[653] Clift, *supra* note 413 at 58.

[654] Clift, *supra* note 413.

The first joint UNCITRAL/INSOL Colloquium was held in April 1994 in Vienna, and Manfred Balz presented a paper titled “Roads toward Worldwide Cooperation in Transborder Insolvency.” He called for INSOL practitioners' involvement in fashioning any regime, so it is tested for feasibility by those on the ground.[655] It was a dramatic turnaround from the harmonization agenda of the May 1992 UNCITRAL Congress. The achievement of partnership with UNCITRAL and availability of financial resources to organize specialized insolvency conferences with UNCITRAL had placed INSOL in a strong position for the following norm contestation with the IBA, the other norm entrepreneur.

The Notes and Reports of UNCITRAL on attendance at the 1994 Colloquium indicated that “... approximately 90 participants from various countries included lawyers, chartered accountants, bankers and judges that have presided over notable cross-border insolvency cases as well as representatives of interested ministries of a number of Governments and of international organisations, such as INSOL and Committee J of the Section on Business Law of the International Bar Association (IBA).”[656] The report also stated that the participants found that the prevailing legal environment was fragmented and compartmentalized, causing legal uncertainty due to inadequate legislative framework for cooperation but resolved that it would not be feasible to solve those problems through substantive unification of laws.[657] Although the colloquium considered the possibility of unification through treaties and mentioned the ongoing work of Committee J of the IBA, the colloquium report gave no reasons for not recommending that approach or consigning it to possible future work.[658]

The Vienna Colloquium also decided to hold a joint judicial colloquium. Cooper recalled that the then Secretary-General of UNCITRAL, Gerold Herrmann, challenged the Executive of

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[655] *Ibid*; See also Balz, *supra* note 445 which seems to be paper related to the address delivered at the INSOL UNCITRAL 1994 Colloquium by Balz.

[656] *Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency - Note by Secretariat to Twenty-seventh session of UNCITRAL*, by UNCITRAL, A/CN.9/398 (New York: UNCITRAL Commission, 1994) at 2.

[657] *Ibid* at 3.

[658] *Ibid* at 3–5.

INSOL, and he muttered, “Access, Recognition, Relief and Judicial Cooperation” and proceeded to “make our case to the annual meeting of the Commission of UNCITRAL but they, too, were persuaded.”[659] Before the joint judicial colloquium held in 1995, INSOL had persuaded UNCITRAL that the correct approach to cross-border insolvency regulation was a limited objective of cooperation and coordination among state courts. The Commission's annual meeting, which Neil Cooper referred to as having approved the INSOL approach, took place in December 1994. This was just before the Toronto Joint UNCITRAL INSOL Judicial Colloquium in 1995, where the judges backed the Expert Report. The Commission meets twice annually, in May in New York and in December in Vienna. A respondent explained the focus on getting the judges of different states to cooperate and interact through judicial colloquium and the Model Law approach. He said:

> We created a meeting in Vienna co-sponsored by UNCITRAL and INSOL and invited all involved in this, lawyers, judges, and bankers who were impactful and knowledgeable about cross-border issues. Invited them all, and at that meeting, we came up with three proposals. The first was let’s undertake a project for the model law, and Gerold [Hermann] established the two-year timeframe, which he said would be the shortest period to get the Model Law out of UNCITRAL, but he was willing to try and do it. Second, we realized it was important to have the judges talking to each other because the only other way without a treaty is whether the judges were willing to cooperate, as Judge Brozman did with Lord Hoffman [*Maxwell* case]. ….so we set up a judicial conference that we would have to have a good relationship among judges at every meeting.[660]

3.5.13 INSOL UNCITRAL 1995 Joint Judicial Colloquium

The Judicial Colloquium that followed in 1995 in Toronto, Canada, had in attendance 60 judges and government officials from 36 states, and also attended were panels of invited experts,

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[659] Cooper, *supra* note 413 at 56.

[660] Interview of February 13 and 17, 2020

including academics and practitioners.[661] The International Insolvency Review editorial report on the joint Judicial Colloquium stated that the proceedings included presentations, followed by open discussion, in the form of case studies of famous examples of cross-border insolvencies, with contributions from some of the judges and practitioners centrally involved with them.[662] In addition, the report of the 1994 Vienna Colloquium and the Expert Committee Report prepared by Ron Harmer and Evan Flaschen were presented and discussed by participants at the 1995 Toronto Judicial Colloquium, following which a committee of judges prepared a Judges' Evaluation.[663]

The Expert Committee report prepared by INSOL observed that business problems require a business solution.[664] It then discussed the landscape extensively for cross-border insolvency and associated challenges and posed the issue for the 1995 Judicial Colloquium as follows:

> The issue for discussion at the March 1995 Multinational Judicial Colloquium is whether there can be devised a more predictable, convenient, expedient and cost-effective means to provide for "access" and "recognition." There will be an added bonus if this can be done in such a way as to encourage and facilitate judicial co-operation within that system.[665]

The Expert Committee report recommended non-reciprocal recognition of insolvency orders, access, relief and judicial cooperation among state courts based on a model law that each

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[661] "Joint project of UNCITRAL and INSOL International on cross-border insolvencies: expert Committee's report on cross-border insolvency and recognition" (1996) 5:2 Int Insolv Rev 139, 140–161 at 139.

[662] *Ibid*.

[663] *Ibid* at 140–161, 162–169 The Expert Committee Report and Judges Evaluation are reproduced in this publication. The Expert Committee consisted of Ron Harmer, Evan Flaschen, Manfred Balz, Juan Dobson, Bruce Leonard and Hon Jean-Luc Vallens. The Judge Evaluators were Hon Justices Hoffmann (UK), Farley (Canada), Lifland (US), Vallens (France) and Wadhwa (India).

[664] *Ibid* at 143.

[665] *Ibid* at 151.

state would adopt as part of their domestic insolvency law.[666] The Judicial Colloquium merely affirmed the consensus recommended by the Expert Committee that a legislative text of limited scope by way of Model Law approach be pursued and recommended reference of further work on it to a working group of the UNCITRAL Commission.[667] The project landed on the WGV schedule in December 1995, following approval by the Commission of the recommendation of the 1995 Toronto Joint INSOL UNCITRAL Judicial Colloquium to the Commission.

However, perhaps the more significant development in norm generation was the work between Richard Gitlin meeting with Gerold Herrmann in 1992, the 1994 Vienna Colloquium and the 1995 Toronto Judicial Colloquium. These include the initial study by Cooper and Jarvis and the Expert Committee report by Hammer, Flaschen and others. The 1995 Judicial Colloquium recommended UNCITRAL should further work on the Model Law based on these inputs by INSOL. The Judicial Colloquium's significance is its role as a forum for the buy-in of state judges to eventually implement the concept of recognition, access, relief, and cooperation. Thus, while for INSOL, the projected norm provided a practical business solution, UNCITRAL, on the other hand, benefited from legitimacy gains from the Judicial Colloquium endorsement of the Model Law approach.

Section C – Norm Contestation and Relevance of Motivation

3.6 **Norm Contestation**

Norm contestation began from the formation of INSOL in 1982. It gained urgency with the declaration of interest of UNCITRAL in possible future work on cross-border insolvency at the May 1992 UNCITRAL Congress on harmonization of international trade laws. Neil Cooper recounted how himself, Rebecca Jarvis and Sonali Abeyratne produced a study that Ron Harmer and Evan D. Flaschen wove into a report presented to the 1994 Vienna Colloquium and formed

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[666] *Ibid* at 160–161 for summary of the recommendations.

[667] *Report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency - Note by the Secretariat to the Twenty-eighth session*, by UNCITRAL, A/CN.9/413 (Vienna: UNCITRAL Commission, 1995). *Ibid*.

the fulcrum of the UNCITRAL Model Law.[668]Although he said the colloquium was in April 1993,[669] the Adamson conference call report and Jenny Clift placed it in 1994. [670] The colloquium took place in April 1994. However, the apparent discrepancy is understandable because the study was conducted between 1992 and 1993 and formed the basis for UNCITRAL Secretariat Note to the Commission of June 23, 1993, titled, Possible future work – Note by the Secretary – Cross-border Insolvency.[671] A comparison of the Note and the Neil Cooper study suggests that the Note derived from the study's contribution. The Note in paragraph 50 referred to the views of commentators and associations of practitioners, indicating that the Secretariat received contributions from practitioners.[672] Cooper and Jarvis also assert that when UNCITRAL expressed interest in work on cross-border insolvency, "INSOL was able to contribute the views of its members on how to develop solutions."[673] Also, UNCITRAL did not have the in-house skill or resources to conduct the study. INSOL was already involved with UNCITRAL as subject matter experts since mid-1992 when Gitlin and Felsenfeld approached UNCITRAL for collaboration after the May 1992 UNCITRAL Congress in New York.

Most interview respondents confirmed that Neil Cooper and Ron Harmer were responsible for the Model Law's initial draft. However, one respondent could not attribute the Model Law to any group other than the WGV.[674] The only alternative norm was the MIICA from the IBA, adopting US Bankruptcy Code s.304.[675] Most practitioners were interested in a procedure for cooperation

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[668] Cooper, *supra* note 413.

[669] This may be the usual printers devil.

[670] Cooper, *supra* note 413.

[671] A/CN.9/378/Add.4 published in UN 1993 Yearbook UNCITRAL Commission Secretariat, *supra* note 637 at 248–253.

[672] *Ibid* at 253.

[673] Cooper & Jarvis, *supra* note 415 at xiv.

[674] Interviews on March and April 2019 in New York, 3rd April 2019 in Singapore, June 2019 in Barcelona, February 5, 13, 14 and 17, 2020 and March 26, 2020.

[675] *Ibid*

and not a uniform law.[676] The MIICA had no traction.[677] All the respondents concluded that the parties used persuasion to work out a solution.[678]

Paul J. Omar contends that both IBA Committee J's MIICA proposal and Cross-Border Insolvency Concordat and the Model Law were global initiatives.[679] Omar did not attribute the Model Law to INSOL, but UNCITRAL, understandably.[680] Omar noted that the IBA Concordat followed in the wake of the *Maxwell Communication* case, and argues that it was also based on the same universalist concept as the MIICA proposal and had limited application in a few cross-border protocols dealing with insolvencies in Canada and the United States.[681] Omar did not enquire beyond the fact that the Model Law was an output of UNCITRAL. Indeed, John Pottow was more emphatic in suggesting that the IBA's "Concordat provided the theoretical foundation for the Model Law."[682]

This study's perspective goes beyond the UNCITRAL output and considers the norms from the norm life cycle approach's prism. By this approach, the enquiry would stretch to the input

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[676] *Ibid*; also see analysis of findings in Chapter 7 below.

[677] *Ibid*

[678] *Ibid*

[679] Paul J Omar, "The Landscape of International Insolvency Law" (2002) 11 Int Insolv Rev 173–200 at 192–196.

[680] Omar, *supra* note 679.

[681] *Ibid* at 192–196 By 1995 when IBA Committee J came out with the Concordat, they were already out of the game and INSOL had become the dominant norm entrepreneur for cross-border insolvency. Also, norm definition had changed for the IBA as the Concordat was based on the norm of cooperation and not harmonization based on treaty as proposed under the MIICA.

[682] "International Insolvency Law's Cross-Roads and the New Modularity" in *Mod Intl Trade Support Innov Sustain Dev Proc Congr U N Comm Intl Trade L* (Vienna: United Nations, 2017) at 2; See also, Sefa M Franken, "Cross-border insolvency law: a comparative institutional analysis" (2014) 34:1 Oxf J Leg Stud 97–131 arguing that the Model Law was based on US Bankruptcy Code section 304, an assertion that is only partially correct because the MIICA idea of application of s.304 was the same as the domestic uniform application in all states within the United STates through a treaty at the international level , which was not the same as the Model Law approach of a menu of option for adoption by each state.

into the UNCITRAL process. It considers the Model Law's introduction to UNCITRAL and the norm entrepreneur responsible for generating or propagating the norm. The life cycle approach recognizes that norms do not enter a normative vacuum. Instead, there is a contestation with existing norms leading to the cascade when a norm becomes widely accepted. Using this approach, we found that INSOL's methods and processes generated norms that became transmuted to cooperation and coordination among state courts climaxing in the *Maxwell Protocol* in January 1992. All these occurred before the IBA 1995 Concordat. Also, the April 1994 joint colloquium in Vienna discussed the theoretical basis for the Model Law and set up an expert committee to articulate and present it to the joint judicial colloquium of 1995 before the IBA Concordat. The life cycle approach explains why the INSOL norm triumphed and MIICA did not. The IBA proposal did not scale the norm emergence stage. The researcher argues that MIICA failed because the MIICA norm entrepreneur did not sufficiently promote the norm they proposed to their members and UNCITRAL Commission, the Secretariat and state delegates as the norm modelling site for micro and macro factors. The IBA norm also had no relevance to their members' interest, as does the INSOL norm of limited cooperation and coordination among state courts.

The contestation between the IBA Committee J and the INSOL proposals was won and lost partly by both organizations' engagement strategies on the field with practitioners. INSOL had a specific focus and attracted membership that cut across different insolvency practice fields. IBA only had lawyers as its members, and only a small section of its membership was interested in insolvency. The result was that the IBA lost its initial position as the preferred partner of UNCITRAL in its foray into the murky waters of international bankruptcy. INSOL continued to improve its knowledge leadership once it caught up with IBA that had the initial lead.[683]

The norm contestation process may lead to a backlash from supporters of a threatened norm resulting in norm erosion.[684] Successful norm entrepreneurs are conscious of states'

[683] After the MIICA and the Concordat the IBA went cold on work on insolvency virtually abdicating to INSOL. A respondent in interview who was IBA delegate as well as state delegate at UNCITRAL noted that he never received any responses to his report on proceedings to IBA and was left to his own machinations at Working Group V – interview at St Johns Unversity New York in 2019 and virtually February 14, 2020.

[684] Deitelhoff, "What's in a name?", *supra* note 13; Vries, Hobolt & Walter, *supra* note 175.

normative weight and utilize persuasion techniques to avoid confrontation with norm leaders and avert a backlash and norm erosion. INSOL was aware of this paradigm. It recognized the United States as the norm leader and engaged in massive recruitment of American members by carrying its "coming of age" party across the "pond."[685] Over 100 Canadian, 100 British, 35 American, and 2 Australian insolvency practitioners attended the Hyannis Port conference in 1982.[686]

INSOL maintained the traditional British political secrecy using the Chatham House rules in its relationship with members and UNCITRAL. INSOL established its secretariat in London only in 1998, and the INSOL conference did not occur in the UK until 2001. INSOL's effort at legitimacy as the knowledge leader in cross-border insolvency coincided with UNCITRAL and US norm leadership legitimacy claims. Some strategies utilized to gain legitimacy include the joint INSOL-UNCITRAL judicial colloquia, which emphasized state court judges communicating directly and approving the Model Law approach.[687] Others include Kathryn Sabo's appointment from Canada as the first chairperson of the UNCITRAL WGV in 1995 when Canada was not a member delegate of the working group. UNCITRAL subsequently, in 2007, adopted a rule of procedure to allow the appointment of an official on personal merit.[688] At her appointment in 1995, Kathryn Sabo had no prior insolvency experience. Perhaps her only qualification for acceptance as chairperson was her inexperience in insolvency at the time and neutrality of her state as the non-member states had no voting rights in the impending norm contestation at UNCITRAL WGV. In May 1997, Mr. Bossa from Uganda, who had earlier acted as rapporteur, was elected chairperson of WGV. His

[685] Adamson, *supra* note 373 at 45.

[686] *Ibid* at 46.

[687] See paragraph 4 of A/CN.9/419 and Corr.1 United Nations, *United Nations Commission on International Trade Law yearbook. Vol. 27, 1996.* (New York: UN, 1998) at 114.

[688] United Nations, "UNCITRAL rules of procedure and methods of work, Note by the Secretariat to UNCITRAL resumed fortieth session Vienna, 10-14 December 2007 A/CN.9/638/Add.2", (17 October 2007), online: <https://undocs.org/en/A/CN.9/638/Add.2> at 12 para 36-41 particularly para 40. *Ibid* para 36-41 particularly para 40.

election seems consistent to ensure that the presiding officer is not from a state perceived to be involved in the ongoing normative contestation.[689]

3.7 **The Motivation of the Norm Entrepreneur**

The norm life cycle approach postulates that the actors' motivation at the emergence stage is altruistic, ideational and empathic, and persuasion is the dominant mechanism for promoting the norm.[690] This approach, rooted in international human rights and regime context, assumes that the norm entrepreneur's motivation is positive. The question arises whether we can assume that the motivation of a business norm entrepreneur is positive. The Expert Committee report of INSOL noted that the cross-border insolvency challenge was a business problem and that a business problem required a business solution.[691] The presumption is that prudent business people would act in their rational self-interest, which may not be ideational. In a sense, INSOL's motive was altruistic as it sought to relieve its members' frustration and improve the efficiency of the cross-border insolvency resolution mechanism. However, according to Philip Wood, a professor of insolvency law, bankruptcy profoundly affects stable legal relationships with contracts shattered, and their terms interfered with or negated.[692]

Consequently, more powerful creditors seek to manage the priority risk when insolvency shatters contracts through security arrangements that deliver super-priority even in a cross-border insolvency situation.[693] Janis Sarra, a Canadian Professor of Law, argues that the choice of the norm of cooperation and coordination is driven partly by creditors and debtors' perception of the

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[689] UN Commission on International Trade Law, *United Nations Commission on International Trade Law yearbook. Vol. 28, 1997.* (New York: UN, 1999) at 345.

[690] Finnemore & Sikkink, *supra* note 7. *Ibid*.

[691] note 661 at 143.

[692] Philip Wood R, "Principles of International Insolvency (Part II)" (2013) A Special Collection Celebrating 21 Years Int Insolv Rev 109–138 See also, British Columbia (AG) v Canada (AG), [1937] AC 391 [FCAA Reference (PC)] confirming that bankruptcy law can affect rights of secured creditors even without their consent.

[693] *Ibid* at 126.

convenience of a foreign jurisdiction to their respective interest in either liquidation or restructuring.[694] It follows that while INSOL's motive may have been altruistic, its members and states that adopt its norms may have been differently motivated. It is challenging to separate INSOL motivations from those of its members.

For instance, INSOL was not interested in harmonization because its implementation would have been by treaty, a process that would have been too long and outside the control of its members as state officials control the treaty-making process.[695] INSOL members experience from failed effort among EU states to agree on an insolvency convention influenced its approach as captured by a respondent as follows:

> I think it was the reality of the EU regulations' experience with a much smaller group of countries that could not agree. A convention must be identical. Political impediments, reprisal due to mad cow disease, there was also Gibraltar and England issues**.** UNCITRAL discussed what instrument to use, and the conclusion was that it is just too hard to get a convention adopted. The model law can be flexible; it was a path of less resistance.[696]

The limited objective of access, non-reciprocal recognition, relief, cooperation and coordination was quickly achievable through the Model Law approach enabling practitioners to access assets located abroad in cross-border insolvency. Also, a treaty would have been based on reciprocity, a further obstacle. Reciprocity is not required to obtain access and relief under the UNCITRAL Model Law. Still, some states provided reciprocity as a condition for access and relief in their state courts in adopting the law.[697]

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[694] Janis Sarra, "Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies" (2008) 17 Int Insolv Rev 73–122 at 108.

[695] Interviews of February 5, 13 and 17, 2020, March 26, 2020, April 3, 2019

[696] February 13 and 17, 2020

[697] Keith D Yamauchi, "Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvemcy Law?" (2007) 16 Int Insolv Rev 145–179 Unfortunately in implementing the model law some

Keith D. Yamauchi, a Canadian Professor of Law and judge, argues that reciprocity provision could be detrimental to the operation of the Model Law and prejudicial to the parties, especially for those states whose legislation includes a reciprocity provision because they risk other states' reprisal.[698] He contends that applying jurisdictional, substance, negative, positive and legislative reciprocity concepts could affect recognition and access to domestic courts.[699] He, therefore, suggests that states should adopt the Model Law without reference to reciprocity.[700] INSOL Expert Committee report to the 1995 joint judicial colloquium also suggested eliminating reciprocity in the Model Law's development. The Committee found, based on the collective nature of insolvency proceedings, the necessity for further directive under a bankruptcy order and varying degree of court involvement, that "the policy, development and present scope of most reciprocity of judgments legislation does not really suit the quest for recognition and enforcement of foreign insolvency proceedings."[701] The adopting states that include reciprocity provisions do not reference the rationale for its exclusion in the Model Law, espoused by the Expert Committee report. The need to overcome the difficulties of lack of access after exhaustive proceedings in a foreign state court was one of the motivations for the involvement of INSOL in cross-border insolvency. It is ironic that despite its success in eliminating reciprocity from the Model Law, some states still included it in adopting legislation.[702]

In some instances, INSOL's motivation does not align with its members. The choice of cooperation and coordination norm still left some creditors and debtors inadequately protected.

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states like Mexico, the British Virgin Islands, Romania, Mauritius, Malawi, South Africa and Uganda have included reciprocity requirement; Fletcher, *supra* note 491 discusses the challenges of the implementation of the model law in the UK and elsewhere. The consequences of inconsistent adoption of the Model Law for norn internalization and diffusion are discussed in Chapter 6 below.

[698] Yamauchi, *supra* note 697 at 145, 178–179.

[699] Yamauchi, *supra* note 697.

[700] *Ibid* at 179.

[701] note 661 at 147.

[702] We consider the issue of how far institutionalization of the new norm resulted in change of behaviour by broad acceptance and norm internalization in Chapter 5 below.

For example, the international commercial law and insolvency regime encourages holding some form of security, leaving unsecured creditors unprotected.[703] Practitioners from Europe and North America dominate INSOL membership and represent most international creditors.[704] Inevitably, the ideas which INSOL pursued reflected what practitioners in those regions prefer.

INSOL employed the classic method of promotion of new emergent norms, which is persuasion. INSOL was so successful with this strategy that many observers did not perceive INSOL as the critical factor in the emergence of the global norm. For instance, in his comprehensive discussion of the international insolvency landscape, Omar did not acknowledge the role of INSOL in delivering the Model Law as a global initiative.[705] Likewise, Block-Lieb and Halliday did not venture beyond debates at UNCITRAL in seeking the "origins of invention" considered by UNCITRAL in the informal law-making process with non-state entities.[706] The oversight is understandable because INSOL deliberately did not draw attention, thereby enhancing its persuasion techniques effectiveness.

The set-up of structures for knowledge exchange and referral by INSOL was quiet and voluntary. It was INSOL's methods and processes that produced the norm and not the rules of the organization. Engagement with UNCITRAL was backroom, and INSOL was comfortable in the engine room churning out the ideas but letting others run with them. INSOL deployed the stealth strategy at the emergence stage of the norm of cooperation and coordination life cycle. INSOL, as a norm entrepreneur, understood that once it has recruited the norm leader, it must leave the leader to persuade other state actors to become followers.

The perception of INSOL as the norm entrepreneur or lack of such perception by other actors at the norm emergence stage may have contributed to INSOL's success at generating and eventually cascading this norm. Pattberg explained that the problem structure determines the

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[703] Wood, *supra* note 692 at 127.

[704] See INSOL members directory over the years.

[705] Omar, *supra* note 679 at 192–200.

[706] Block-Lieb & Halliday, *supra* note 64 at 222–225.

strategy and influence of a non-state global norm entrepreneur.[707] If the problem structure is oppositional, the norm entrepreneur may have to be combative to persuade the norm leader and others to recognize the norm. However, suppose the problem structure is collaborative. In that case, it may make sense to allow a multilateral institution to run with the norm as INSOL did with UNCITRAL as a modelling site and the American insolvency practitioners as norm leaders.

3.8 **Conclusion**

This chapter answers why INSOL was formed and aligned with the limited objective of pursuing a norm of cooperation and coordination among state courts. Insolvency practitioners, creditors, and debtors' frustration and hardship in dealing with insolvency that extends across territorial boundaries and desire for a practical business-driven solution to cross-border insolvency challenges motivated the engagement of INSOL in cross-border insolvency global norm making. However, existing legal concepts like reciprocity hindered cooperation and coordination in managing insolvent assets located abroad. Overcoming the legal challenges and the emergence of a norm is dependent on the existence of a norm entrepreneur and an organizational platform.[708] INSOL was the norm entrepreneur for the emergence of the UNCITRAL Model Law on Cross-Border Insolvency. INSOL provided the structure and processes for cooperation and coordination among insolvency practitioners, bankers, regulators, policymakers, and judges worldwide. By acting as a forum for exchanging knowledge and communication, INSOL understood its members' needs and mobilized expertise and resources to impact global law-making in the specialized area of cross-border insolvency. As a respondent put it:

> Between 1975 and 1991, there was just a group dedicated to improving the system, which is what we did, and INSOL just took over the reins.[709]

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[707] Pattberg, *supra* note 87.

[708] Finnemore & Sikkink, *supra* note 7; Nadelmann, "Global Prohibition Regimes", *supra* note 163.

[709] Interview of February 13, 2020

Many factors, such as ideas, crises, actors, and processes, can trigger the generation or emergence of a new norm. For example, the research shows that the emergence of the norm of cooperation and coordination is attributable to a combination of factors. These factors are the transition crisis from ideas of a command economy to the growth of neoliberal capitalism. Other factors include globalization and the processes set up by INSOL to overcome the situation by reducing the frustration of its members in their cross-border insolvency practices.

Norms are socially constructed and not imposed but generally accepted behaviour, the promotion of which is usually through persuasion. Law, on the other hand, requires some form of compulsion. INSOL norms are attributable to its internal structures for generating knowledge, referrals and resources from among its members and its processes and methods, which positioned it as the norm entrepreneur to generate the underlying norm behind the Model Law. INSOL promoted its norms using persuasion as the mechanism for its propagation in line with the norm life cycle approach. In so doing, INSOL's engagement in norm contestation avoided norm backlash, which could have led to erosion of its norm. Instead, it adopted a collaborative approach, recognized and wooed the norm leader, created a forum for constant interaction through conferences and a directory and applied the Chatham House Rules to manage its relationships. Eventually, it succeeded in persuading the norm leader, the United States, and its delegates to change their norm definition from the universal application of s.304 of the Bankruptcy Code via MIICA, leading to the cascade of INSOL's preferred norm of cooperation and coordination among state courts.

4. Chapter Four – Norm Cascade at UNCITRAL and the making of the Model Law

Introduction

INSOL was one of the active non-state entities at UNCITRAL between 1995 and 1997 when the Model Law on Cross-Border Insolvency was introduced, debated and adopted.[710] The preceding chapter considered why INSOL became involved in global norm making in cross-border insolvency and the norm entrepreneur under whose methods and processes the norm of cooperation and coordination in cross-border insolvency emerged. Norm emergence is the first stage of the norm life cycle. The second stage of the norm life cycle is the norm cascade. INSOL still had to cascade the cross-border insolvency norms it encouraged into a global norm and influence global norm making in insolvency. This chapter discusses how between 1992 and 1997, INSOL selected UNCITRAL as the site for normative modelling and cascaded the norm of cooperation and coordination among state courts in insolvency proceedings to a global norm by persuading critical state delegates to adopt its favoured approach. The norm leader, in turn, socialized other state delegates at UNCITRAL to become norm followers leading to the adoption of the Model Law.

Although state delegates debated and crafted the final version of the UNCITRAL Model Law on cross-border insolvency, a significant gap remains in our understanding of how that law came to be adopted and the role of INSOL in its cascade at its UNCITRAL modelling site. UNCITRAL's website states its business as the modernization and harmonization of international business and trade rules.[711] UNCITRAL affirms that trade leads to faster growth, higher living standards, and new opportunities through commerce [contra: TWAIL arguments

[710] The other active non-state entities at UNCITRAL WGV between 1995 and 1997 were International Bar Association (IBA), European Insolvency Practitioners Association (EIPA), International Women in Insolvency and Restructuring Confederation (IWIRC), Union Internationale des Avocats (UIA) and International Chamber of Commerce (ICC).

[711] "United Nations Commission on International Trade Law |", online: <https://perma.cc/4LF3-ZX6J>.

against international law and the interest of the Global South in paragraph 1.14 above].[712] To increase these opportunities worldwide, UNCITRAL formulates modern, fair, and harmonized rules on commercial transactions.[713] These include conventions, model laws and rules which are acceptable worldwide. It also produces legal and legislative guides, recommendations of great practical value, updated information on case law and enactments of uniform commercial laws.[714] It offers technical assistance on law reform projects and regional and national seminars on uniform commercial laws.[715]

The Commission performs its functions through working groups.[716] For example, UNCITRAL WGV developed the Model Law in 1997 to manage cross-border insolvency.[717] The Model Law's objectives are the effective and efficient cooperation and coordination of insolvency proceedings in multiple national courts to realize debtors' assets located across borders. Other objectives are to ensure all creditors in various jurisdictions are treated fairly and equally and prevent debtor fraud by exploiting traditional cross-border limitations under international law.[718]

Consequently, the Model Law dealt with recognizing foreign proceedings, coordination of proceedings concerning the same debtor, rights of foreign creditors, rights and duties of foreign insolvency representatives, and co-operation among insolvency authorities, including

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[712] *Ibid*.

[713] *Ibid*.

[714] *Ibid*.

[715] *Ibid*.

[716] "About UNCITRAL | United Nations Commission On International Trade Law", online: <https://perma.cc/FYH5-ZQHM>. *Ibid*.

[717] *UNCITRAL model law on cross-border insolvency with guide to enactment and interpretation* (New York: United Nations, 2014).

[718] See the preamble of the Model Law UNCITRAL Commission Secretariat, *supra* note 436 at 3.

state courts in different states. Whether it has succeeded in its objective, particularly in resolving the tensions in cross-border insolvency, is debatable.[719] There is also debate about the legitimacy and accountability of the UNCITRAL work method, which, though directed by state actors, allows non-state entities to participate in its process, which is not self-enforcing.[720] UNCITRAL output is the outcome of a state-directed policy network that Coleman describes as structured linkages among state agencies and between those state agencies and civil society actors where state actors retain for themselves all decision-making competence.[721] He argues that a state-directed policy network requires equilibrium between state autonomy and civil society actors' support to ensure accountability and legitimacy.[722] In the face of the reality of a state-directed policy environment at UNCITRAL, INSOL had to be inventive in its engagement strategy.

INSOL's initial strategy was to consolidate its position as an international federation of national associations and a member's association. It pursued this strategy vigorously by recruiting established national associations and their members, such as the ABA, American Bankruptcy Institute ("ABI") and other specialized bankruptcy associations in the US and helped establish national associations where none exists. This way, the members of national

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[719] Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, 2018); S C Mohan, "Cross-border insolvency problems: is the UNCITRAL Model Law the answer?" (2012) (Chichester, U.K.) 21:3 Int Insolv Rev 199–223; R Mason, "Cross-border insolvency and legal transnationalisation" (Chichester, U.K.) 21:2:105-126, 2012 Int Insolv Rev; Adrian Walters, "Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law" (2019) 93:1 Am Bank LJ 47; McCormack, *supra* note 447; note 682.

[720] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64; Block-Lieb & Halliday, *supra* note 62 at 2 at note 4 arguing that legitimation by participation of non-state entities is necessary because UNCITRAL output is not self enforcing.

[721] Coleman, *supra* note 210 at 711, 721 and 731; Block-Lieb & Halliday, *supra* note 64 at 352; United Nations, *supra* note 645 Annex III Guidelines of Procedure and Work Method Conclusions and Summary Clause 7 states that "Observers, in particular non-governmental organizations, do not participate in the decision-taking." It should be noted that A/64/17 Annex III was issued long outside the study period but confirms that UNCITRAL eventually formally adopted the approach observed during the study period which perhaps informed INSOL strategy in engaging with UNCITRAL during that period. .

[722] Coleman, *supra* note 210 at 734 Please note that Coleman wrote in the context of domestic state-directed policy network in relation to monetary policy in Canada. *Ibid* Please note that Coleman wrote in the context of domestic state-directed policy network in relation to monetary policy in Canada.

associations became members of INSOL. Although the administration and governance of INSOL during its formative years of 1982 to 1989 were informal, it still focused on its mission statement and grew its membership.[723] Adamson recalls as follows:

> By 2006, INSOL's membership had reached the impressive number of 8,500 practitioners representing some 50 Member Associations around the world. Not bad for a group who thought that the potential members in 1982 might be persuaded to agree to pay £5 per annum.[724]

INSOL has forty-four (44) member associations and over 10,500 members in over 90 countries.[725] Adamson also reminiscences to members that besides the executives, "there are all the other people who have made it possible – members of Council and of many committees, sponsors, the vital secretariat, the Group of 36, our ancillary group, International institutions – and you, the individual members whom we all serve."[726]

Having built a stable structure and strong membership by the early 1990s INSOL then-President, Richard Gitlin, shared his ideas about greater collaboration between INSOL and UNCITRAL in implementing UNCITRAL plan for modernizing and harmonizing international trade laws in the area of insolvency.[727] INSOL had a vision of leadership in insolvency and involvement with significant global issues concerning insolvency.[728]

The norm life cycle approach explains the phenomenon of private participation in global norm making in cross-border insolvency. First, this chapter reconstructs the historical and

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[723] Adamson, *supra* note 373 at 48.

[724] *Ibid* at 49.

[725] "INSOL - Membership", online: <https://perma.cc/LL57-5YPB>; note 3.

[726] Adamson, *supra* note 373 at 49.

[727] Cooper, *supra* note 565 Gitlin was President of INSOL between 1991 and 1993. He was also one of the founders of the American Bankruptcy Institute (ABI) a member association of INSOL. These facts were confirmed in an interview with a respondent.

[728] note 18. *Ibid*.

primary data. Then, it evaluates the extent of applicability of the norm life cycle approach in explaining the role of INSOL in the cascade of the norm of cooperation and coordination in insolvency cross-border into the UNCITRAL Model Law. Finally, it also considers the level of influence of INSOL norms on UNCITRAL Model Law output.

Private international organizations' actions can influence global norm-making. As an interview respondent involved as a high-level INSOL official said, this is "an area of law where individuals with talent, commitment and strategy and purpose, made a profound contribution to both the law and their clients."[729] Also, UNCITRAL gained the respect of states and its work output, the first of which was the Model Law was taken seriously and adopted by states partly because UNCITRAL involved the most knowledgeable non-state entities experts in the world in its work process. The chapter considers the various methods and strategies to socialize UNCITRAL WGV and its influential state delegates to persuade them to adopt the Model Law approach to regulating cross-border insolvency proceedings and abandon the alternative norm of harmonization under the IBA proposal for a Model International Insolvency Cooperation Act otherwise referred to as MIICA. Indeed, INSOL was the trailblazer in new governance and private non-state actor norm entrepreneurship in international law within the state-directed policy network, which the UNCITRAL platform offered.

Norm Cascade at UNCITRAL

4.1.1 Establishment of Collaboration with UNCITRAL

In the previous chapter, INSOL responded to the UNCITRAL 1992 New York Congress by engaging and nudging the decision-makers within UNCITRAL, its preferred site for norm modelling, through a complex socialization process that targeted UNCITRAL an institution and state delegates [see paragraph 3.5.10 above].[730] Thus, an essential attribute of INSOL strategy

[729] Interview of Feb 13 and 17 2020

[730] Thaler & Sunstein, *supra* note 643; Adamson, *supra* note 373 at 46 Adamson stated that INSOL strategy on building enthusiasm was the wish of the British members to avoid prominence by not hosting the conferences till 2001 .

was that the organization remained in the background and acted quietly.[731] First, however, INSOL needed to establish formal collaboration with UNCITRAL as a springboard to deploy its socialization strategy. As a result, the status of preferred collaboration partner was achieved very early with research and studies support in 1992 and agreement on the organization of joint colloquia announced in November 1993 [see paragraph 3.5.11 above].[732]

4.1.2 Secretariat Support and Knowledge Leadership

Adopting the Model Law approach as the solution for cross-border insolvency occurred before the draft Model Law document was introduced to the WGV [see paragraphs 3.5.12 and 3.5.13 above].[733] INSOL provided secretarial support to WGV and exercised two forms of influence over the WGV secretariat through the support provided. The first was expert knowledge. Neil Cooper assisted the WGV secretary, Jernej Sekolec and was part of the secretariat for many years.

The second was the financial resources that INSOL could deploy to pursue what it thought was a matter of global significance for insolvency.[734] These resources enabled INSOL

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[731] The wisdom of this approach was vindicated when outside the study period France raised observations about the involvement of non-state entities in UNCITRAL work method UNCITRAL, *supra* note 37; Adamson, *supra* note 614 discussing the strategy of keeping British involvement quiet to encourage other states to participate in INSOL and its project; Wallace, *supra* note 743 discussing British business and political secrecy strategy. Also, it is noted that one of the interview respondents in this study claimed that the Chatham House rules still applies to the work they did at UNCITRAL; Block-Lieb & Halliday, *supra* note 56; Cohen, *supra* note 56; Kelly, *supra* note 14; Kelly, *supra* note 40 In the light of the above writings, it is arguable whether it makes sense to continue with the policy of secrecy when the issue of the role of non-state entities like INSOL in UNCITRAL work process is already the subject of much academic and public debate. Annex III Guidelines on UNCITRAL Rules of Procedure and Work Method United Nations, *supra* note 816 at 101–103 The guideline eventually adopted by UNCITRAL in 2010 confirmed the sensitivities which INSOL strategy understood and overcame during the study period when UNCITRAL had no formal procedural rules or work method.

[732] Clift, *supra* note 413 at 58.

[733] As discussed in the previous chapter the Model Law approach was recommended by the May 1995 Toronto UNCITRAL/INSOL Joint Judicial Colloquium and directed to the UNCITRAL Working Group V in December 1995 by the Commission.

[734] For discussion on the controversy over funding of UNCITRAL activities by expert groups of non-state entities, see Kelly, *supra* note 14.

to sponsor and organize the joint colloquia with UNCITRAL before adopting the Model Law. INSOL maintained a hundred percent attendance at UNCITRAL WGV sessions between 1995 and 1997 and kept its officials who provided secretarial support over the period. The setup of Group Thirty-Six sponsors enabled INSOL to mobilize the required resources.[735]

INSOL's strategy for attracting expert knowledge to the insolvency work of UNCITRAL and other global institutions involved with cross-border insolvency was somewhat inclusive because it did not restrict involvement to lawyers like the IBA.[736] It welcomes all professionals in the channel of insolvency services, including bankers, accountants, turnaround experts, insolvency officeholders, and lawyers. It also ensured that academics in the area and judges were involved in its activities. Adamson surmised the expertise INSOL brought to the insolvency rule-making process of UNCITRAL in the record of his interview and conference call with its early officials. He interviewed Ian Strang (Canada, first and founding President of INSOL), Gerry Weiss (the UK, the first Executive Secretary), Richard Gitlin (the USA, past President), Stephen Adamson, the UK, past President and the interviewer), Maurice Moses (co-editor of INSOL World) and Penny Robertson (Communications Manager, INSOL International). He said:

> In our conversation, Maurice Moses contrasted the position today where he feels that INSOL must remain inclusive and ensure that the credit providers particularly (later formed as the Lenders Group, in 1994) should be encouraged to be part of our programme. Richard Gitlin thought that this group comes together particularly when there is a specific project for it to complete, such as the out of court workout guideline project. This was a unique product for INSOL. The Judges also have participated particularly from the INSOL/UNCITRAL (the United Nations Commission for International Trade and Law) sponsored colloquium held in Vienna in 1994 when the practitioners and the judges together created a wish list

[735] Gitlin, *supra* note 413.

[736] The term inclusive is used only in terms of the range of professionals involved with INSOL at the time and not diversity in terms of the spread of those within the range.

> for achievable and efficient laws to encourage crossborder acceptance and recognition.[737]

Neil Cooper was in the engine room at the time and wrote as follows:

> So, following an UNCITRAL meeting at which UNCITRAL's involvement with insolvency law was proposed, the idea of a global insolvency colloquium at UNCITRAL was hatched. Before that a great deal of research was undertaken. Rebecca Jarvis and I undertook a study of the insolvency provisions of about 30 countries, aided by a young researcher, Sonali Abeyratne, now technical manager of INSOL. The results were woven into a report by Ron Harmer and Evan Flaschen and the whole thing presented to the colloquium which took place in April 1993 with the whole of the INSOL board and many other characters from the world of insolvency sharing their views.[738]

He said further:

> In the haze which follows any long evening with new vintage wine in Grinzing, on the edge of the Vienna Woods, we muttered, “Access, Recognition, Relief and Judicial Cooperation". …….And that became the objective of the Working Group set up to draft what became the Model Law on Cross-Border Insolvency…. As a side note, when we embarked on the exercise, we anticipated a "menu of options" rather than a black-letter model law. What was interesting was that the end product suited all types of legal systems equally and there was little need for optional provisions.[739]

There is no doubt that the intellectual firepower on insolvency which UNCITRAL Secretariat possessed in the early period between 1992 and 1997 is attributable to its relationship with INSOL. Before 1992, UNCITRAL had not considered an insolvency project and had no human and financial internal resources to do so. As a respondent retorted,

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[737] Adamson, *supra* note 373 at 47.

[738] Cooper, *supra* note 413.

[739] *Ibid*.

UNCITRAL was looking for work to do when it stumbled on cross-border insolvency.[740] The purpose of UNCITRAL congresses is to define new work areas around its core mandate. These congresses are an opportunity for UNCITRAL to know what other organizations are doing or thinking about as relevant to consider. Block-Lieb and Halliday corroborate the respondent when they found that international organizations exist in lawmaking ecologies with various actors struggling for survival as they compete, bargain and negotiate on the ascendancy of their norms within the ecology.[741]

UNCITRAL depended on expert groups to provide knowledge and financial resources for its consultation process to develop insolvency norms.[742] Initially, it engaged Committee J of the IBA as its preferred non-state expert group leading to Zeyen's presentation at the UNCITRAL Congress in New York in 1992. The IBA was not without financial muscle or some knowledge leadership in this area. It sponsored the 1978 ABA study of insolvency systems, which became Gitlin and Mears' book, *International Loan Workouts and Bankruptcies*.[743] The IBA, like INSOL, made an earlier attempt to build a relationship with insolvency practitioners in the most advanced insolvency jurisdiction, the US [see paragraph 3.5.2 above for more details on IBA involvement with ABA and the convergence on INSOL].

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[740] Interview in Barcelona, June 17, 2019

[741] Block-Lieb & Halliday, *supra* note 64 at 357–388.

[742] Article 71 of the UN Charter provides that the Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. United Nations, *supra* note 22; France has argued that Article 71 is the basis for consultation with non-state entities by all UN agencies including UNCITRAL UNCITRAL, *supra* note 37 at 3 note 1. Article 71 of the UN Charter provides that the Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. United Nations, *supra* note 22; France has argued that Article 71 is the basis for consultation with non-state entities by all UN agencies including UNCITRAL UNCITRAL, *supra* note 37 at 3 note 1.

[743] A respondent stated as follows: I became really active and started learning and published the book "International Loan Workouts and Bankruptcies" which was a long project we did on the behalf of the International Bar Association. …….. and it was one of the first books on cross-border bankruptcy. [Emphasis supplied]

However, INSOL proactively intervened in the middle of 1992, immediately after the UNCITRAL Congress in New York in May 1992, offering to work with UNCITRAL on insolvency. INSOL established Group 36 to help fund the cost of its participation with UNCITRAL.[744] Besides, the group of experts assembled by INSOL undertook the study of existing insolvency systems and prepared reports and documents for UNCITRAL Secretariat and presentation at colloquia.[745] By the time UNCITRAL Commission referred the insolvency project to WGV for consideration in December 1995, the INSOL idea of a Model Law based on cooperation and coordination was entrenched. In an interview, an active observer at WGV, closely aligned with the U.S. state delegation, recalls that Neil Cooper was always running around the UNCITRAL Secretariat. However, he was unsure what role he played there.[746] The observer's perception corroborates the strategy of INSOL of being seen but not heard in the UNCITRAL work process.

In the end, the presentations and thoughts on global insolvency norm making put together by INSOL at the 1994 and 1995 UNCITRAL INSOL Joint Judicial Colloquia influenced the core norms of the UNCITRAL Model Law [see paragraphs 3.5.12 and 3.5.13 above for details of the UNCITRAL INSOL joint colloquia engagement].[747]

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[744] Gitlin, *supra* note 654 In an interview a respondent said: I can tell you about the Group of 36. When I was President, our sources of income were really from dues that were relatively minor and could not possibly support the organization and funds from our meetings every four years and some meeting in between. It was not a sound enough platform to build INSOL in the way that we envisioned building it in the world, so we came up with a concept of the Group of 36, I think it was originally the idea of Jack Butler. Let's get 36 firms ..... those firms will help develop INSOL into a more significant international organization and get the active members to support INSOL more generally. That was a concept we put into place and it turned out to be fortunately very successful. Initially, not every firm wanted it because it was a new concept, but I think they are now. It became a foundation to fund the work of INSOL and frankly the commitment of those firms helped INSOL grow substantively as well .

[745] Cooper, *supra* note 413.

[746] Interview held at St John's University New York March 27, 2019. Note that US state delegates to UNCITRAL Working Group V included INSOL, ABI and ABA members. IBA also had an observer at UNCITRAL WGV.

[747] See analysis under Assessment of Impact of INSOL on Norm Cascade below. Also, previous chapter on norm emergence shows the details of the ideas explored and recommended by expert committee

4.1.3 Introduction of INSOL documents as Discussion Papers in WGV Provisional Agenda

The discussion draft of the Model Law was already in existence as an output of the 1994 Vienna Colloquium and the 1995 Joint Judicial Colloquium.[748] When the Commission assigned further work to WGV, the document had become the work product of the UNCITRAL Secretariat. The provisional agenda for the WGV 18th session from October to November 1995, which first considered cross-border insolvency, was issued on 15 August 1995, soon after the May 1995 UNCITRAL INSOL Joint Judicial Colloquium in Toronto.[749] The provisional agenda was the main introduction document that guided the commencement of the work of WGV on insolvency. Item 3 of the provisional agenda introduced the actual documents for discussion as follows:

> Item 3. Cross-border insolvency
>
> The Working Group will have before it a Note by the Secretariat containing a review of possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cases of cross-border insolvency (A/CN.9/WG.V/WP.42). The Working Group may wish to use the report as a basis for its deliberations.
>
> The following documents will be made available at the session:
>
> (a) Note by the Secretariat containing a report on the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994) (A/CN.9/413);

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report presented to the 1995 UNCITRAL INSOL Joint Judicial Colloquium in Toronto were incorporated in the Model Law such as non-reciprocity, limited access, recognition, relief and cooperation and coordination among state courts.

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749 UNCITRAL, *UNCITRAL Working Group V 18th Session Provisional Agenda A/CN.9/WG.V/WP.41* (United Nations General Assembly, 1995).

(b) Note by the Secretariat containing a report on the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22-23 March 1995) (A/CN.9/398); and

(c) Note by the Secretariat on cross-border aspects of insolvency (A/CN.9/378/Add.4).[750]

There was no need for INSOL to introduce any document before WGV as its work output was now UNCITRAL Secretariat documents before WGV as input. Indeed, if a non-state entity like INSOL had attempted to introduce such documents, it would have likely met serious objection from state delegates who would have seen it as an incursion into state sovereignty.[751] Instead, applying Finnemore and Sikkink approach, UNCITRAL became the socialization agent of the norm of cooperation and coordination embodied in the Model Law of which INSOL was the norm entrepreneur. While state delegates and observers made copious edits to the initial draft document and rightly claimed credit for the work of producing the Model Law from interviews with them, the fundamental norm, which the initial document espoused, never altered.[752] Every report of WGV of its eighteenth to twenty-first sessions recited the history of the work, referring consistently to the project emanating from the narrow focus determined by the UNCITRAL and INSOL joint colloquium and joint judicial colloquium.[753] The reports all mention that the provisional agenda was the basis of discussion.

The study sought to measure how quickly the WGV secretariat became cross-border insolvency law-making experts between May 1992 UNCITRAL incursion into insolvency and December 1997 when the Model Law was adopted. The argument is that if UNCITRAL became

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[750] *Ibid*; see also UNCITRAL, "Working Paper submitted to the Working Group on Insolvency Law at its eighteenth session: Possible issues relating to judicial cooperation and access and recognition in cases of cross-border insolvency A/CN.9/WG.V/WP.42" in *Yearb U N Comm Int Trade Law* (New York: United Nations, 1996) 136; UNCITRAL, *supra* note 656; "Joint INSOL UNCITRAL Judicial Colloquium" (1995) 4 Int Insolv Rev Spec Conf Issue 9–35.

[751] Kelly, *supra* note 14.

[752] Interview at St John's University March 27, 2019

[753] UNCITRAL Working Group V, *supra* note 36; UNCITRAL Working Group V, *supra* note 361; UNCITRAL, *supra* note 361; UNCITRAL, *supra* note 362.

experts, then the INSOL objective for rendering secretariat support would have been achieved, leaving UNCITRAL to socialize state delegates directly. By mid-1993, UNCITRAL Commission had produced an excellent report, a summary of the INSOL study [see paragraph 3.5.10 above discussing INSOL's input to UNCITRAL 1993 report].

Between 1995 and 1997, UNCITRAL officials Jernej Sekolec, the Secretary of WGV and Gerold Hermann, the UNCITRAL Commission secretary-general, had become respected as experts and made the most considerable contribution to WGV debates by May 1997.[754] The study calculated the words spoken at the May 1997 WGV session in the table below to determine the relative number of participants' words at the session.[755] The researcher argues that there is a relationship between the words spoken at WGV sessions and the speaker's level of expertise. Hirschman found that voice (words spoken), exit and loyalty are ways to express levels of satisfaction or dissatisfaction with ideas and concepts.[756] Following this method, many studies consider spoken words and how they affect norm definition.[757] From the table below, the UNCITRAL officials had the highest level of participation at the WGV session of May 1997.

Delegate	**Status**	**Signatory of Model Law**	**Words Spoken**	**Level of Relative Participation**	**Notes**
Jernej Sekolec	UN International Trade Law Branch Secretary of Commission	N/A	8582	15.4%	
Gerold Herrman			2120		

[754] United Nations, *supra* note 350.

[755] *Ibid* at 339–417.

[756] Hirschman, *supra* note 366.

[757] Hadden & Seybert, *supra* note 9; Kentikelenis & Voeten, "Legitimacy challenges to the liberal world order", *supra* note 61.

Mr. Choukri Sbai	Observer State Morocco	Y	2699	3.9%	
Ms. Sabo	Observer State Canada	Yes	1178	2.9%	
Mr. Sutherland-Brown			842		
Ms. Sanderson			25		
Mr. Tell	Member State France	N	4699	6.8%	NS HA HP
Ms. Brelier			48		
Neil Cooper	Observer INSOL	N/A	1277	5%	
Ron Hammer			2161		
Mr. Burman	Member State USA	Y	1927	8.6%	
Mr. Westbrook			4069		
Ms. Ingram	Member State Australia	Y	1786	5.9%	
Mr. Griffith			2288		
Mr. Yamamota	Member State Japan	Y	153	1.2%	S HA LP
Mr. Koide			684		
Mr. Mori			23		
Mr. Al- Nasser	Member State Saudi Arabia	N	1151	1.7%	
Mr. Abascal	Member State Mexico	Y	4124	5.9%	S LA HP
Mr. Mazzoni	Member State Italy	N	5139	7.4%	NS HA HP
Mr. Ter	Member State Singapore	Y	405	0.6%	S HA LP
Mr. Berends	Observer Netherlands	N	1668	2.4%	
Ms. Nikanjam	Member Islamic Republic of Iran	N	1693	2.4%	
Mr. Grandino Rodas	Member Brazil	N	130	0.2%	NS LA LP

Mr. Moller	Member Finland	N	2796	4%	
Mr. Glosband	Observer IBA	N/A	2396	3.5%	
Mr. Ho Jin Lee	Observer Republic of Korea	Y	96	0.1%	S HA LP
Mr. Shang Ming	Member China	Y	1334	2.0%	
Mr. Guo Jingyi			88		
Mr. Nicolae Vasile	Observer Romania	Y	106	0.2%	S,LA,LP; Vasile supported model law
Mr. Renger	Member Germany	N	453	2.4%	
Mr. Wimmer			1209		
Ms. Unel	Observer Turkey	N	388	0.6%	
Mr. Enie	Observer Gabon	Y	73	0.1%	Did not attend sessions but signed in 2015. LP as well.
Mr. Olivencia	Member Spain	N	2773	4.3%	
Mr. Madrid Parra			218		
Mr. Sandoval	Member Chile	Y	482	1.0%	
Mr. Puccio			217		
Mr. Blomstrand	Observer Sweden	N	265	0.7%	
Mr. Friman			196		
Ms. Mear	Member United Kingdom	Y	932	2.9%	S; HA
Mr. Callaghan			968		
Ms. Allen			95		
Mr. Agarwal	Member State India	Y	625	1.3%	
Mr. Gill			280		
Mr. Doyle	Observer Ireland	N	258	0.4%	
Mr. Wisitsora-at	Member Thailand	N	582	0.9%	NS; HA; HP Wisitsora-At supported the IBA proposal
Ms. Manglaklatanakul			55		

Ms. Loizidou	Observer Cyprus	N	488	0.7%	
Mr. Domaniczky Lanik	Observer Paraguay	N	948	1.4%	
Mr. Al- Zaid	Observer Kuwait	N	164	0.2%	
Mr. Cardosa	Member Brazil	N	130	0.2%	
Mr. Markus	Observer Switzerland	N	1333	1.9%	NS, HA, HP
Ms. Sorokina	Member Russian Federation	N	102	0.2%	
Mr. Lebedev			65		
Mr. Krzyzewski	Member Poland	N	179	0.3%	
Mr. Perez Useche	Observer Colombia	Y	216	0.3%	
Mr. Ochola	Member Kenya	Y	99	0.1%	S, LA, LP
Mr. Odeyemi	Member Nigeria	N	32	0%	
Mr. Somda	Observer Burkina Faso	Y	91	0.1%	Supported IBA proposal, but signed model law.
		TOTAL WORDS:	**69637**	**100%**	

Table 1 Analysis of Level of Participation at UNCITRAL WGV Session May 1997

CODE: S= Signatory, NS: Non- Signatory

HP= High Participation, >5% LP: Low Participation <5%

HA= High Attendance 100% LA: Low attendance (0-25%)

Among the entire dataset, only a few qualified as a high-level participant (HP) with the UN/UNCITRAL (15.4%), USA (8.6%), Italy (7.4%), France

> (6.8%), Mexico and Australia (5.9%), and INSOL with 5%. The only non-governmental organization that qualifies under HP is INSOL.

The researcher postulates that UNCITRAL officials had by May 1997 become confident experts in cross-border insolvency regulation and strong supporters of the Model Law approach from analysis of the number of words they spoke relative to the other participants at the twenty-first session of WGV. Another factor that supports this conclusion is the copious notes from the secretariat and working papers for the WGV sessions prepared by the WGV secretariat between 1995 and 1997.[758]

The data indicate a positive correlation between the number of words spoken and the quality of the contribution. Those with helpful contributions to the work of the working group spoke more. Also, norm leaders like the US delegates spoke the most.[759] Although transcripts of WGV sessions 18 to 20 are not available, the secretariat reports reflect the contributions of the norm leader. As pointed out earlier, a partial transcript of the twenty-first session of the working group is available. Also, the study relies on the data from the interview of respondents. INSOL understood global lawmaking's intricacies and the role of norm leaders and multilateral state-directed policy agencies like UNCITRAL in global norm-making. It focused on staying in the background and letting the norm leader and UNCITRAL do most of the talking. The words matter, and so did who spoke those words. By May 1997, Jernej Sekolec, the WGV secretary, was emphatic about the direction of the final output of UNCITRAL, which he strongly argued was toward a Model Law approach and not a treaty, when he made the following decisive contribution:

> At its twentieth session, the Working Group had discussed the form that the instrument being prepared should take. The widely

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[758] United Nations, *United Nations Commission on International Trade Law YEARBOOK Volume :XXVIII: 1997* (New York: United Nations Publication, 1999); United Nations, *supra* note 687; UNCITRAL, *supra* note 750; UNCITRAL, "Working paper submitted to the Working Group on Insolvency Law at its twentieth session: revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency (NCN.9/WG.V/WP.46)" in *U N Comm Int Trade Law Yearb Vol XXVIII 1997* (New York: United Nations Publication, 1999) 65; UNCITRAL, "Working paper submitted to the Working Group on Insolvency Law at its twentyfirst session: newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency: note by the Secretariat (A/CN.9/WG.V/WP.48)" in *U N Comm Int Trade Law Yearb Vol XXVIII 1997* (New York: United Nations Publication, 1999) 97.

[759] Interview with IBA delegate on February 14, 2020.

> prevailing view had been that a model national statute, or set of legislative provisions, would be appropriate to give judicial cooperation a clearer legal framework. An international treaty, on the other hand, would require a cumbersome process of adoption. The issue concerned national procedural law, an area of law which was not easy to harmonize through treaties. For the sake of speed, model legislation was generally considered the preferable solution. Nevertheless, some had expressed the view that certain aspects of the subject would be more appropriately dealt with in an international treaty. If, after adopting model legislation, the Commission felt there was a need for an international treaty, that could be discussed and decided at a later stage.[760]

Later in the proceedings, Sekolec drew the attention of the Working Group to the point, "as summarized in the report on its twentieth session (AlCN.9/433), in paragraphs 16-20, and particularly to the Working Group's suggestion in paragraph 20 that the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency should be considered at a later stage."[761] Thus, Sekolec's words gave direction to the work of WGV, enabling it to conclude the project at its twenty-first session within the two-year deadline, which Neil Cooper confirmed Herrmann set in Vienna in 1994.[762] Having introduced the documents that set the UNCITRAL discussion on cross-border insolvency through UNCITRAL WGV provisional agenda and supported the UNCITRAL secretariat to gain expertise in defending the agenda, INSOL ensured measured participation in the formal proceedings of UNCITRAL WGV.

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[760] United Nations, *supra* note 350 at 339 paragraph 5.

[761] *Ibid* at 340 Paragraph 11.

[762] Cooper, *supra* note 413.

4.1.4 Participation in Formal Proceedings

The practice of UNCITRAL allows participation by non-state entities as observers.[763] During the study period, UNCITRAL had no formal rules of procedure or work method that allowed non-state entities to participate as observers. The fallback, the General Assembly procedure provided for subsidiaries to develop their rules, failing which Rules 45 and 60 would apply.[764] There is controversy about the extent to which non-delegate observer states and non-state entity observers should participate in the proceeding.[765] The issue brewed below the surface before 1997 when the Model Law was adopted. After adopting the Model Law, France raised criticism on observers' participation in UNCITRAL Working Group proceedings and other aspects of the UNCITRAL work method.[766] The UNCITRAL Commission and the WGV secretariat wrote several notes on its procedure.[767] However, it was in 2010 that UNCITRAL adopted a formal guideline on its rule of procedure and work method.[768] The guideline confirms what INSOL knew since their engagement with UNCITRAL in 1992, informing their strategy.

In summary, the guideline expresses the sentiment of majority member states that decision making is for member states only, based on consensus and, if inevitable, voting

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[763] Kelly, *supra* note 14. *Ibid*.

[764] United Nations, *supra* note 33; UNCITRAL Commission Secretariat, *supra* note 33 In paragraph 16 of the report of the first session UNCITRAL agreed that UN General Assembly Rules of Procedure Rules 45 and 60 would apply to it until it adopts its own rules. By paragraphs 18 and 35, it adopted consensus as its preferred means of decision making otherwise GA rules would apply.

[765] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64 at 322–356 Chapter 8 for detailed discussion of the French critique on UNCITRAL work method and procedure and response of other states on the issues of consensus, participation of non-state entities, language and use of experts among others.

[766] UNCITRAL, *UNCITRAL, France's Observations on UNCITRAL's Working Methods* (UNCITRAL, 2007); Block-Lieb & Halliday, *supra* note 64 at 322–356; Kelly, *supra* note 14.

[767] note 33 UNCITRAL has on its website the rules of procedure adopted at its first session, the guideline adopted in 2010 and all the notes issued in between relating to procedure and work method. *Ibid* UNCITRAL has on its website the rules of procedure adopted at its first session, the guideline adopted in 2010 and all the notes issued in between relating to procedure and work method.

[768] United Nations, *supra* note 645 at 101–102.

according to General Assembly rules of procedure.[769] Observers are entitled to attend and participate in UNCITRAL Working Group proceedings, but the guideline excludes non-state entities from decision-making.[770] The secretariat of UNCITRAL can make submissions to any working group, consult outside expert groups without being bound by the advice of such group, organize expert meetings and colloquiums and invite member states, among other work methods.[771]

Neil Cooper captures the role played by INSOL in the formal procedure during the study period as follows:

> To make a submission, a delegate has to turn his delegation's name sign upwards and hope that the chair spots him or her. The 36 member nations occupy the first few rows; the other nations come next with the IGOs and NGOs including INSOL in the back row 'stalls.' Nevertheless, the INSOL delegates throughout those four years, Ron Harmer and I, with the assistance of Dan Glosband from the IBA, never had any trouble getting the floor.[772]

A respondent who was an observer at WGV recalls that Neil Cooper was almost part of the UNCITRAL Secretariat between 1995 and 1997 when the Model Law was adopted but did not participate much in the Working Group proceedings.[773] He also said that Ron Harmer of INSOL was more active in the proceedings and occasionally contributed.[774] The observation of the respondent is correct. However, the life cycle approach requires considering the norm's emergence before the cascade stage to ascertain the extent of the norm entrepreneurs'

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[769] *Ibid* at 101 paragraphs 1-4 deals with decision making by only members states by consensus and voting was noted to be an exceptional procedure.

[770] *Ibid* at 101–102 Paragraphs 5-10 provides for participation of observers upon invitation, but non-state entities of NGOs are excluded from decision making under pararaph 7.

[771] *Ibid* at 102 Paragraphs 11-15.

[772] Cooper, *supra* note 413.

[773] Interview of 27 March 2019

[774] Ibid

contribution. Such an examination would reveal the role of INSOL and the activities of its members discussed in the earlier chapter on norm emergence [see Chapter 3.1 on Norm Emergence]. A versatile norm entrepreneur could adopt different socialization strategies to promote the norm at the various stages of the norm's evolution. The strategy of INSOL at the cascade stage was the socialization of norm leaders while it remained in the background providing support to the UNCITRAL secretariat.

State delegates and observers who first engaged with cross-border insolvency at WGV from December 1995 might have missed that Neil Cooper had been with UNCITRAL Secretariat since 1993. Cooper recalls that they "met for four years; twice a year for two weeks at a time" and "[I]ndeed, when the project ended, many nations thanked us for what one delegate referred to as a 'four year master class in insolvency.'"[775] The WGV meetings on insolvency commenced between October and November 1995, following the Toronto Joint Judicial Colloquium held in May 1995. The Model Law was adopted in December 1997, making just about two years with four negotiations sessions at WGV.

INSOL, with Cooper among others, spent the earlier two years preparing the country study, arranging the colloquiums and providing support to the UNCITRAL Commission secretariat and later WGV secretariat. Another interpretation is that Cooper may have added two years post the Model Law spent on the Legislative Guide in referring to four years. In which case, the total time committed would have been six years, including the period spent with the secretariat before the reference of the work to WGV. The emergence stage is usually forgotten or ignored in accounting for norm evolution. Indeed, a respondent was emphatic that INSOL observers did not contribute substantially to the debates at the WGV sessions, and the US delegates led the discussions.[776] From the earlier analysis of the available transcript, the US delegates achieved a high participation level at 8.6%. However, other high participants

[775] Cooper, *supra* note 413 at 56.

[776] Interview of February 14, 2020.

included the UNCITRAL secretariat as the surprise at 15.4% participation, Mexico at 5.9% and INSOL at 5%.[777]

A respondent who was a US Attorney involved in the *Maxwell Communication* case and retired as a bankruptcy judge and US state delegate after the Model Law adoption in 1997 and participated actively in WGV adoption of the Legislative Guide said that the contribution of observers was welcome at WGV.[778] He categorized observers into two types; the UN member states who were not members of the Working Group and non-state entities.[779] The observers were allowed to participate freely, unlike other working groups.[780] The role of observers varied. While observers could participate, some were unprepared and saw participation as a New York or Vienna holiday.[781] Since the Model Law was before his time at UNCITRAL, he could not speak about the role of INSOL at that time.[782] This respondent's view is consistent with Neil Cooper's assessment of contributions of delegates and observers at WGV during the study period, which he said ranged "from the insightful, pithy, and sometimes humorous to the slightly

[777] See Table 1 Analysis of Level of Participation at UNCITRAL WGV Session May 1997. Analysis is based on only one session, the twenty-first session for which there was partial transcript available. The other sessions only had available reports which could not be subjected to the same data analysis. UNCITRAL had not commenced electronic recording during the study period. Recordings of Working Group sessions are now available on UNCITRAL website but not for the study period.

[778] Interview at St John's University New York 27 March 2019. United Nations, *supra* note 645 at 101–102 The UNCITRAL Guideline confirm that there is a third category of observers consisting of other regional or international multilateral institutions.

[779] Ibid

[780] Ibid; For discussion on UNCITRAL Rules of Procedure and right of observers to participate Kelly, *supra* note 14.

[781] Ibid

[782] Ibid

irrelevant submissions of delegates who have been sent to put a marker down that they have 'contributed.'"[783]

The study sought to understand whether there was a correlation between the participation of non-state entities at UNCITRAL WGV 18th to 21st session between October 1995 and December 1997 and their influence on the output, i.e. the Model Law. We have earlier shown that INSOL exercised influence through its engagement with UNCITRAL, secretarial support, joint colloquia, knowledge leadership, and discussion documents introduced through the provisional agenda.[784] In addition, voice can express satisfaction or dissatisfaction with a proposal or outcome.[785] In this case, the contending norms were harmonization through treaty or cooperation and coordination through a Model Law approach. We showed how UNCITRAL officials gained more voice and became assertive about the outcome. Therefore, by considering the voices of non-state entities in WGV proceedings, we can determine their influence on the outcome. Fourteen (14) non-state observers attended those sessions. Only about two were multilateral institutions, and the rest were non-state entities with the levels of participation as distributed in the table below.

Table 2 Non-state observers participation levels at UNCITRAL WGV 18th to 21st Sessions

International Organizations	**Levels of Participation at the 18th- 21st Session between 1995-1997**
Banking Federation of EU	25%
Cairo Regional Center for International Commercial Arbitration (CRCICA)	25%

[783] Cooper, *supra* note 413 at 56.

[784] See paragraphs 4.1.1 to 4.1.3 above.

[785] Hirschman, *supra* note 366; Kentikelenis & Voeten, "Legitimacy challenges to the liberal world order", *supra* note 61.

European Insolvency Practitioners Association (EIPA)	100%
Federation Bancaire De L'Union Europeene (FBUE)	25%
Hague Conference of Private International Law	25%
INSOL	100%
International Bar Association	100%
International Bar Foundation (IBF)	25%
International Credit Insurance Association (ICIA)	25%
International Chamber of Commerce (ICC)	50%
Insitituto Iberoamericano de Derecho Internacional Economico (IIDIE)	25%
International Monetary Fund (IMF)	25%
International Women's Insolvency and Restructuring Confederation (IWIRC)	75%
Union Internationale des Avocats (UIA)	75%

Three organizations achieved 100% attendance at all four WGV sessions. These are EIPA, INSOL and IBA. In addition, 57% of non-state observers attended at least one out of the four sessions, and 21% attended two or three sessions. INSOL and IBA, who achieved a hundred percent attendance, were the norm entrepreneurs for the contesting norms at WGV. Thus, we argue a co-relationship between their participation and influence in the UNCITRAL work process because they move in the same direction. Those who participated more had their

agenda on the table though their relative levels of success in influencing the UNCITRAL process differed.

The study also considered the data derived from the analysis of the partial transcript of the WGV 21st session. It classified the states participating according to the World Bank ranking of those with high and low GDP (Gross Domestic Product) and then compared their participation with non-state entities.[786]

Table 3 Highest GDP States were also the top 12 participants at WGV session in May 1997.

State	Words
United States	5996 (1)
Japan	860 (10)
Germany	1662 (8)
France	4747 (3)
United Kingdom	1995 (7)
Italy	5139 (2)
China	1442 (9)
Brazil	130 (11)
Canada	2045 (6)
Spain	2991 (5)
South Korea	96 (12)
Australia	4074 (4)

High GDP States terms= = 31,177 (Top 12 GDP)

[786] "Ranking of the World's Richest Countries by GDP (1997) - Classora Knowledge Base", online: <https://perma.cc/4J5E-5V94>.

Low GDP= 21,924 (Bottom 25 GDP)

UN= 10,702

IO's= 5834

Total = 69,637

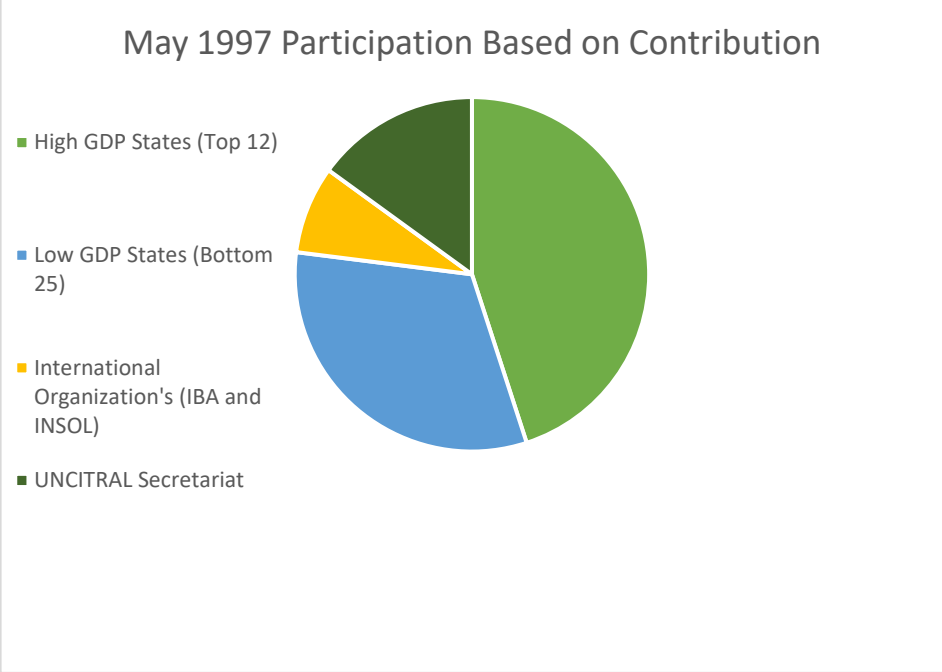

Figure 2 UNCITRAL WGV May 1997 Session Transcript Analysis

Supplementary Information

Top 12 1997 High GDP States predictably contributed significantly to WGV session discussions (45%) than the bottom 25 GDP States (32%). UNCITRAL Secretariat contributed a significant percentage of 15.4% to the debates. Two non-state international organizations participated: INSOL and IBA. They contributed 8% to the overall discussions but compared to individual states, they had the second-highest level of participation (5834 words combined), just following the United States with (5996 words). INSOL among the IO's contributed 59% of the discussion compared with IBA.

Some INSOL affiliate member associations did not rely on INSOL representing them as observers at WGV. They also applied for and maintained their national or international organization's observer status.[787] INSOL delegates did not treat participation at formal proceedings or attendance at the Working Group V session during the period as holiday trips. It was quiet background hard work for INSOL delegates, and interventions at formal proceedings were measured and utilized only when necessary. The state delegates from the critical mass of state delegates were also INSOL members in any event.[788] INSOL achieved cascade mainly through the support it gave to the UNCITRAL Secretariat and the utilization of the expertise of INSOL members who were state delegates.

France subsequently complained that non-state observers whose experts support state delegates' position diluted state sovereignty's centrality in global lawmaking by giving undue normative weight to those state delegates in the UNCITRAL work process.[789] However, INSOL's expertise cut across many state delegations and did not give unnecessary weight to any particular state. For example, in the early days of the working group, Richard Gitlin (U.S.), Ron Harmer (Australia), and Neil Cooper (U.K.) represented INSOL as observers.[790] In any event, Finnemore and Sikkink's approach recognizes that states do not carry the same normative weight.[791] Thus, INSOL engaging member states such as US delegates who were norm leaders was crucial to the norm cascade.

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[787] An example is the International Women's Insolvency and Restructuring Confederation ("IWIRC") which is an INSOL affiliate and also attended as observers at UNCITRAL.

[788] For instance, Prof Jay Westbrook was a US state delegate at the time and member of INSOL.

[789]

[790] Participation of Richard Gitlin in early work of UNCITRAL Working Group V was confirmed in interview of February 13 and 17, 2020.

[791] Finnemore & Sikkink, *supra* note 7 at 901. *Ibid*.

4.1.5 State Delegates

The state delegates took centre stage upon presenting the draft documents for discussion to UNCITRAL WGV by the secretariat through its provisional agenda.[792] State delegates and observers at WGV perhaps, rightly so, claim that they are the Model Law's primary drafters.[793] The clauses' actual negotiation was among the state delegates, and they had the power to vote although observers could participate but had no voting right.[794] The state delegates and other observers acknowledged that Neil Cooper and others were always around during their meetings representing INSOL. However, they did not seem aware that Cooper and his team did the initial compilation of insolvency laws of thirty (30) states which formed the basis of the Ron Harmer report. They were also not conversant with the Ron Harmer report turning into the working documents presented for discussion to the state delegates despite explicit references to the papers by the provisional agenda.[795]

As captured by elite interview, the perception of state delegates was that the US delegates were influential and their contributions short to the point, Spanish delegates spoke for long times; the French could be insistent on an issue, Italians, combative.[796] Women made a valuable contribution, referring to Kathryn Sabo of the Canadian Ministry of Justice. Although from an observer state, Canada Kathryn Sabo chaired WGV for most of the sessions that debated the Model Law.[797] The perception was also that the US state delegates' views dominated formal proceedings of the Working Group. The Working Group's formal proceedings design ensured that state delegates maintained their state sovereignty in terms of attendance,

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[792] UNCITRAL, *supra* note 749 Item 3.

[793] Interview on March 27, 2019 at St John's University Queens New York

[794] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64 at 322–356 Chapter 8; United Nations, *supra* note 645 at 101–102 Annex III.

[795] Deduced from interviews.

[796] Preliminary Interviews

[797] Preliminary Interviews.

the right of audience, and the ability to participate and vote in decision-making, excluding non-state entities. However, consistent with Finnemore and Sikkink norm leader concept and TWAIL observation on Third World states disadvantage in global lawmaking, states with high GDP dominated participation and decision making at WGV [on norm leaders, see paragraphs 1.1, 3.1 and 3.6 while on TWAIL see paragraphs 1.3 and 1.14]. The data supports this view. Analysis of reports of WGV to the Commission between 1995 and 1997 and available partial transcript show the dominance of the US delegates in discussions while UNCITRAL officials gained expertise, confidence and authority over time.[798] The interview respondents confirmed that the US delegates dominated the discussions at WGV during the period.[799] Also, the writings of participants record the influence of norm leaders.[800] When there is disagreement on the floor of WGV, the chairperson usually requests a small group of delegates, the delegates from high GDP states and influential non-state observer delegates, to discuss the matter during coffee breaks and revert with a compromise draft.[801] INSOL awareness of this dynamic drove its need to socialize American insolvency practitioners on its norms before the cascade to UNCITRAL [see paragraphs 3.5.2 and 4.1.1].[802] Non-state entities with sufficient clout using the socialization methods explained by the norm life cycle theory influenced consensus within the WGV through various methods, including participation in break-out caucus meetings and strategic intervention during formal proceedings.

The chairperson's election for the Working Group holds at every session, which means every six (6) months as the group meets in April/May and November/December at New York and Vienna. The chairperson is unable to acquire power by virtue only of the position. Any occupier of that position had to cater to influential US state delegates. From 1995 to 1997, two

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[798] Post 1997 the correspondence and memos between France, the US and UNCITRAL over participation of non-state entities in UNCITRAL work process indicate that the US position prevailed allowing participation of non-state entities UNCITRAL, *supra* note 37; note 37.

[799] Interviews of March 27, 2019, February 5 and 14 2020.

[800] Cooper, *supra* note 413.

[801] *Ibid*.

[802] Finnemore & Sikkink, *supra* note 7 at 895.

persons acted as chairs of WGV. They were Kathryn Sabo of Canada and Mr. Bossa from Uganda. Despite the short official tenure, occupants held the position for a long time.[803] Because of the norm contestation at the WG session, it is imperative that any chairperson understands the limits of their powers and utilizes persuasion and consensus-building among state delegates to win and maintain their confidence.

INSOL also knew when to exit the stage for state delegates. INSOL understood that UNCITRAL was a site for norm modelling within the UN structure, in other words, a state-directed policy network.[804] Therefore, INSOL persuaded the US as the norm leader to accept and lead the socialization of other state delegates on the norm of cooperation and coordination as the foundation for any significant cross-border insolvency law regime. The involvement of US state delegates and their influencers with INSOL and its norms and the collaboration with UNCITRAL before presenting the draft working document to WGV made the socialization of norm leaders among the state delegates seamless.

US WGV state delegates' successful socialization is significant because the US position has historically favoured an international convention on insolvency. For instance, the US Delegation to the Third ICC Congress of 1925 supported a convention on bankruptcy.[805]Also, in 1939 the US Delegation to the ICC Congress voted for a resolution

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[803] For instance, Wisit Wisitsora-At of Thailand chaired the Working Group for extended periods between 2001 and 2019 chairing all sessions of UNCITRAL WGV except two sessions [**thirty-second** (New York, 14-18 May 2007) **and fourty-eighth session** (Vienna, 14-18 December 2015)]. Also, as observed earlier in discussion on norm contestation any person who is not a member delegate can be appointed an official on personal merit as Kathryn Sabo of Canada was so appointment when Canada was an observer member, and she was not a member delegate perhaps because Canada was perceived a neutral state in the sense that it had no voting right.

[804] Coleman, *supra* note 210; William D Coleman, "Fencing Off: Central Banks and Networks in Canada and the United States" in Bernd Marin & Renate Mayntz, eds, *Policy Netw Empir Evid Theretical Consid* (Frankfurt, 1991).

[805] Nadelmann, *supra* note 19 at 87. *Ibid*.

urging the conclusion of bilateral bankruptcy treaties.[806]It follows that persuading them to abandon the IBA MIICA proposal was no mean feat.

Despite INSOL's success in introducing its discussion documents at the 18th session of WGV and setting the agenda, it was on May 12, 1997, at the 21st session of WGV that the WGV secretary Jernej Sekolec made the categorical opening statement settling the issue of adoption of Model Law approach. He said:

> For the sake of speed, model legislation was generally considered the preferable solution. Nevertheless, some had expressed the view that certain aspects of the subject would be more appropriately dealt with in an international treaty. If, after adopting model legislation, the Commission felt there was a need for an international treaty, that could be discussed and decided at a later stage.[807]

4.1.6 Informal Interactions

Apart from formal contribution at WGV sessions and reliance on the UNCITRAL secretariat recently gained epistemic authority as insolvency experts, INSOL socialized state delegates through informal interactions. For example, a respondent recalled a couple of logjams during the Working Group sessions over some clauses of the draft Model Law.[808] A "small group" used coffee breaks and lunchtime to prepare position papers and resolve these disagreements or misunderstandings.[809] The small group consisted of state delegates and observers from the significant economies led by the US delegates.[810] In addition, Neil Cooper

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[806] Nadelmann, *supra* note 19 at 87. *Ibid*.

[807] United Nations, *supra* note 759 at 339 paragraph 5.

[808] Interviews of 27 March 2019

[809] Ibid

[810] Ibid

referred to “expert meetings,” which presumably refers to informal meetings held outside the formal sessions to iron out differences among delegates.[811]

The question arises whether the informal drafting groups had any impact on the outcome of WGV. The answer is in the reports of WGV acknowledging the use of informal drafting groups. The WGV report to the Commission on its twentieth session in paragraph 13 records as follows:

> As the Working Group progressed with its consideration of document NCN.9/WG.VIWP.46, it established an informal drafting group to revise the draft Model Legislative Provisions, reflecting the deliberations and decisions that had taken place. The Working Group expressed its appreciation to the drafting group for its work and, since there was no time to consider the texts prepared by the drafting group at the current session, decided to consider those texts at its twenty-first session, which would take place in New York from 20 to 31 January 1997.[812]

The WGV report on its twenty-first session also acknowledged the contribution of the informal drafting group, which revision of the draft Model Law the WGV did not have time to consider, so the task was delegated to the WGV secretariat to do.[813] The pressure on the WGV to submit its final draft to the Commission's thirtieth session in May 1997 meant that it relied on the informal drafting group and WGV secretariat to harmonize the draft. Analysis of the amended draft attached to the twentieth and twenty-first sessions report indicates no substantial differences or improvements in the informal drafting group's work.[814]

Besides discussions of “experts” at lunch and coffee breaks, various organizations sponsored dinners and other events around the Working Group meetings that enable

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[811] Cooper, *supra* note 413 at 56.

[812] UNCITRAL, *supra* note 361 at 47 paragraph 13.

[813] UNCITRAL, *supra* note 362 at 74 paragraphs 14 and 15.

[814] UNCITRAL, *supra* note 361; UNCITRAL, *supra* note 362 at 93–97.

delegates and observers to mingle and know each other better.[815] Such fora encouraged ideas bouncing and allowed excellent ideas and arguments to rise to the top without much friction. According to Cooper, "...a significant number of delegates have been regular attendees over the years and have become good friends."[816] The informal interactions between delegates and observers contributed to developing these relationships crucial in establishing the norms. INSOL sponsored and encouraged these informal interactions, as did other organizations interested in cross-border insolvencies, such as the IBA.[817]

The pervasive formal and informal influence of INSOL and its strategy of engagement with judges meant a third joint colloquium and the second judicial colloquium held in New Orleans in March 1997. The New Orleans colloquium considered the final draft of the Model Law before its adoption by UNCITRAL in May 1997, as reported by UNCITRAL as follows:

> After the last of those Working Group sessions, the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held (22-23 March 1997) in conjunction with the 5th World Congress of the International Association of Insolvency Practitioners (INSOL) (New Orleans, United States of America, 23-26 March 1997). The Colloquium considered the draft Model Provisions as they were prepared by the Working Group. The participants, mostly judges and government officials, were generally supportive of the draft, expressed suggestions on the substance of several provisions, and considered that the Model Provisions, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases.

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[815] INSOL, III (International Insolvency Institute) and many of the American observer organizations organize formal dinners for delegates or their members who are either observers and delegates for different organizations and countries.

[816] Cooper, *supra* note 413 at 57.

[817] Interview of February 13 and 17, 2020. For list of non-state entities that attended the May 1997 WGV session see Table 5 Non-state observers participation levels at UNCITRAL WGV 18th to 21st Sessions.

4.1.7 Adoption of UNCITRAL 1997 Model Law on Cross Border Insolvency

Finally, after two years and four (4) sessions in Vienna on the morning of May 30, 1997, WGV concluded work on the draft UNCITRAL Model Law on Cross-Border Insolvency at its twenty-first session recommending its adoption to the Commission. The Commission met at its thirtieth session in the afternoon of the same day to adopt and recommend the Model Law to the UN General Assembly.[818] The General Assembly eventually adopted the Model Law in December 1997.[819] Being a Model Law, it has no force on its own and requires adoption by each UN member state to achieve efficacy as a new international law norm.[820] However, the adoption of the Model Law by UNCITRAL was a significant milestone in evolving the norm of cooperation and coordination in cross-border insolvency proceedings because it began institutionalizing the norm. While adoption by UNCITRAL was the high point of the norm cascade, adoption of the Model Law by states under their national law is part of the third stage of the norm life cycle, internalization. The next chapter discusses state responses after UNCITRAL adoption of the Model Law. It also discusses whether institutionalization led to states' norm internalization and behaviour change.

The institutionalization of a norm by adopting a regulation or rule could evidence norm cascade. However, Finnemore and Sikkink pointed out that institutionalization could follow the norm's cascade.[821] The non-state entity, INSOL, whose members were at the firing line of the impact of insolvency laws on their cross-border practice of insolvency, understood the problem better, providing UNCITRAL the expertise it needed to tackle it. After the norm was conceived, and the site for norm modelling identified, the non-state entity and norm entrepreneur receded

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[818] note 4; UN Commission on International Trade Law, *supra* note 689 at 413–417.

[819] note 4; note 717.

[820] Adoption of the UNCITRAL Model Law on Cross Border Insolvency as national law of states is the beginning of the third stage of norm life cycle which is norm internalisation and is discussed in another chapter.

[821] Finnemore & Sikkink, *supra* note 7 at 900; Hadden & Seybert, *supra* note 9 argue that institutionalization alone does not guarantee change of behaviour by states. The next chapter considers the issue of internalization of the norm set by the Model Law.

to the background at the cascade stage, allowing state actors to move the process forward. The actors at the cascade stage compared with those at the norm emergence stage had different motivations driven by politics and legitimacy.

Neil Cooper aptly surmised the UNCITRAL WGV decision-making process in adopting the Model Law as follows:

> Critics of the system might say that it should not have taken us the equivalent of four months of meetings and a great deal of secretariat time to draft something as simple as the Model Law and its accompanying guidance notes. This would place no value on the process which enabled many nations to feel that they had contributed and "brought in" to the end result. No simple exercise by consultants, however bright, would have resulted in the uptake of UNCITRAL Model Law on Cross-Border Insolvency.[822]

Assessment of Impact of INSOL on Norm Cascade

Several factors contributed to the success of INSOL in cascading the norm of cooperation and coordination on cross-border insolvency proceedings at UNCITRAL, leading to the Model Law. This section discusses those facts that contributed to the successful cascade.

4.2.1 Organizational Platform

Norm promoters need some form of organizational platform to engage at the international level. UNCITRAL provided the organizational platform for norm cascade. There was a convergence between UNCITRAL's need for legitimacy in the pursuit of harmonization and modernization of international trade laws and INSOL's objective of cascading the norm of cooperation and coordination into global cross-border insolvency law. The structure of an organization or multilateral agency influences the norms it pursues.[823] UNCITRAL work method

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[822] Cooper, *supra* note 413 at 56.

[823] Finnemore & Sikkink, *supra* note 7 at 899; Nadelmann, "Global Prohibition Regimes", *supra* note 163.

allowed the use of experts that INSOL provided, and the output of their joint work influenced state actors' behaviour at UNCITRAL.

The platform provides the network for information dissemination to global decision-makers. Slaughter argues that state and non-state parties operate through global networks in the world order of the 21st century.[824] Further, private networks of non-state actors can perform government functions from providing expertise to monitoring compliance and even negotiating the substance of those regulations.[825] The problem is how to ensure that these private actors uphold public trust since they are unelected.[826] Slaughter concludes that government networks bring stability to the tri-lemma and prevent blurring the line between government, corporate and civil society organizations as global governance actors.[827]

UNCITRAL provides a balance between a purely private international network for global governance and a solely public network. Slaughter's public trust problem is managed partly because of the UNCITRAL process, which moderates INSOL's normative effect on international norm making. INSOL's organizational structure also enabled it to engage with UNCITRAL, attract funding, and grow as the umbrella organization for insolvency practitioners to share knowledge, contacts, and project members' interests by participating in significant international regimes' moulding affecting insolvency law and practice. Clift reflected in 2007 on the silver jubilee celebration of the relationship between INSOL and UNCITRAL that:

> INSOL has been a regular participant at meetings of the UNCITRAL working group on insolvency law, providing valuable and balanced practical input based on accumulated years of first-hand insolvency experience and knowledge of all the interests that compete in insolvency proceedings- debtors, creditors, employees and others…..We hope that

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[824] Slaughter, *supra* note 134.

[825] *Ibid*.

[826] *Ibid*.

[827] *Ibid*.

> INSOL will continue its active participation in UNCITRAL insolvency work in the coming years…[828]

4.2.1 INSOL Work Method

INSOL considers itself a body of knowledge on insolvency. It exhibits its knowledge leadership through various publications, such as technical papers, INSOL World and International Insolvency Review. It is also a marketplace where this knowledge, contact and information about insolvency law, events and persons exchange among members collaborating with international governmental agencies. INSOL conferences provide a platform for such an exchange of ideas. Not surprisingly, "INSOL conferences have indeed provided a forum for discussing and seeking feedback on UNCITRAL work and product."[829] INSOL is careful about how it manages the information and knowledge it has acquired over the years. It is also responsive to specific sections of its membership needs through specialized sections such as the lenders, academic groups and judges' colloquium.

The embedded cascade catalysis with UNCITRAL was the first foray of INSOL into international areas of significance. It has since expanded its influence in the international arena.[830] INSOL has developed strategic relations with multilateral institutions such as the World Bank and the International Finance Corporation ("IFC"). Besides joint regional events such as the African Round Table, it recently produced a guide on states' measures in dealing with the COVID-19 virus pandemic with the World Bank.[831] INSOL's current engagement

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[828] Clift, *supra* note 413 at 58–59.

[829] *Ibid* at 59.

[830] "INSOL - Africa Round Table", online: <https://perma.cc/AT89-NXHX> ART introduces delegates accross Africa to various insolvency and restructuring tools to encourage and support insolvency reform in the region; "INSOL - Focus Groups", online: <https://perma.cc/LT8U-MXUY> INSOL works with multilateral institutions on a forum in MENA region on insolvency reforms through sharing of regional and international best practice experience.

[831] note 376.

strategy is consistent with its historical engagement strategy with UNCITRAL from 1992 to 1997.

4.2.2 Socialisation, Norm Definition and Institutionalisation

In global law-making, an emergent norm requires state actors' support to endorse the norm and make socialization part of their agenda.[832] Socialization is also the means to achieve a critical mass of acceptance by state actors required for cascade. Under the UNCITRAL work method, states act as disaggregated units rather than unitary sovereigns because state delegates are not necessarily members of the executive arm of government but primarily independent professionals, academics and judges with a minority from the executive arm of the national government. In this scenario, the primary political authority's location is at the national rather than international levels except specifically delegated to multilateral institutions. As a result, multilateral institutions leverage weaker and developing countries but cannot coerce their agreement to a norm. An exciting dynamic yet to be considered is the role performed by state delegates at the norm internalization stage [see paragraph 5.4.1 below].[833]

As a result of the success of the INSOL socialization effort, many delegates changed their position from the IBA MIICA to the Model Law approach over time. Gitlin and Flaschen had written about the extension of US Bankruptcy Code s.304 to the international realm, which was the concept carried through by MIICA. However, they became advocates of the Model Law.[834] The IBA delegate at WGV, Dan Glosband, became one of the Model Law's strongest advocates.[835] The US delegates, including Westbrook, became advocates of the modified

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[832] Finnemore & Sikkink, *supra* note 7 at 895.

[833] This issue is discussed in the next chapter.

[834] Gitlin & Flashen, *supra* note 441.

[835] D M Glosband, "UNCITRAL adopts Model Cross-Border Insolvency Law. Bankruptcy court decisions: weekly news and comment", *Horsham* (24 June 1997) 30:22:A3; D M Glosband et al, *The American Bankruptcy Institute guide to cross-border insolvency in the United States* (Alexandria, Va: The

universalism approach of the Model Law, abandoning absolute universalism, which has traditionally represented the US idea of exporting its concept of bankruptcy abroad.[836] Wisit Wisitsora-At of Thailand, an ardent MIICA supporter before adopting the Model Law, later became the longest-serving chairperson of WGV mid-wiving the Legislative Guide and many other instruments based on the success of the Model Law. Hadden and Seybert suggest tracking norm definition over the life cycle to assess norm acceptance following institutionalization. Norm dynamism enables changes in definition during norm contestation that render the norm widely acceptable.[837] Lack of participation in norm definition, on the other hand, may result in resistance at the diffusion stage. INSOL understood this dynamism and, as shown earlier, built a big tent that accommodated the norm leader, the US insolvency practitioners, norm followers and contesters. However, the following chapter shows, controversy exists as to the size of the tent and those accommodated in it.

A new norm institutionalizes specific sets of international rules and organizations, but it is unnecessary for norm cascade and can follow the norm cascade.[838] INSOL was able to socialize both UNCITRAL and state delegates for several reasons. UNCITRAL did not have the expert knowledge required to dabble into the uncharted waters of cross-border insolvency. It also did not have the resources to gather knowledge to stimulate discussions and generate ideas. INSOL fulfilled those roles effectively. State delegates respected the knowledge of INSOL, and INSOL members were state delegates of critical norm leaders at UNCITRAL. Finally, socialization

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Institute, 2008); Daniel M Glosband, "SPhinX Chapter 15 opinion misses the mark" (2007) 25:10 Am Bankruptcy Inst J 44–48; Daniel M Glosband & Jay Lawrence Westbrook, "Chapter 15 recognition in the United States: is a debtor 'presence' required?" (London) 24:1:28-56, 2015 Int Insolv Rev; D M Glosband, "Bear Stearns appeal decision" (London) third quarter 2008. p. 14-17 INSOL World.

[836] Westbrook, *supra* note 607; J L Westbrook, "Commission recommends UNCITRAL Model Law to United States Congress" (1997) 6 Int Insolv Rev 252; Jay L Westbrook, "Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court" (2018) 96:7 Tex Rev 1473; Westbrook, *supra* note 451; Jay Lawrence Westbrook, "Universalism and Choice of Law" (2005) 23 Penn State Int Law Rev 625.

[837] Hadden & Seybert, *supra* note 9.

[838] Finnemore & Sikkink, *supra* note 7 at 900. *Ibid*.

occurred before the matter arrived at WGV through the early involvement of US and Canadian practitioners in INSOL activities, the joint colloquiums held in Vienna in 1994 and Toronto in 1995 and eventually in New Orleans in 1997 to approve the final draft Model Law before adoption by UNCITRAL in May 1997.

4.2.3 UNCITRAL Work Method

Kelly, Block-Lieb and Halliday wrote on the UNCITRAL work method and identified two pillars of its decision-making process: consensus and participation.[839] Consensus relates to the way by which it arrives at its decision. Participation refers to the process by which it arrives at decisions. Although the procedure rules provide for applying the UN General Assembly procedure of a simple majority for decision making, UNCITRAL has a consensus-building practice and has never taken a vote for decisions.[840] Its process is open to observers, including non-state entities, international governmental organizations, expert organizations and non-member states. Observers can introduce discussion documents and participate in proceedings. Further, non-member states such as observer non-member can be appointed or elected officials of UNCITRAL on their merit.[841]

Another aspect of the Working Group work method that assisted norm cascade is the Chairman's election at every meeting. With no guarantee of tenure, the presiding person cannot descend to the arena in debates. Not surprisingly, although Kathryn Sabo, an observer from a non-member state, Canada, was elected chairperson in 1995, by May 1997, the

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[839] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64 at 322–356 Chapter 8; United Nations, *supra* note 645 at 101–102 Annex III.

[840] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64 at 322–356; United Nations, *supra* note 645 at 101–102; UNCITRAL Commission Secretariat, *supra* note 33 paragraphs 16 and 18 .

[841] United Nations, *supra* note 645 at 101–102 Kathryn Sabo was elected Chairperson at the eighteen session of the WGV when discussion on insolvency commenced eventhough she was an observer delegate of a non-member state, Canada; UNCITRAL, *UNCITRAL Report of Working Group V Eighteen Session A/CN.9/419 to UNCITRAL Commission Twenty-Ninth Session* (United Nations General Assembly, 1995).

chairperson was Mr. Bossa from Uganda.[842] In assessing the UNCITRAL work method, Cooper writes that "[W]e have benefited from the informed chairmanship of Kathryn Sabo of Canada and Wisit Wisitsora-At of Thailand … who have been able to make sense of a large number of seemingly contradictory submissions of delegates."[843] Cooper wrote on a longer time frame that included the Model Law study period and the Legislative Guide's adoption. From 1995 to 1997, Sabo and Bossa acted as chairpersons even though Wisit Wisitsora-At of Thailand was a state delegate becoming chairperson after the adoption of the Model Law.[844] Bossa also acted as rapporteur before serving as chairperson.[845]

4.2.4 Politics, Accountability and Legitimacy

Kelly, Block-Lieb and Halliday argue that the UNCITRAL work method has implications for politics among the state delegates and legitimacy claims of the organization itself.[846] Thomas M Franck, a Professor of Law, explains how and why international rules come to be habitually obeyed by states despite the absence of a sovereign and argues that some international rules possess a compliance pull for international institutions by which they seek legitimacy to fill the gap created by the inability to enforce compliance.[847] Obedience to their

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[842] In the last chapter we argued that there seems to be an understanding among state delegates that the chairperson should be from a state that is not perceived as involved in the norm contestation.

[843] Cooper, *supra* note 413.

[844] Chairman Wisit WISITSORA-AT (Thailand) has chaired the Working Group on Insolvency Law starting on the twenty-fourth session (July-3 August 2001) through to the fifty-fifth session **(**28–31 May 2019) **with a notable exception of the thirty-second** (New York, 14-18 May 2007) **and forty-eighth session** (Vienna, 14-18 December 2015) which were chaired by Mr. Carlos SÁNCHEZ MEJORADA Y VELASCO (Mexico). Since the end of his tenure as chairman, from the fifty-sixth session onwards the Working Group has been chaired by Mr. Xian Yong Harold Foo (Singapore).

[845] UNCITRAL, *supra* note 361; UNCITRAL, *supra* note 362.

[846] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64.

[847] Thomas M Franck, *The Power of Legitimacy Among Nations* (New York - Oxford: Oxford University Press, 1990) at 187–194, 202–207.

rules is achieved because of the perception of the institution's legitimacy.[848] States within UNCITRAL compete for influence by positioning to control the law-making process.[849] UNCITRAL competes for relevance in international lawmaking's legal ecology through the legitimacy of its lawmaking process seen as legitimate because of stakeholder participation (including non-state entities) and therefore more likely to be effective.[850] Black, Finnemore and Sikkink argue that the structure of an organization or multilateral agency influences the norms it pursues and one prominent feature of modern organizations and an essential source of influence and legitimacy for them, in particular, is their use of expertise, public consultation and information reporting to change the behaviour of other policy actors.[851]

UNCITRAL law-making process is a site for constructing and contesting legitimacy claims made more complicated by the actors' differing political and economic interests and those affected by the output. Classic approaches justify legitimacy in rational choice theory or the realist concept of state sovereignty, pursuing only state self-interest. However, these approaches have caved in the face of the rise of international institutions and the proliferation of non-state entities as international law subjects. Other interests, such as those of individual practitioners organized as a group of experts, become relevant when UNCITRAL considers a global regulation that would affect their profession's practice no matter the state of their location. Ostrom argues that the social dilemma of the simple application of the rational choice or public good theory to the “tragedy of the commons” is resolved through polycentric norms, a behaviour not consistent with norm-free, complete rationality.[852] Being polycentric, while states dominant the cascade process, the process could not ignore INSOL. UNCITRAL sought legitimacy of its law-making process (since there is no enforcing sovereign) not just because

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[848] *Ibid*.

[849] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64.

[850] Kelly, *supra* note 14; Block-Lieb & Halliday, *supra* note 64.

[851] Finnemore & Sikkink, *supra* note 7 at 899; Julia Black, “Constructing and contesting legitimacy and accountability in polycentric regulatory regimes” (2008) 2 Regul Gov 137–164.

[852] Elinor Ostrom, “Beyond Markets and States: Polycentric Governance of Complex Economic Systems” (2010) 100 Am Econ Rev 641–672.

INSOL had the expertise and the resources and UNCITRAL did not. It also requires a sort of social license or justification from INSOL members who would be most affected.[853] Kelly suggested a balance between the level of participation of stakeholders and the output of UNCITRAL when she said:

> An assessment of an institution's claim to legitimacy should therefore consider the following: whether the institution's level of effectiveness justifies its role, whether there is some level of participation by those affected by its rules, and whether some processes exist to protect both its normative mission and its representative credentials.[854]

This study argues that the adoption of the 2010 Guideline by UNCITRAL, which confirms the procedure at the study period, 1995 to 1997, allowing the participation of non-state entities in the UNCITRAL work process, justifies INSOL contribution and affirms that such participation gave legitimacy to UNCITRAL output, the Model Law.

4.2.5 Positive Co-Relationship

There is a positive co-relationship between INSOL initial input and the UNCITRAL output, the Model Law. The Model Law dealt with issues such as the non-reciprocal access of foreign representatives and creditors to national courts, recognition of a foreign proceeding and relief, cooperation with foreign courts and foreign representatives and coordination of concurrent proceedings.[855] These ideas of limited access, recognition, relief and cooperation were first passed by INSOL to UNCITRAL in Vienna in 1994.[856] The Ron Harmer Expert Committee Report also laid out the argument for non-reciprocal recognition of foreign

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[853] Allen Buchanan & Robert O Keohane, "The Legitimacy of Global Governance Institutions" (2006) 20 Ethics Intl Aff 405, 407, 413 arguing legitimacy of an international organization is an ongoing dynamic balancing act involving interaction with agents and outside organizations to strike a right balance of public support on moral grounds in the absence of justifications of state sovereignty such as democratic institutions and practices like elections.

[854] Kelly, *supra* note 14 at 27.

[855] UNCITRAL Commission Secretariat, *supra* note 436 see chapters I-V.

[856] Cooper, *supra* note 413 at 56.

proceedings, avoidance of existing impediments to assistance in the enforcement of a foreign insolvency judgment, access to national court by a foreign insolvency representative, cooperation among state courts, coordination of concurrent proceedings and other solutions to existing impediments to cross-border insolvency.[857] The provisional agenda submitted by the UNCITRAL secretariat to the eighteenth session of WGV in 1995, which first considered global law-making in cross-border insolvency, introduced the documents and reports arising from joint UNCITRAL INSOL colloquia as discussion documents. Despite the vigorous debates at WGV, the final output did not deviate much from the original input of INSOL. WGV reliance on an informal drafting group and the WGV secretariat to resolve and harmonize debates on the draft law meant a minor group supported by INSOL, and the norm leader determined the outcome. While INSOL would have been happy with a legislative guide with a "menu of options," the output was even a stronger mandatory model law.[858] Applying the input and output criteria of Buchanan and Keohane, INSOL greatly influenced the norm that underlay the Model Law.[859]

Conclusion

Cohen discussed how UNCITRAL became a productive site for normative modelling [see paragraph 1.3 above on Normative Modelling].[860] It is undisputed that UNCITRAL was part of the broader agenda for a post-war regulatory regime for international law, peace and security. However, Cohen's contention that the setting up of UNCITRAL was an afterthought following the success of the 1958 New York Convention on Arbitration and the rancorous nature of voting at the UN General Assembly is only an additional impetus for the establishment of UNCITRAL. The idea of a specialized agency on international trade was part of the original

[857] note 661.

[858] Cooper, *supra* note 413 at 56.

[859] Buchanan & Keohane, *supra* note 854.

[860] Cohen, *supra* note 62.

conception of the UN.[861]As far back as 1944, Nadelman called for a specialized agency on international trade law based on the original UN proposal.[862]

As it may, INSOL understood that it had to look for an organizational platform to socialize the states if it was to succeed with escalating its norm to a global norm. UNCITRAL provided that platform. The challenge was enormous. Apart from the MIICA convention proposed by the IBA, the most influential member state, the US, had a history of supporting a convention on bankruptcy and concluding bilateral bankruptcy treaties.[863] The founders of INSOL, as norm entrepreneurs, were very strategic in creating an organization that was truly international and not seen to be dominated by any state or insolvency tradition to gain acceptability around the world. They recalled as follows:

> It was decided by the founding members, in order not to lose the enthusiasm created by the memorable first meeting, that the next conference would be held in Monte Carlo in 1985. One of the guiding reasons for the venue was the British wish that the conference should not be held in the UK (Indeed, it was to be delayed until 2001 when the first quadrennial congress was held in London!)[864]

The norm life cycle approach postulates that the actors and their motivations differ at the norm cascade stage. At this stage, state actors become dominant as they socialize one another seeking to reach a critical mass of shared agreement for the norm to become a global norm. As revealed by the debates contained in reports on the four sessions of WGV and the partial transcript, INSOL, though the norm entrepreneur at the emergence stage of the life

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[861] note 52 Proposal 11(2) b.

[862] Nadelmann, *supra* note 19 at 93.

[863] *Ibid* at 87.

[864] Adamson, *supra* note 373 at 46.

cycle, played a subtler and more subterranean role at the cascade stage. This left state actors to engage in the persuasion of each other through the UNCITRAL work method.[865]

The UNCITRAL work method of consensus and participation created the combination of pressure for conformity, desire to enhance international legitimacy and state leaders and delegates self-esteem, which all facilitated cascade, thereby corroborating the norm life cycle approach. Again, state actors played a significant role at the norm cascade stage, unlike the norm emergence stage, characterized by non-state actors like IBA and INSOL. UNCITRAL was interested in delivering on its objective to harmonize and modernize international commercial laws, including insolvency law. The life cycle approach is applicable to explain the success of INSOL in cascading the norm of cooperation and coordination on cross-border insolvency proceedings. INSOL was not combative, as are many NGOs in the international human rights and policy arena where the approach developed.

With the adoption of the Model Law, the norm of a limited objective of cooperation and coordination among state courts became institutionalized as a global norm. However, institutionalization may not translate to the widespread acceptance of the norm, given the low adoption rate by low GDP states.[866] Therefore, it is imperative to scrutinize internalization to determine the states' extent of compliance or change of behaviour. Moreover, the imbalance in international lawmaking between the western states and the global south remains even under the UNCITRAL work method. The recent adjustment of UNCITRAL procedure and work method to allow for remote participation in response to the Coronavirus pandemic offer opportunity for a post-pandemic solution to the problem of low participation by low GDP states.[867]

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[865] UNCITRAL Working Group V, *supra* note 36; UNCITRAL Working Group V, *supra* note 361; UNCITRAL, *supra* note 361; UNCITRAL, *supra* note 362; United Nations, *supra* note 350.

[866] note 187 As of October 11, 2020, 48 states in 51 jurisdictions have adopted the Model Law.

[867] UNCITRAL Commission, "Decisions pertaining to the fifty-third session of UNCITRAL adopted by States members of UNCITRAL in accordance with the procedure for taking decisions of UNCITRAL during the coronavirus disease 2019 (COVID-19) pandemic adopted by States members of

However, non-state entities have a more remarkable ability to constrain state sovereignty. While explaining the role of INSOL in the evolution of UNCITRAL Model Law, the life cycle approach was limited in explaining the differences in normative weight among states and the effect of such differences on non-state entities' role in global norm making. Further study may help overcome the obstacles to effective participation by low GDP states at leadership levels of INSOL and UNCITRAL.

UNCITRAL on 8 June 2020 A/CN.9/1013 - E - A/CN.9/1013 -Desktop", (30 June 2020), online: <https://perma.cc/J9HX-CS4R>; UNCITRAL Commission, "Decisions adopted by States members of UNCITRAL in August 2020 in accordance with the procedure for taking decisions of UNCITRAL during the coronavirus disease 2019 (COVID-19) pandemic A/CN.9/1038 - E - A/CN.9/1038 -Desktop", (28 August 2020), online: <https://perma.cc/CG3V-4U2P>; UNCITRAL Commission, "Decision adopted by States members of UNCITRAL in December 2020 concerning working group sessions in accordance with the procedure for taking decisions of UNCITRAL during the coronavirus disease (COVID-19) pandemic A/CN.9/1078 - E - A/CN.9/1078 -Desktop", (18 June 2021), online: <https://perma.cc/X2FD-45MV>; UNCITRAL Commission, "Decisions adopted by States members of UNCITRAL in June 2021 concerning the fifty-fourth session of UNCITRAL in accordance with the procedure for taking decisions of UNCITRAL during the coronavirus disease (COVID-19) pandemic A/CN.9/1079 - E - A/CN.9/1079 - Desktop", online: <https://perma.cc/TB7F-HC9D>.

5 Chapter Five – Norm Internalization – The Challenge of Acceptance and Diffusion of the Model Law

5.1 Introduction

According to Finnemore and Sikkink, the norm life cycle's next stage is norm internalization at the end of the norm cascade.[868] The norm becomes widely accepted at the internalization stage and acquires a "taken-for-granted quality" and "no longer a matter of broad public debate," with almost automatic conformance.[869] Hadden and Seybert argue, correctly, that adopting a norm through institutionalization does not translate to its wide acceptance.[870] Instead, they suggest tracking norm definition over the life cycle to assess norm acceptance by changing behaviour following institutionalization.[871]

This chapter considers the extent of acceptance, and internalization, of the Model Law by states following its adoption as the international norm for cross-border insolvency. The first part reviews the scope of its domestication through its institutionalization in national laws. The second part evaluates whether such domestication equates to accepting the Model Law's norms and behaviour change by states. Many states have not yet adopted the Model Law in their body of national laws. The chapter seeks to understand why acceptance and internalization have not become widespread among low GDP states, yet the norm cascaded to a global model. It ends with considering how acceptance could be made more widespread through an aggressive and inclusive strategy.

The chapter also considers whether the internalization stage is an irreversible growth pattern separable from the earlier two stages of emergence and cascade. If not, whether in seeking solutions to diffusion challenges of the norm at the internalization stage, there is a need

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[868] Finnemore & Sikkink, *supra* note 7.

[869] *Ibid* at 895.

[870] Hadden & Seybert, *supra* note 9.

[871] *Ibid*.

to revert to the earlier stages of the life cycle for co-relationships. Finnemore and Sikkink argue that researchers should understand that "different social processes and logics of action may be involved at different stages in a norm's 'life cycle.'" The study, therefore, explores whether there is reflexivity (in a sense used in sociology) among the norm's life cycle stages. In other words, whether the emergence and cascade stages generate causes that have determinative effects on diffusion at the internalization stage.

The chapter relies on secondary data from desk research, existing interviews and historical records, academic writings and elite interviews. The discussion structure is in five sections: domestic adoption, norm internalization, legitimacy gains, professionalization and regional and multilateral cooperation.

5.2 Domestic Adoption

Determining when cascade has occurred, and internalization began is not easy, as Hadden and Seybert have observed in the context of norms on sustainable development.[872] The adoption of a Model Law, the signing of a treaty, or even the passage of national laws and enactment of other acts of institutionalizing and accepting the relevant norm does not necessarily produce or guarantee a change of state behaviour.[873] Nevertheless, the actual change of behaviour is the broad acceptance of the norm that completes the norm cascade and ushers internalization. Hadden and Seybert's study shows that the "breadth of conceptual consensus" on a norm was affected by states' interpretations of the norm and the "depth of behavioral expectations implied by the collective discourse."[874] Despite institutionalizing the norm through treaties and even national laws, a significant difference among states in the expected behavioural change required by the norm could result in a lack of behaviour change. Thus, the norm dynamic must reflect and facilitate the internal consistency and practical impact of the norm. Hadden and

[872] *Ibid*.

[873] *Ibid* at 249–250.

[874] *Ibid* at 250.

Seybert conclude that norms can influence state behaviour when they become the focal point for coordination or achieve legitimacy gains over time.[875]

A similar issue arose when the Hague Conference of 1925 adopted a Bankruptcy Convention for universal bankruptcy based on the place of domicile. Nadelman argues that the treaty was a failure because the British delegation withdrew from the conference, and no state ever ratified the convention.[876] He asserts that "[D]rafting of a convention acceptable to all, or most countries of the world, if not impossible, is apparently a very difficult undertaking."[877] In other words, a Model Law which no state has adopted into their local law and implemented cannot create a global norm. Indeed, most states must first adopt such a model law for this to occur. The adoption of the norm by UNCITRAL or the UN was not enough to complete the norm evolution. As conceived by Finnemore and Sikkink, domestic adoption by a critical mass of states is also required, followed by actual behaviour change. Simmons et al. argue that diffusion of a global norm into domestic policy occurs due to four mechanisms, competition, coercion, socialization/learning and emulation.[878] These are similar to Finnemore and Sikkink persuasion techniques.[879] We now examine the diffusion of the Model Law into domestic law to determine whether internalization occurred.

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[875] *Ibid*.

[876] Nadelmann, *supra* note 19 at 86.

[877] *Ibid*.

[878] B A Simmons, F Dobbin & G Garrett, eds, *The Global Diffusion of Markets and Democracy* (New York: Cambridge University Press, 2008).

[879] Finnemore & Sikkink, *supra* note 7.

5.2.1 The Rationale for Adoption of UNCITRAL Model Law

Many writers were optimistic about the domestic adoption of the Model Law.[880] However, others were skeptical about the likelihood of its success.[881] Mohan argues, quoting UNCITRAL, that the rationale for adopting the Model Law lies in its design to "assist states to equip their insolvency laws with a modern harmonized and fair framework to address more effectively instances of cross-border insolvency."[882] Mohan further argued that the Model Law's attraction lay in its simplicity and flexibility anchored on the four pillars of access, recognition, relief and cooperation, and coordination.[883] Also, enacting local legislation implementing the Model Law should be easier because of the significant exceptions for special industries, treaty exceptions, and public policy applications tolerated.[884] We now examine the adoption rates to evaluate the Model Law's object's achievement and determine the extent of diffusion and any related challenges.

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[880] R W Harmer, "The UNCITRAL Model Law on Cross-Border Insolvency with introductory note." (1997) 6:2 Int Insolv Rev 145–153; J L Westbrook, in Martinus Nijhoff, ed, *Glob View Bus Insolv Syst* (Washington, D.C.: World Bank, 2010) 246; Bob Wessels, "WIll UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain?" (2006) 3 Int Corp Rescue 200.

[881] Andrew JF Kent, Stephanie Donaher & Adam Maerov, "UNCITRAL, eh? The Model Law and its implications for Canadian Stakeholders" (2005) Annu Rev Insolv Law 187; Jacob S Ziegel, "Canada-United States Cross-Border Insolvency Regulations and the UNCITRAL Model Law" (2007) 32 Brook J Intl L 1042 at 1061–1065 discussing the previous article expressing satisfaction with pre Model Law US and Canadian cross-border regime.

[882] Mohan, "Cross-border insolvency problems", *supra* note 719 at 5 note 19 UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[883] *Ibid* at 5.

[884] *Ibid* at 6.

5.2.2 Low Adoption Rates

1997- 2012

Between 1997 and 2003, only seven states adopted the Model Law.[885] Mohan narrated how following encouragement from the UN General Assembly in December 2004, twelve states adopted the law between 2005 and 2008.[886] By 2012, only eighteen states adopted the Model Law. Mohan argues that the expectation that the US and Great Britain's adoption in 2005 and 2006 "might encourage adoption by a wider circle of countries" has not materialized.[887] Many out of the eighteen adopting states as of 2012 did not have a significant insolvency industry. They were undergoing structural adjustment programs, suggesting that the IMF may have pressured those states to adopt the Model Law.[888]

2013 -2021

Only about forty-nine (49) countries and fifty-three (53) territories have adopted the Model Law out of about 200 states globally by August 20, 2021.[889] There is no consistency in the adoption rates of model laws. While some model laws have a low rate of adoption, others have a high rate of adoption. Eighty-four (84) states and one hundred and seventeen (117) jurisdictions had adopted the 1985 Model Law on International Commercial Arbitration as of November

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[885] *Ibid* at 9 at note 40 Mohan had included Eritrea as having adopted the Model Law in 1998; but the provisional Commercial Code drafted in 1998 which included the Model Law was never adopted by the Eritrean government Peter Winship, "The Eritrean Commercial Code and the UNCITRAL Model Law on Cross-Border Insolvency" (1998), online: <https://papers.ssrn.com/abstract=3520787>.

[886] Mohan, "Cross-border insolvency problems", *supra* note 719 at 9.

[887] *Ibid* at 11.

[888] *Ibid* at 9.

[889] "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission On International Trade Law", online: <https://perma.cc/J3CD-Z2VZ>.

2020.[890] Seventy-four (74) states and one hundred and fifty-three (153) jurisdictions adopted the 1996 Model Law on Electronic Commerce by November 2020.[891] On the other hand, only thirty (30) states have adopted the 1994 Model Law on Procurement of Goods, Construction and Services, and thirty-three (33) states the 2001 Model Law on Electronic Signatures.[892]

Reflecting on the Model Law in 2002, Omar observed that "[S]ince its production, the Model Law has only been adopted by a limited number of countries."[893] The position has not changed much as only forty-nine (49) states, and 53 territories have adopted the Model Law.[894] The low adoption rate for the Model Law may be evidence of the non-acceptability of the norm underlying the Model Law. However, as Finnemore and Sikkink have argued, a new global norm does not require acceptance by all the states to move to the next stage in the norm life cycle.[895] It is enough if a critical number of states accept the norm and tipping occurs before one-third of states have adopted it because states do not carry equal normative weight.[896] In this regard, an interview respondent indicated that the key states driving the global economy and, therefore,

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[890] "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 | United Nations Commission On International Trade Law", online: <https://perma.cc/KJC6-YKLS>.

[891] "UNCITRAL Model Law on Electronic Commerce (1996) - Status | United Nations Commission on International Trade Law", online: <https://perma.cc/V3G7-V2VL>.

[892] "UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) - Status | United Nations Commission On International Trade Law", online: <https://perma.cc/CY6A-X9AF>; "UNCITRAL Model Law on Electronic Signatures (2001) - Status | United Nations Commission on International Trade Law", online: <https://perma.cc/KEX5-XUJP>. [CSL STYLE ERROR: reference with no printed form.].

[893] Omar, *supra* note 679 at 196.

[894] note 890.

[895] Finnemore & Sikkink, *supra* note 7.

[896] *Ibid*.

insolvency had adopted the Model Law and those who have not, such as Germany, Italy, and Austria, have enacted more or less similar laws.[897]

The adoption rate has implications for the cascade and the eventual internalization and legitimacy of the norm. It also has implications for global norm making as to whether the life cycle theory reinforces traditional concepts of international law or post-modern ideas of international law reflecting the views of previously excluded states.[898] The life cycle theory postulates that less than one-third of states can constitute the required critical mass to tip a norm to the next life cycle stage as all states do not carry the same normative weight. However, the states that are the most producers or users of the norm must adopt it to cascade. Examples would include a norm against, say, land mines. Finnemore and Sikkink argue that for norm cascade to occur, the states that produce land mines and those who buy and use them must adopt the new norm, banning land mines.[899]

Consequently, to determine whether we have reached the end of the norm cascade for the Model Law, the researcher considered those states who have adopted it to determine the extent to which they are involved with cross-border bankruptcy. If a critical mass of states involved with cross-border insolvency adopts the Model Law, then the cascade is complete as they move to the internalization stage. At this stage, the life cycle approach raises the issue again of global norm making as it assumes that the norm accepted by a minority of states with normative weight becomes a global norm. The question then arises when the cascade is complete as to which states are to internalize the norm, the states involved with the cascade or every state.

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[897] Interview at St John's University New York March and April 2019; see E. Appendix V for list of adopting countries which includes countries like the US, the UK, Canada, Australia and most states of the global north.

[898] B S Chimni, "Customary International Law: A Third World Perspective" (2018) 112:1 Am J Intl L 1 arguing that: there is an intimate link between the rise, consolidation, and expansion of capitalism in Europe since the nineteenth century and the development of CIL that is concealed by the supposed distinction between "formal" and "material" sources of CIL.

[899] Finnemore & Sikkink, *supra* note 7 at 901.

B. S. Chimni, an Indian Professor of International Law, argues that nineteenth-century customary international law using formal and materials sources to establish its existence protects the interest of the few states of Europe in the rise, consolidation and expansion of capitalism.[900] Consequently, these capitalist states impose their perception of norms as global norms.[901] On the other hand, post-colonial, newly independent states lack the formal and material sources to generate global norms, and when they so do, they meet resistance from capitalist states.[902] Thus, there is a conundrum of whether the life cycle theory protects the interest of capitalist insolvency states against most non-insolvency states. In reviewing previous work in this area and presenting the data, we hope to gain insight into the tensions in global norm-making in the commercial law area of insolvency.

Besides Mohan's pioneering work, the most comprehensive work on adopting the Model Law is the two-volume commentary edited by Look Chan Ho, a UK and Hong Kong licensed solicitor and New York Attorney.[903] The current edition covers twenty-one states and territories and seventeen states of the Organization for the Harmonization of Business Law in Africa ("OHADA"). The adopting states and territories discussed in Ho's edited work by various country experts are Australia, British Virgin Islands, Canada, Cayman Islands, Chile, Colombia, England, Greece, Japan, Mauritius, Mexico, New Zealand, Philippines, Poland, Romania, Scotland, Serbia and Montenegro, Singapore, South Africa and OHADA states, South Korea and the United States. The seventeen OHADA states are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Ivory Coast, Equatorial Guinea, Gabon, Guinea, Guinea-

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[900] Chimni, *supra* note 899.

[901] B S Chimni, "Third World Approaches to International Law: A Manifesto " (2006) 8:1 Int'l Comm L Rev 3." (2006) 8:1 Intl Comm Rev 3; Chimni, *supra* note 222; Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 Int Community Law Rev 371–378; Okafor, *supra* note 146; Anghie, *supra* note 11; Alter, Gathii & Helfer, "Backlash against International Courts in West, East and Southern Africa", *supra* note 13.

[902] Chimni, *supra* note 899.

[903] Look Chan Ho, ed, *Cross-Border Insolvency: A Commentary on UNCITRAL Model Law, Volume I*, fouth edition ed (Surrey, U.K.: Globe Law and Business, 2017); Look Chan Ho, ed, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law, Volume II*, fourth edition ed (Surrey, U.K.: Globe Law and Business, 2017); See also, Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Singapore: Springer, 2017).

Bissau, Mali, Niger, Senegal, Togo and the Democratic Republic of Congo. The adopting states not covered by Ho's work are Bahrain, Israel, Myanmar, Panama, Slovenia, Seychelles, Uganda, United Arab Emirates (DIFC), Vanuatu, Zimbabwe and Ghana.

The largest economies and high GDP states have adopted the Model Law.[904] Besides, as a respondent mentioned earlier, some significant states did not adopt the Model Law but enacted modern insolvency laws incorporating much of what the Model Law intended to achieve.[905] However, the rate of adoption among low GDP states remains low. This data raises concern about the inability of life cycle theory to explain the low adoption rate by low GDP states. Also, the internal consistency required for norm definition among states to achieve behaviour change is uncertain, as shown by varied exceptions in domestic implementation. Lastly, INSOL and UNCITRAL can only gain legitimacy by driving behaviour change by states in the long run.

5.3 Norm Internalization

It is no mean task for a non-state entity like INSOL to persuade states to accept a global norm and change the domestic behaviour of the states and their societal agents. As pointed out earlier, mere legislation of a new norm under national law does not mean that there would be a change of behaviour.[906] Also, many impediments arise from norm definition at the cascade stage, which manifests at the internalization stage. Further, a critical number of states must adopt the Model Law for internalization to commence, and there must be an explanation for the low rate of adoption. Without paying heed to Chimni argument, internalization begins for all states at the end of the norm cascade, which occurs only when a few states with normative weight have adopted the law.

Anthony Ogus, a law professor and scholar in regulation and economic analysis of law, applies economic analysis to the debate about how convergence forces influence the adoption of

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[904] note 787.

[905] Interview of February 5 in New York. Examples include Germany, Italy, Austria, France, and Switzerland

[906] Hadden & Seybert, *supra* note 9.

global norms by states and argue that competition between suppliers of legal rules significantly affects the evolution of law.[907] There is a link between the social and economic order and the evolution of legal principles. These convergence forces can be homogeneous, in which case there is a common interest and less resistance or heterogeneous, seeking to impose different ideas, in which case there may be more resistance.[908] Halliday and Carruthers argue that developing economies are caught in the middle of contestation over the convergence of insolvency norms and often the target of "global" norms.[909] Odetola identified that the challenge for low GDP states, mainly African states, is navigating between conforming to global standards without sacrificing their development needs.[910]

The life cycle theory anticipates the convergence of global and national norms at the internalization stage of the norm's evolution. However, the actors who drive internalization are partly different from those at the norm emergence and cascade stages, and their motivation is different. For instance, non-state entities like INSOL and IBA were active as norm entrepreneurs at the emergence stage. On the other hand, at the cascade stage at UNCITRAL, state delegates played a more significant role. Moreover, at the internalization stage, the norm entrepreneurs are re-engaged, and other multilateral agencies possessing coercive authority over states to be socialized more active.

Also, the techniques of persuasion at internalization overlap with those of earlier stages of norm evolution. We now discuss the internalization of the Model Law bearing in mind the questions raised earlier on whether the life cycle approach can explain states responding differently to adopting the global norm and the role of the various actors in the process.

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[907] Ogus, *supra* note 77 cited at n.12 in ; Odetola, *supra* note 77.

[908] Ogus, *supra* note 77.

[909] Halliday & Carruthers, *supra* note 62.

[910] Odetola, *supra* note 77 at 3.

5.3.1 Critical Number of States for Internalization

Close to a third of UN member states adopted the Model Law. Most adopting states are high GDP states with active cross-border insolvency practices. The two states that are most active in cross-border insolvency are the UK and the US, followed by the European states.[911] Significant European and Asian states such as Germany, France, Switzerland, Austria, and Italy that did not adopt the Model Law enacted similar laws. Their insolvency laws are identical to those of other European states that adopted the Model Law.[912] Only about four European states adopted the Model Law, so the EU relied on its regulation to recognize insolvency proceedings and provide predictability within the EU.[913] This approach left recognition of non-EU insolvency proceedings to consideration on a case by case basis.[914] Britain's recent exit from the EU poses a similar challenge for recognizing UK insolvency proceedings in the EU.[915]

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[911] Franken, "Cross-border insolvency law", *supra* note 682 arguing that states can be classified as dependent or dominant based on their level of economic interdependence and the United States in this frame is a dominant state viz-a-viz other states.

[912] Philip Wood R, *Principles of International Insolvency*, 2nd edition and south asian edition ed, Law and International Finance Series (London: Thomson Sweet & Maxwell, 2007); Balz, *supra* note 445 at 488–489 arguing that before the Model Law the German insolvency system was universalist in approach while some other states like the US and Switzerland had a modified universalist approach .

[913] P Omar, "The European Insolvency Regulation and UNCITRAL Model Law" (Clifton, U.K.) 49:32-33, 2012 Eurofenix; M Virgos & F Garcimartin, *The European Insolvency Regulation: Law and Practice* (Kluwer International, 2004); E C Hollander & R A Graham, "UNCITRAL Model Law on Cross-Border Insolvency. In European insolvency regulation. K. Pannen, ed. Berlin, De Gruyter Recht, 2007. Pt. 4. p. 687-818." in K Pannen, ed, *Eur Insolv Regul* Pt 4 (Berlin: De Gruyter Recht, 2007) 687.

[914] Nicolò Nisi, "The recast of the Insolvency Regulation: a third country perspective" (Abingdon, U.K.) 13:2:324-355 2017 J Priv Int Law.

[915] Gerard McCormack & Hamish Anderson, "Brexit and its implication for restructuring and corporate insolvency in the UK" (2017) 7 (London) J Bus Law 533–556; Crispin Daly & Bobby Friedman, "Continental drift: challenges and possible solutions to cross-border insolvency issues following Brexit" (Hertfordshire, U.K.) 13:4:221-224, 2016 Int Corp Rescue.

The users of insolvency services in a cross-border context are those states with a high propensity towards cross-border business, the dominant states.[916] Low GDP states have fewer businesses than high GDP states, and some hardly have operations across borders and so are dependent states. Professor Robert Rasmussen, an American professor of bankruptcy law, argues that contrary to the universalist position, the reality of bankruptcy practice is that multiple insolvencies will not inevitably result once a transnational enterprise becomes financially distressed because they depend more on the dynamics of the debtor and senior creditors control than the relationship among states.[917] Rasmussen's study challenges the relevance of global norms on cross-border insolvency and the need for diffusion or adoption of such norms and argues that there is no cross-border implication for large multinational insolvencies.[918] Not surprisingly, many states had reasons to be skeptical about adopting the Model Law. Sefa Franken, a senior legal counsel with ING Bank, argues that dominant states are attracted to territorialism by applying their law to cross-border insolvency, and dependent states to increase their gains from cross-border economic activity are interested in the dominant state applying territorialism.[919] In addition, by using unilateral universalism vis-à-vis the dominant state, the dependent states increase these gains.[920] Consequently, Franken argues that because of the distributional impact of applying foreign law in domestic settings, some states naturally claim an aversion to universalism while others cling to territorialism.[921] However, contrary to Franke's

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[916] Franken, "Cross-border insolvency law", *supra* note 682.

[917] Robert K Rasmussen, "Where are All the Transnational Bankruptcies - The Puzzling Case for Universalism" (2007) 32:3 Brook J Intl L 983 at 984–986. *Ibid*.

[918] Robert K Rasmussen, "Where are All the Transnational Bankruptcies".

[919] Franken, "Cross-border insolvency law", *supra* note 682.

[920] *Ibid*.

[921] *Ibid*.

postulation, it is unclear that dependent states desire unilateral universalism while gaining from dominant state territorialism.[922]

The first state to consider adopting the Model Law was Eritrea. It engaged consultants who produced a provisional Commercial Code in 1998 intended to replace the Commercial Code inherited from Ethiopia. One of the consultants, Peter Winship, a law professor, recalled the Model Law provisions in Book 6 of the provisional Code. However, due to strong sensitivity to sovereignty and reciprocity issues, the adoption of the Code never occurred.[923] Nevertheless, Winship captured the perception in Eritrea, leading to non-adoption of the provisional Code as follows:

> Implicit also may be some skepticism that judges and insolvency administrators will willingly accept court requests and insolvency representatives from less well-endowed jurisdictions. The issue may also be particularly acute for Eritrea because the diaspora of Eritreans to other countries during the thirty years of fighting for independence may increase the number of foreign creditors seeking assets of their debtors in Eritrea.[924]

In other words, low GDP states perceived the ease of access to their courts and debtors under the Model Law as disadvantageous because they were likely to be at the receiving end of enforcement action. This negative perception could explain the relatively low adoption rate of the norm and low rate of participation of low GDP states in norm contestation at the UNCITRAL norm modelling site. Non-participation in norm definition means that some states do not perceive the outcome as aligned to their interest. The resistance to domestic adoption of the Model Law persists among low GDP states. When the Companies and Allied Matters Bill was introduced at the Senate of the National Assembly in Nigeria in 2019, it had provisions adopting the Model Law,

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[922] Other criticism of Franken's argument is the faulty premise that the UNCITRAL Model Law is modelled after section 304 of the US Bankruptcy Code.

[923] Winship, *supra* note 886.

[924] *Ibid* at 3.

but the final version approved and assented to by the President did not contain those provisions.[925]

Applying Finnemore and Sikkink's norm life cycle theory, by 2012, a critical number of states (18) with developed insolvency law practice adopted the Model Law, enabling cascade and internalization commencing. This situation was so, notwithstanding the tension resulting from power imbalance among states inhibiting wide acceptance of the norm of cooperation and coordination underpinning the Model Law. Further, the internal inconsistency in norm definition among norm leaders and followers resulted in significant deviations in implementing the norm, which questions the norm's internalization. Nevertheless, the perspectives of life cycle theorists are not much different from those of TWAIL scholars. TWAIL scholars acknowledge the disadvantage of the Global South in classic customary international law. Even gains of the Global South in modern international law are limited to public international law leaving private international law and areas of commerce such as insolvency still dominated by the pro-capitalist agenda of states dominant in economic activities. Consequently, there is consistency between the life cycle theory postulation of different normative weights for different states and TWAIL's recognition of international law not accounting for the Global South's interest.

5.3.2 Cart before the Horse

Winship questioned whether the Model Law offered much to states with less developed economies and antiquated bankruptcy laws.[926] The Cork Report postulated the imperatives for insolvency reform when it stated that one of the aims of good modern insolvency law is to recognize that the world in which we live and create wealth depends on a system founded on credit. The report further states that the system requires an insolvency procedure to cope with its casualties as a correlative.[927] So, unless a state has developed a reliable credit system and

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[925] *CAMA-NOTE-BOOK-FULL-VERSION.pdf* https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf.

[926] Winship, *supra* note 886 at 4.

[927] *Insolvency Law Review Committee: Insolvency Law & Practice Cmnd 8558 Report. (Cork Report)* (1982).

created wealth, it would not have sufficient capital to deploy to productive activities within the state and across borders. Unless assets, debtors or creditors exist abroad, there is no motivation for state engagement in cross-border insolvency. In this sense, national insolvency systems' development to anchor a viable credit system's casualty is more important than engagement with cross-border insolvency for low GDP states. Reversing the priority would amount to putting the cart before the horse. From the perspective of low GDP states, pursuing a Model Law on cross-border insolvency when there is no credit system, and therefore, no insolvency system is a wrong arrangement of priorities.

The study applied the life cycle approach to answering Winship's question about the relevance of cross-border insolvency to less developed economies. At the norm generation stage, members from the less developed states were not effective participants in the work of INSOL as the norm entrepreneur in generating the norm. Furthermore, there was limited participation by less developed states at the UNCITRAL norm modelling site at the cascade stage. The absence of vibrant domestic credit and insolvency systems translated to a lack of capacity or interest in norm definition at the first two life cycle stages. These findings show the crucial influence of power asymmetries identified by TWAIL and other scholars regarding how economic power determines roles in global lawmaking.[928] Therefore, it is not surprising that economic power disparity explains the apathy toward domestic adoption and change of behaviour by low GDP states at the internalization stage.

5.3.3 Internal Inconsistency in Norm Definition

Even among adopting states, acceptance of the Model Law is not uniform despite institutionalization through domestic adoption. Mohan catalogues the various deviations from the core principles of the Model Law by adopting states.[929] Areas of inconsistency in adoption include

[928] Chimni, *supra* note 899; Chimni, *supra* note 222; Chimni, *supra* note 902; Anghie, *supra* note 11; Kennedy, "Quinnipiac L Rev", *supra* note 20 bemoaning the loss of state sovereignty as the focal for the making of international law; Franken, "Cross-border insolvency law", *supra* note 682 arguing that level of economic interdependency determines which states are dominant or dependent.

[929] Mohan, "Cross-border insolvency problems", *supra* note 719 at 11–18.

reciprocity, protection of local creditors, and trumping of foreign law by national law.[930] Mohan argues that given the deviation by those adopting the Model Law and non-adoption by many states, the mere existence of global insolvency Model Law does not necessarily call for a universal legislative answer or "'harmonisation' of laws and procedure."[931] Mohan further argues that post Model Law has a proliferation of legislative instruments, principles, guidelines, acceptable practice standards, and recommendations that the Model Law itself may have become less relevant.[932]

A historical review of the norm's evolution indicates that the norm anticipated that there might not be a consistent application of the Model Law. The objective of the norm is cooperation and coordination. Mohan suggested that the problem was that states placed national interest beyond harmonization as the solution to the universal challenge of insolvency.[933] Rasmussen argued that bankruptcy had no real cross-border consequences requiring the Model Law. Mohan and Rasmussen may have missed the point that the Model Law attempted to avoid harmonization by creating a flexible "menu" of options from which states may choose, as Cooper, who was intimately involved with its evolution, asserts.[934] The Model Law never intended to guarantee a consistent outcome. Justice Hildyard scored this point when he said:

> 83. However, it is also important to appreciate that the Model Law is not dependent or premised upon reciprocal recognition (it has not been adopted in any of the major European states); and it does not address substantive domestic insolvency

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[930] note 518 where the English High Court applied the Gibbs Rule to refuse granting a UK Moratorium Continuation Application for an Azerbaijan moratorium order upon opposition by creditors with English law governed debt who did not submit to the Azerbaijan foreign proceeding. "Drawbridge Special Opportunities Fund LP v. Barnet, 737 F.3d 238 | Casetext Search + Citator", online: <https://perma.cc/T3EQ-BZTK> US 2nd Circuit applied section 109 of the Bankruptcy Code to hold that the foreign debtor must have property in the US to have standing for Chapter 15 Model Law recognition when it is the foreign representative and not the debtor that is given standing under the Model Law.

[931] Mohan, "Cross-border insolvency problems", *supra* note 719 at 19.

[932] *Ibid* at 24.

[933] *Ibid* at 20.

[934] Cooper, *supra* note 413 at 57.

provisions. Still less does it seek to achieve a substantive uniformity or reconciliation between different jurisdictions and their substantive laws.

84. Its application, and the notion of 'universalism' which it is intended to advance, is thus subject to modification according to the jurisdiction in which it has been adopted. These modifications follow the substantive law in that jurisdiction, and may be significant.[935]

To this extent, it is arguable that the criticism based on the inconsistency in implementing the Model Law is unwarranted. The dilemma of inconsistency remains with the courts of different states struggling to reconcile their local laws with the Model Law objectives. However, as Fletcher stated, it remains undeniable that the Model Law hoped to generate a tidal wave of support for limited but functionally essential provisions to be consistently incorporated into national laws, achieving some uniformity in procedural, if not in substantive law.[936]

5.3.4 Power Imbalance and Differences between High and Low GDP States

As Winship questioned, low GDP states' interest was quite different from high GDP states in cross-border insolvency. The legal history method enables us to trace the factors responsible for norm generation arising from events in the UK, Europe and the US which converged on coordination and cooperation on cross-border insolvency. On the other hand, most low GDP states had antiquated credit and insolvency systems that did not generate assets abroad to require their interest in cross-border insolvency. Goldman Sachs Economic Research coined the phrases BRIC and N11 predicting that the growth experienced by states like Brazil, Russia, India and China (BRIC), and the Next Eleven (N11), that is, Bangladesh, Egypt, Indonesia, Iran, Korea, Mexico, Nigeria, Pakistan, Philippines, Turkey and Vietnam would surpass those of Western states by 2050.[937] However, the control of assets abroad is still broadly consistent with colonial

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[935] note 518 paragraphs 83 and 84.

[936] Fletcher, *supra* note 491.

[937] *How Solid are the BRICs?*, by Jim O'Neill et al, Global Economics Paper 134 (Goldman Sachs Economic Research, 2005); *The N-11: More Than an Acronym*, by Dominic Wilson & Anna

and imperial vestiges. The UK and European states consistently lead in the global distribution of capital flows and cross-border connectedness.[938] State self-interest drives international law, and Western states dominate the international legal space by their economic, political and military power. In prioritizing cross-border insolvency over improvements in domestic insolvency laws, the Model Law reflects an existing predominate order that does not consider the third-world perspective.[939] From this perspective, placing cross-border insolvency before the modernization of domestic bankruptcy is not just putting the cart before the horse but the regular order of things. However, from the TWAIL perspective, the Model Law is just another instrument insensitive to the needs of low GDP states.

TWAIL is a resistance frame or paradigm that offers both theories and methodology to analyze international law and institutions.[940] It postulates that international law is unlikely to be altered to foster a much more equitable world economic order envisaged by third-world states.[941] Karin Mickelson, a TWAIL scholar and Associate Professor of Law, argues that the Third World approach expands the debate about specific legal issues or areas by confronting the full panoply of historical, political, economic and cultural debates, which surround them, enriching the understanding of the phenomenon.[942] The Third World frame has many variants but borrows a lot

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Stupnytska, Global Economics Paper 153 (Goldman Sachs Economic Research, 2007); Goldman Sachs, "Beyond the BRICs - A look at the 'Next 11'" in (Goldman Sachs); "Next Eleven", online: <https://perma.cc/M92Z-DFYA>.

[938] *DHL Global Connectedness Index 2020 - The State of Globalization in a Distancing World*, by S A Altman & Philip Bastian (Bonn, Germany: Duetsche Post DHL Group, 2021); *DHL Global Connectedness Index 2020 - Key Highlights*, by S A Altman & Philip Bastian (Bonn Germany: Deutsche Post DHL Group, 2021); Altman, Ghemawat & Bastian, *supra* note 396; "DHL Global Connectedness Index 2016: The State of Globalization in an Age of Ambiguity. Deutsche Post DHL Group" P Ghemawat & S A Altman, (2016).

[939] Chimni, *supra* note 899.

[940] Okafor, *supra* note 902.

[941] Obiora Chinedu Okafor, 'Poverty, Agency and Resistance in the Future of International Law: An African Perspective', in *International Law and the Third World: Reshaping Justice*, ed. by R Falk, B Rajagopal, and J Stevens quoted in article in note 64 above.

[942] Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16:2 Wis Int Law J 353 at 414. *Ibid*.

from the conflict paradigm, a valuable tool for analyzing and understanding relationships.[943]On the other hand, the life cycle approach is limited in examining the conflict and imbalance in power relations under international law even though it provided a frame for considering the actors and their motivation at each life cycle stage.

We can rationalize the imbalance between states with well-developed insolvency systems and less developed systems in many ways. Odetola argues that developing countries vary in their integration into the global market and importance to the global economy. She contends that the more critical a developing economy is to global actors, the more necessary it is for international actors that their commercial laws align with global bankruptcy scripts.[944] Odetola's argument is problematic as it assumes that Western-style insolvency systems are automatically global and all global actors are from Western economies. How a developing economy would achieve relevance in the world economy to draw the attention of the high GDP states to the need for alignment of low GDP states insolvency laws to "global scripts" draws us back to the chicken and egg situation. It is difficult to determine which one must come first, the modern domestic insolvency regime, which depends on a robust credit system or a cross-border insolvency regime like the Model Law? The study argues that the foundation for cross-border insolvency is a solid credit and insolvency system. Therefore, the states struggling to modernize their domestic insolvency system have less motivation to make cross-border insolvency law. This conclusion is consistent with Odetola's postulation of a "global" pull since modernization is presumed to increase the integration of the domestic system with the "global economy."

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[943] A paradigm is a model or frame for observing and understanding a phenomenon. A conflict paradigm perceives social behaviour as a process of conflict or struggle as with Karl Marx's paradigm of struggle among economic classes or Spencer's social darwinism of free competition as a process or struggle allowing the strong to develop and the weak to be overtaken. See, Babbie, *supra* note 353 at 33–36; Okafor, *supra* note 902 refers to some TWAILers who subscribe to broadly Marxian approach; Okafor, *supra* note 11.

[944] Odetola, *supra* note 77 at 11–12.

5.3.5 Harmonization or Coordination and Cooperation

Since the Model Law is not binding on any state, its operation depends entirely on local enactment.[945] It is the adoption by many states that would make it practically significant.[946] However, the reality is that the Model Law has not gained much traction in terms of states' acceptance compared to treaty adoption.[947] Gregory Shaffer, a law and political science professor and Carlos Coye, a labour lawyer, argue that:

> In trade law, the original membership of General Agreement on Tariffs and Trade (GATT) was 23 countries when it was created in 1948; by the end of 2015, the WTO had 162 members……. For commercial arbitration, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards had only 25 parties on December 31, 1958, the year it went into effect, but 153 countries are parties today. Ratification of the six core human rights treaties likewise increased significantly, rising by over 50% to approximately 2,000 ratifications if one includes the treaties' optional protocols.[948]

Treaties have faired better than the model laws regarding adoption. The Model Law has not achieved the tidal wave of support for harmonization through adoptions anticipated by Fletcher.[949] Even amongst adopting states, there are so many variants of the Model Law that it is doubtful that adoption has been harmonious.[950] Many adopting states have no significant insolvency industry.[951] Those states that have not adopted fear the concentration of skill, resources and knowledge in a few states and risk invocation of enforcement proceedings against

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[945] Fletcher, *supra* note 491.

[946] Mevorach, *supra* note 404 at 30.

[947] note 867 as at October 2020 only 48 states and 51 territories had adopted the Model Law.

[948] Shaffer & Coye, *supra* note 62.

[949] Supra note 30 above

[950] Mohan, "Cross-border insolvency problems", *supra* note 719.

[951] Many Francophone Africa states under the OHADA regime and Anglophone countries like Uganda and Kenyan have insignificant domestic and cross-border insolvency industry.

their nationals if the Model Law is adopted.[952] Also, many adopting states use local jurisprudence to avoid Model Law obligations even when these obligations have been adopted into their domestic law resulting in inconsistent jurisprudence. For instance, Look Chan Ho discussed extensively how English courts had used insistence on their local jurisprudence, like the *Gibbs Rule*, to render the Model Law's harmonization objective ineffective.[953] He suggests discarding the traditional English common law position on non-recognition of foreign insolvency discharge.[954] The High Court of Singapore *In re Pacific Andes Resources Development Ltd*, held that even though the same English common law principles are applicable in Singapore, the principle in *Gibbs* does not create an obstacle to the exercise of jurisdiction legitimately compromising debt not governed by Singaporean law under section 210 of the Singapore *Companies Act*.[955] However, despite innovation and passion for supporting the Model Law by many English judges, some English courts still hold on tightly to the *Gibbs Rule*.[956] There seem to be many escape clauses and loopholes for adopting states that enable special consideration for local creditors or public policy exceptions.[957] Delay is still rampant in resolving cross-border insolvency of

[952] Winship, *supra* note 886.

[953] Look Chan Ho, *Cross-Border Insolvency: Principles and Practice*, first edition ed (London: Sweet & Maxwell Thomson Reuters, 2016) at 215 para 4–093 to 4–094; note 518 innovative efforts to circumvention the Gibbs Rule through stay application failed in this case, so the rule remains alive and well.

[954] Ibid p.215

[955] [2016] SGHC 210 at [52]

[956] note 518; The same inconsistency in support for the Model Law exists in the US with cases like note 931.

[957] Buckel, "Curbing comity", *supra* note 525; T A Barnes, "Notice, due process and the public policy exception to Chapter 15 relief in the United States" (London) fourth quarter 2011, pp. 23–25 INSOL World; Chung, "In re Qimonda AG", *supra* note 525; S C Mund, "11 U.S.C. 1506: U.S. courts keep a tight rein on the public policy exception, but the potential to undermine international cooperation in insolvency proceedings remains" (Madison, Wis.) 28:325-356, 2010 Wis Int Law J; O Shahid, "The public policy exception: has sect.1506 been a significant obstacle in aiding foreign bankruptcy proceedings?" (Hempstead, N.Y.) 9:175-200, spring 2010 J Int Bus Law.

multinational enterprise groups, thereby questioning the efficiency and effectiveness of adopting the Model Law.[958]

Ian Fletcher captured the dilemma of lack of consensus and harmonization when he said:

> The numerous points of departure from the terms of the original text of the UNCITRAL Model Law make it imperative that anyone who contemplates making use of the Model Law within Great Britain should study carefully the actual provisions of the Cross-Border Insolvency Regulations 2006. It would be inadvisable to assume that their substance is in every material respect identical either to that of the original text itself, or to the terms in which it has been enacted in any other state with which the user may be familiar. Global uniformity is still a far distant dream.[959]

Mohan argues that protocols may be an alternative to the Model Law, suggesting that ad-hoc agreements and informal workouts and restructuring of businesses mean that states are not pressing to adopt binding legislative text like the Model Law.[960] Thus, he concludes that the Model Law does not appear to provide states with what they need or do not presently have or cannot otherwise negotiate for themselves.[961] Mohan predicates his conclusion on his earlier finding that there is a proliferation of legislative instruments, principles, guidelines, good practice standards post the Model Law's adoption and recommendations that the Model Law itself becomes less relevant.[962]

As the researcher found earlier, the use of protocols that climaxed in the *Maxwell Communication Corp plc* case is not an alternative to the Model Law but the climax of the

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[958] https://www.reuters.com/article/us-nortelnetworks-bankruptcy/nortel-cleared-to-end-bankruptcy-distribute-7-billion-to-creditors-idUSKBN1582TO accessed on 16th September 2017 noting the delay of many years in resolving the Nortel bankruptcy.

[959] Fletcher, *supra* note 491 supra note 27.

[960] Mohan, "Cross-border insolvency problems", *supra* note 719 at 27.

[961] *Ibid*.

[962] *Ibid* at 24.

emergence of the norm of coordination and cooperation [see paragraphs 3.5.8 and 3.5.9 above]. Further, the objective of the Model Law was not harmonization but cooperation and coordination. The life cycle approach reveals that the Model Law, as proposed by INSOL, avoided the difficulties of harmonization through a treaty which was the solution preferred by the IBA-led MIICA proposal. As Fletcher observed, harmonization was only a desirable consequence, but not the Model Law's objective to be achieved through the "tidal wave" of adoptions where the options, chosen by adopting states from the "menu of options," do not differ much. For instance, the different states could keep their varying national systems but grant access and recognize foreign insolvency representatives, providing relief and fostering cooperation and coordination among state courts. These are minimal objectives. In arguing that the Model Law was unnecessary for resolving transnational insolvency, scholars like Mohan and Rasmussen evaluated the Model Law from the assumption that it intended to achieve harmonization, which was not its intended objective.

Block-Lieb and Halliday argue that UNCITRAL's shift from harmonization by treaty or convention to modernization using the model law results from the difficulty of achieving harmonization, a different objective.[963] However, they concede that both modernization and harmonization required other states to change their laws leading to a convergence of the challenge.[964] It is doubtful that the Model Law was a modernization instrument. It does not seek to modernize the insolvency system of any state. It merely adjusts it to admit a foreign representative without the need to comply with classic conditions to enforce a foreign order or judgement. Its focus is on access, recognition, relief, cooperation and coordination, leaving the existing insolvency system primarily intact. Interpretation 25 of the Guide to Enactment, made subsequently to accompany the Model Law, urges states to make as few changes as possible "in order to achieve a satisfactory degree of harmonization and certainty."[965] This Guide provision confirms that harmonization was a desirable consequence and not the main objective of the Model Law.

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[963] Block-Lieb & Halliday, *supra* note 62.

[964] *Ibid*.

[965] UNCITRAL Commission Secretariat, *supra* note 436.

Consequently, Block-Lieb and Halliday contend that UNCITRAL resorted to new legal technologies like the *Legislative Guide to Enactment*, a halfway house between a convention and model law to achieve modernization.[966] They argue that these new legal technologies may eventually lead to achieving the original objective of harmonization.[967] However, the Legislative Guide is a post-UNCITRAL Model Law legal technology outside the study period. The Legislative Guide seeks to make substantive changes to states' insolvency system to meet the same challenges as a model law and a treaty. Further, the Model Law did not aim at substantive law changes, an inadequacy that instruments such as the Legislative Guide sought to cure.

Given the limited objective of the Model Law, a large area was left untouched, including the dilemma of improving credit systems and the modernization of substantive insolvency law. Instead, practitioners from high GDP states through INSOL focused on their priority need for cooperation and coordination in cross-border insolvency. The approach left many gaps filled through various transnational instruments, such as protocols that Mason and Zumbro argue are imperfect but valuable tools for supplementing cross-border insolvency management under the Model Law regime.[968] Other writers have suggested that the Model Law gaps could be filled not only by transnational instruments but also by customary international law and national legislation.[969] The Model Law was a framework document, the skeleton, that required fleshing up by implementing protocols such as court-to-court communication and other instruments. Therefore, the flesh that gives the Model Law its strength should not be construed to be its weakness.

The Model Law was not without its inadequacies. For one, it reflected a power imbalance that alienated it from the needs of the majority of states by number, not by economic power. It achieved a cascade to a potentially global norm because not all states carry the same normative weight. Many states with developed insolvency systems considered users of the new norm

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[966] Block-Lieb & Halliday, *supra* note 62.

[967] *Ibid*.

[968] Mason, *supra* note 719; Zumbro, *supra* note 452.

[969] Mevorach, *supra* note 719; Walters, *supra* note 719.

adopted it. However, at the internalization stage, the diffusion of a global norm into national policies and reforms needed worldwide is no easy task. Global norms rarely bring about the forms of change expected due to domestic political circumstances and how state and non-state actors engage global norms.[970]

5.4 Legitimacy Gains in Encouraging Adoptions

The diffusion of global norms into national policies and law reform depends on the political circumstances and requires policy actors' active engagement. This section considers how the Model Law became internalized in the limited number of states and non-state and multilateral organizations' roles in the process. UNCITRAL and other multilateral agencies such as the World Bank, IMF, and regional development institutions are the actors engaged in the socialization of norm followers at the internalization stage. Others were non-state entities such as INSOL. The delegates at UNCITRAL WGV were also active in their various capacities in their respective domestic arenas. Domestic political and professional organizations are active at the internalization stage as well. The rest of the chapter discusses the different actors at the internalization stage and their strategy for diffusion or resistance. It also concludes with suggestions for the acceleration of the internalization process.

5.4.1 WGV Delegates

Domestic adoption did not occur without change champions. The natural domestic opinion leaders were the delegates at WGV who worked tirelessly in their respective states to achieve reform and behaviour change. There were different categories of delegates. The state member and non-member delegation usually consist of a government official from the Ministry of Justice, a judge from the Judiciary and an academic. The non-state entity observer delegation usually consists of insolvency practitioners and other practising professionals. Multilateral observer delegation of international bureaucrats and student associations observers also attend. When these delegates return to their states, they become instruments for change.

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[970] Engberg-Pedersen & Fejerskov, *supra* note 300.

Duncan Green, a Senior Strategic Adviser at Oxfam GB and Professor in Practice in International Development, notes that social norms are both static and dynamic simultaneously. He argues that changing the rules by adopting new rules may not be enough to change behaviour, as biases are unconscious.[971] He contends that it requires positive and institutional actions to achieve a change of behaviour and suggests a power and system approach by which you look backwards and look forward in contextual analysis to understand the system's complexity without giving up on actions to achieve change.[972] The life cycle approach also enables us to look back at the early stages of norm generation and cascade to identify the actors and their motivation at those stages and the later stage of norm internalization. Applying this approach, elite interviews conducted with state delegates and observers involved at the norm cascade stage at UNCITRAL revealed a strong connection between those earlier stages of the norm life cycle and engagement on norm internalization. A respondent reminiscence on his experience on norm internalization in the US as follows:

> There was a Bankruptcy Review Commission that reviewed and updated the *Bankruptcy Code*. It was nearing its completion when the Model Law was being adopted by UNCITRAL and then approved by the General Assembly. They invited us to make a presentation about the Model Law. This was impacted and delayed by lobbying by the financial industry to make personal bankruptcy more difficult for individuals because they thought it would improve their financial position. The Commission was essentially stuck and got out of that blockage in 2005. We came there and presented. I remember Jay Westbrook and Richard Gitlin were there. The Commission said, "*It sounds good to us and don't wait for our work to be done but try to do the drafting necessary to be enacted in the Bankruptcy Code yourself, don't do it as part of Commission project because that will slow you down."* This was around 1997 or 1998.
>
> Harold Burman created the project to convert the Model Law for the *Bankruptcy Code,* and we had several meetings at my small Washington DC office. Jay Westbrook and I did most of the actual drafting and bounced ideas off the State Department advisor. Jay was the US representative, and Judge Liefland also participated, a lawyer from the

[971] Duncan Green, *How Change Happens* (Oxford University Press, 2016) Chapter 3.

[972] *Ibid* Chapter 12.

> Justice Department, a lawyer from the Commerce Department, a lawyer from the Counsel of States' Attorney General and another private lawyer with some insolvency background. That group did the drafting work to create Chapter 15. Jay Westbrook and I figured out how to fit that Chapter and other parts of the *Bankruptcy Code*. We finished it within the year or so and could not get it introduced as separate legislation due to the lobbying. It didn't become part of the statute until 2005. It was never controversial; everyone thought it was a good idea.[973]

The inference from the interview is that even an established global norm may meet unexpected resistance at the domestic forum, as did the Model Law with the financial industry in the US opposition to other aspects of the reform to the *US Bankruptcy Code* stalling enactment till 2005. Thus, domestic adoption requires positive action by change champions who understand the new norm to engage and drive reform and change behaviour at the national level. This study confirms other studies by Green, Hadden and Seybert and Engberg-Pedersen and Fejerskov, suggesting that mere institutionalization of a norm does not equate to change of behaviour, and positive engagement is required to achieve change.[974]

The English approach was different as it adopted the Model Law through subsidiary legislation, the *Cross-Border Insolvency Regulations, 2006* made on April 4, 2006, by way of secondary reading by the Secretary of State under Section 14 of the *Insolvency Act, 2000*.[975] Where there is any conflict with British insolvency law and the cross-border regulations, the latter will prevail.[976] The subsidiary legislation regime relies on the knowledge of the executive arm of government and the positive action of government officials who attended the WGV as state

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[973] Interview of February 14, 2020.

[974] Green, *supra* note 972; Hadden & Seybert, *supra* note 9; Engberg-Pedersen & Fejerskov, *supra* note 300.

[975] Gary Haywood, "Application of UNCITRAL Model Law to England and Wales", (19 June 2013), online: *Serena Collage Content Manag Syst* <https://www.insolvencydirect.bis.gov.uk/technicalmanual/Ch37-48/chapter42/part%203/PART%203.htm>.

[976] *Ibid*.

delegates to craft and implement the regulation without recourse to Parliament and the public scrutiny of the legislative process as in the US approach.

The data from this study shows that at the stage of the Model Law's internalization, WGV delegates and observers utilized various techniques to overcome domestic opposition and ensure national adoption and behaviour change. Naturally, those states not intimately involved in norm definition at the cascade stage lacked change champions at the domestic level, reflecting the structural power imbalance noted earlier. However, adopting the Model Law under domestic law was insufficient to change behaviour. There is the need to train and sensitize the practitioners and the courts on the new norm and regime. The professionalization of insolvency practice provided the avenue for the completion of norm internalization. Before discussing professionalization, it is pertinent to consider the role of multinational institutions in internalization.

5.4.2 UNCITRAL

Mohan argues that UNCITRAL involvement in the Model Law's internalization through various strategies sought to make adoption easier and behaviour change possible.[977] The techniques include UNCITRAL publications, technical assistance, maintenance of a Model Law cases and bibliography database, and active involvement with other multilateral institutions like the World Bank and non-state entities like INSOL through meetings, conferences, symposia and colloquia.[978] Block-Lieb and Halliday observed that UNCITRAL recognized that the Model Law's norm internalization challenge required a change of law at national levels creating the same difficulties as harmonizing through treaty leading. They argue that this realization led UNCITRAL to adopt new legal technologies, like "guides to enactment, recommendations, model legal provisions, and legislative guides."[979]

The significant political resistance in low GDP states to adopting the Model Law has legitimacy implications for the norm-making process of UNCITRAL. Block-Lieb and Halliday

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[977] Mohan, "Cross-border insolvency problems", *supra* note 719 at 7–8.

[978] *Ibid*.

[979] Block-Lieb & Halliday, *supra* note 62 at 479–480.

observed that since the core participants as delegates at UNCITRAL Working Groups are from a small number of advanced countries, there was a need for a trade-off, which they termed "meta-bargain," obtained through the inclusion of non-state entities in the UNCITRAL work process.[980] However, the swap did not benefit low GDP states, and the result was that there were no change champions in low GDP states to push the reform agenda or drive behaviour change. Moreover, filling the legitimacy gap with non-state entities did not guarantee diffusion within low GDP states partly because the non-state entities like INSOL reflected the high GDP states' priorities. In addition, the low rate of participation by low GDP states in the earlier stages of the norm's evolution means the absence of domestic actors to engage at the national level of these states to achieve domestic adoption.

The fallback for driving domestic adoption in low GDP states in the absence of domestic actors already exposed to the global norm at the cascade and emergence stages was the non-state entities and multilateral agencies. The dilemma of putting the cart before the horse arises again at the internalization stage. There was a need for UNCITRAL and INSOL to revert to the basics of ensuring that states have modern credit and insolvency systems, understanding that a robust national insolvency system will engender cross-border insolvency transactions and interest in adopting the Model Law. Block-Lieb and Halliday discussed the various legal technologies deployed by UNCITRAL to overcome the challenges of modernizing and harmonizing insolvency systems without appearing to impose any system over states' sovereign rights.[981] Mohan noted the networks established by UNCITRAL with multilateral and non-state entities to encourage adoption and change behaviour. The study found that UNCITRAL did not have the mandate to deal with individual states and was limited in ability and capacity to pursue adoption and behaviour change for each member state of the UN outside issuance of publications and organization of regional conferences. The best UNCITRAL could do with the states was to work with them on a regional basis. Even then, UNCITRAL did not have the resources to engage significantly in norm internalization. Again, as with norm emergence and cascade, the fallback was for UNCITRAL to collaborate with INSOL. INSOL's worldwide membership was the best-suited to drive policy and

[980] Block-Lieb & Halliday, *supra* note 64 at 355–356.

[981] Block-Lieb & Halliday, *supra* note 62.

behaviour change through its federating associations at the national level. INSOL offers an epistemic community of experts or network of government and non-government officials and international organizations to diffuse the Model Law.

5.4.3 INSOL

INSOL strategy for the diffusion of the Model Law was proactive. According to one of its past presidents Adam Harris, INSOL, from its formation in New York in 1982, had the vision to be a global association with membership in every country and leadership in information, ideas and experience exchange on insolvency.[982] Part of INSOL's drive for leadership was framing global insolvency norms such as the Model Law and its diffusion into domestic systems. INSOL's diffusion strategies included its members participating in the local legislative process as domestic lobby coalitions and pursuing the professionalization of insolvency practice through training programs. In addition, it encouraged the establishment of national affiliate associations while maintaining direct individual membership. In this regard, Adamson observed that "[B]y 2006, INSOL's membership had reached the impressive number of 8,500 practitioners representing some 50 Member Associations around the world."[983] Also, INSOL developed and shared knowledge of insolvency and guides on the legislative process with its affiliates and members. Lastly, it established collaboration with multilateral agencies that deal with national governments and regional development institutions. The idea was to reach practitioners, judicial officers, policymakers, legislators, and regulators and sensitize them to adopt the Model Law and change their practice concerning cross-border insolvency.

In North America, as already noted, INSOL members, and others like Jay Westbrook, an academic member of the US delegation at WGV, worked with other delegates and observers to deliver the *US Bankruptcy Code Chapter 15 2005*.[984] In the UK and Europe, many INSOL members were instrumental in improving EU regulations relating to insolvency. For example, Bob

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[982] note 558. *Ibid*.

[983] Adamson, *supra* note 373 at 49.

[984] Interview of February 14, 2020.

Wessels, an emeritus law professor and longstanding INSOL member, advises the EU Commission on insolvency.[985] As a result, INSOL achieved knowledge leadership in insolvency, but yet the rate of adoption of the Model Law remained relatively low.

The diffusion of the Model Law by INSOL suffered from limitations identified earlier, such as political resistance and remoteness of the Model Law's relevance to low GDP states in contrast to their need for modern credit and insolvency systems. Not surprisingly, INSOL focused on achieving congruence on substantive insolvency law once the Model Law was institutionalized globally. Odetola argues that by 2012 there was convergence on global norms of bankruptcy, which were widely accepted.[986] The convergence is still ongoing with the current movement toward preventative insolvency in the UK and Europe bringing them closer to US-style Chapter 11 bankruptcy.[987] The UK *Corporate Insolvency and Governance Act 2020* now allows cross-class clam down. In *Re DeepOcean,* the English court sanctioned a restructuring plan where one or more classes did not vote in favour because if the plan is sanctioned, none of the members of the dissenting class would be worse off than in the event of the "relevant alternative" (if the plan were not confirmed). The plan had been approved by at least one class of creditors who has a genuine economic interest in the "relevant alternative."[988]

The UNCITRAL Legislative Guide developed after the Model Law encouraged the US-inspired restructuring regime, a bankruptcy system not based on proof of the existence of insolvency. However, the Guide is not prescriptive and gives states various options, including

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[985] "About - Prof. Dr. Bob Wessels", online: <https://perma.cc/DWK8-QMS4>.

[986] Odetola, *supra* note 77 at 6.

[987] Corporate Insolvency and Governance Act 2020 c.12 (CIGA) "www.legislation.gov.uk", online: <https://perma.cc/W897-2EEV> and also, Re DeepOcean 1 UK Ltd [2020] EWHC 3549 (Ch) approving a restructuring plan where one or more classes do not vote in favor, if the plan is sanctioned, none of the members of the dissenting class would be worse off than in the event of the "relevant alternative" (if the plan were not confirmed); and the plan has been approved by at least one class who has a genuine economic interest in the "relevant alternative." ; See also, Directive (EU) 2019/1023 of European Parliament and Council of 20 June 2019 on Preventive Restructuring Frameworks and others "EUR-Lex - 32019L1023 - EN - EUR-Lex", online: <https://perma.cc/N2DD-42VN>.

[988] *Re DeepOcean* 1 UK Ltd [2020] EWHC 3549 (Ch)

insolvency-based restructuring regimes.[989] Only recently, the UK and Europe moved toward preventative insolvency, narrowing the US bankruptcy approach's gap with cross-class cramdown and other concepts based on relieving financial difficulties before insolvency.[990]

Odetola narrated the effort of INSOL at the diffusion of the Model Law in Africa through the organization of the African Round Table (ART) with the World Bank and IFC. However, mere awareness is not enough. INSOL/World Bank ART has been ongoing for over ten years now, but Africa's adoption rate has not improved significantly.[991] Uganda adopted the Model Law in its *2011 Insolvency Act* with a reciprocity provision.[992] The *Kenyan Insolvency Act of 2015* adopted the Model Law without reservation, but implementation has been challenging.[993] Rwanda reformed its insolvency law in 2018 but did not domesticate the Model Law. However, the Rwanda law included provisions that could facilitate cross-border insolvencies, such as recognizing foreign insolvency representative and providing access to information.[994]

Ghana adopted the Model Law by its April 30, 2020 law, which also reformed its insolvency and restructuring law and facilitated cross-border insolvency.[995] On the other hand, by an August 7, 2020 law, Nigeria amended its insolvency law to include UK-style administration and

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[989] Block-Lieb & Halliday, *supra* note 62 for discussion of rational for UNCITRAL approach of using guides instead of convenction of model laws.

[990] Corporate Insolvency and Governance Act 2020 c.12 (CIGA) note 988 and also, Re DeepOcean 1 UK Ltd [2020] EWHC 3549 (Ch) approving a restructuring plan where one or more classes do not vote in favor, if the plan is sanctioned, none of the members of the dissenting class would be worse off than in the event of the "relevant alternative" (if the plan were not confirmed); and the plan has been approved by at least one class who has a genuine economic interest in the "relevant alternative." ; See also, Directive (EU) 2019/1023 of European Parliament and Council of 20 June 2019 on Preventive Restructuring Frameworks and others note 988.

[991] The first INSOL World Bank ART took place in Abuja Nigeria in September 2010.

[992] Ntale Mustapher, Bernice Gachegu & Isaac Bizumuremyi, *What is in the spotlight and behind the scenes in Insolvency in the East African Region* (Uganda: INSOL International, 2018).

[993] *Ibid*.

[994] *Ibid*.

[995] Bill 1015, *Corporate Insolvency and Restructuring Act*, Ghana Assembly, 2020.

restructuring but did not adopt the Model Law even though it was in the draft bill.[996] About half of the fifty-three (53) African states have adopted the Model Law, with the OHADA states as the largest block of fourteen (14).

Many states' reluctance means that the challenges to adoption remain, causing a rethink of whether the diffusion strategy is adequate. The life cycle approach enables a look back to the early stages of norm evolution to identify the reasons for the lack of shared value on the need for the Model Law or its underlying norm of cooperation and coordination. At the norm generation and cascade stages, the limited involvement of low GDP states in norm definition and near absence in the leadership of INSOL, the leading non-state entity with influence on the policy process, means that diffusion is daunting at the norm internalization stage.

Adamson reminiscence about participation and members commitment in the early period of INSOL as follows:

> We have highlighted above the Presidents who have taken office after INSOL's birth, during its adolescence and up to its jubilee year. Each President has built on the achievements of his predecessors, but there are all the other people who have made it possible – members of Council and of many committees, sponsors, the vital secretariat, the Group 36, our ancillary group, international institutions - and you, the individual members whom we all serve.

However, an analysis of the presidents of INSOL from inception in 1982 to the time Adamson wrote in 2007 indicates that all of them were male, white, and from high GDP states.[997] Appendix C is the List of INSOL Presidents since its formation in 1982 till 2021. It shows the only progress toward diversity has been the election of one president from India, another from South

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[996] The new Companies and Allied Matters Act was signed into law August 7, 2020 but gazetted in November 2020 commencing January 1, 2021 Anthony Ikemefuna Idigbe, *Emerging Trends in Insolvency Reform in Nigeria* (2018); Anthony I Idigbe, "Progress of insolvency law reform", online: *Int Law Off* <https://perma.cc/X9CG-R8UE> for discussion on INSOL affiliate BRIPAN effort at insolvency reform in Nigeria and the need for private and public sector collaboration. The new Companies and Allied Matters Act was signed into law August 7, 2020 but gazetted in November 2020 commencing January 1, 2021 Idigbe, *supra* note; Idigbe, *supra* note for discussion on INSOL affiliate BRIPAN effort at insolvency reform in Nigeria and the need for private and public sector collaboration.

[997] "INSOL - Past Presidents", online: <https://perma.cc/VXT9-3XT4>.

Africa, and INSOL's first female president.[998] The alienation of low GDP states from participation at leadership levels of INSOL deprives the norm evolution process of the actors to agitate for domestic diffusion of global norms as observed in the US and other high GDP states.[999] The participants at INSOL and UNCITRAL played a pivotal role in norm internalization. The dearth of local opinion leaders in low GDP states due to lower levels of participation in norm definition is challenging for norm diffusion.

5.4.4 World Bank and Other Multilateral Institutions

The World Bank's interest in developing the insolvency and creditor rights systems of states arose in 1999 following the global financial crisis of 1997 to 1998.[1000] Multilateral agencies like the World Bank and IMF enjoy observer status at UNCITRAL WGV. These agencies were silent observers of debates over the Model Law at the cascade stage from 1995 to 1997. However, other multilateral agencies became more relevant in the Model Law's diffusion at the internalization stage for several reasons.

INSOL realized the limitation of UNCITRAL in dealing with member states at the domestic level, its mandate being the development of global norms on trade law. On the other hand, the World Bank has clientele states and reviews their business and trade environment from time to time. The IFC, an arm of the World Bank, deals exclusively with private sector non-state businesses as its clientele. Again, the IFC continually reviews and assesses the business environment for its clients.

Richard Peet, a Professor of Human Geography, argues that the Bretton Wood institutions such as the World Bank and the IMF are institutions for economic recolonization of low GDP

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[998] Julie Hertzberg (President 2019 – 2021 USA), Adam Harris (President 2017 – 2019 South Africa) and Sumant Batra (President 2009 – 2011 India); see Appendic C.

[999] For instance, among many others, Manfred Balz who gave the Keynote Address at INSOL UNCITRAL Joint Colloquium in Vienna in 1994 became a member delegate for Germany at WGV, see short author's profile before footnotes Balz, *supra* note 445.

[1000] Mahesh Uttamchandani, "INSOL and The World Bank" (2007) INSOL World Silver Jubil Ed 60 at 60.

states by Western states replacing the political decolonization that followed the end of the Second World War.[1001] The American President Ronald Reagan, speaking to the World Bank in 1983, urged the bank to pursue the "magic of the marketplace" as the centre of state policy in the belief that it would allocate resources better than "any centralised government planning."[1002] Peet argues that the Washington Consensus developed from the triumph of the neoliberal market philosophy.[1003] The Washington Consensus is a set of market-based policies that debtor states must comply with as a conditionality to access loans, making the World Bank and IMF sources of authority for coercion of adopting policy ideas by states.[1004]

Insolvency was not initially part of the package of market policies of the Washington Consensus. The initial policy areas were fiscal discipline, reducing public expenditure, tax reform, interest rate, competitive exchange rates, trade liberation, encouraging foreign direct investment, competitive economy and securing property rights.[1005] Mahesh Uttamchandani, a senior World Bank official, recalled that in elaborating on the insolvency and creditor rights Principles, "the World Bank worked in collaboration with a number of partner organizations, including INSOL", resulting in the inclusion of insolvency reform as part of essential market policies for debtor

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[1001] Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO*, second edition ed (London New York: Zed Books, 2009).

[1002] Ronald Reagan speech is quoted in *ibid* at 14.

[1003] *Ibid* at 14–16.

[1004] Michael Barnett & Martha Finnemore, *Rules for the World: International Organisations in Global Politics* (Ithaca: Cornell University Press, 2005); cited in White, *supra* note 10 at 73; Simmons, Dobbin, & Garrett, *supra* note 879 discussing the four mechanisms of diffusion, competition, coercion, socialization/learning and emulation.

[1005]

states.[1006] The Bank in 2001 adopted the Principles and Guidelines for Effective Insolvency and Creditors Rights Systems.[1007] It is now in its 2016 version.[1008]

Paulus argues that the reasons for the inclusion of insolvency reform in the World Bank conditionalities are the various financial crisis, which brought to the fore the fact that insolvency is crucial in commercial law of all states at both micro and macro levels and strikes a balance between disciplining the debtor and creditors.[1009] According to the World Bank:

> Efficient and predictable Insolvency and Debt Resolution frameworks are key drivers to improve financial inclusion and increase access to credit, which may lead to the reduction of the cost for obtaining credit. Increased access to finance enhances enterprise growth, which in turn leads to preserving employment, growth and the creation of new job opportunities.[1010]

The focus of the World Bank and IMF is substantive insolvency law reform. Cross-border insolvency pursued by the Model Law is procedural law. The Bretton Woods institutions may have realized that adopting the Model Law over substantive insolvency law modernization would amount to putting the horse before the cart for debtor states struggling to exit balance of payment difficulties. Paulus argues that diffusion of the bank's Principles and Guidelines would occur for several reasons, such as the conditionality of the policy to accessing finance, the need for states to connect to the global norm or the persuasive power and quality of the guidebooks.[1011] As Paulus observed, even when adopting global norms for whatever reasons, there is no guarantee that it

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[1006] Uttamchandani, *supra* note 1001 at 60.

[1007] *The World Bank Principles and Guidelines for Effective Insolvency and Creditors Rights Systems* (The World Bank, 2001).

[1008] "Perma | Insolvency and Debt Resolution", online: <https://perma.cc/PSE3-FUDA>.

[1009] Paulus, *supra* note 11 at 756–759.

[1010] note 1009.

[1011] Paulus, *supra* note 11 at 759.

will change behaviour because those expected to adopt these norms never participated in the process of norm generation and cascade. He said:

> Indeed, as a question mark, caution flag, or- depending on one's own perspective- exclamation mark, to the best of my knowledge there has been little interest in how Arabic and the majority of African countries deal with the break-down of their economic enterprises. And almost never- irrespective of the ceteris paribus impressive internationality of the respective drafting groups- are there any Arabic or African representatives participating.[1012]

Paulus and Mohan argue that many low GDP states adopted the Model Law as part of the World Bank/IMF conditionalities. The life cycle approach enables us to realize that limited participation of low GDP states in norm definition and absence of developed economy were responsible for low adoption rates and lack of change of behaviour where there is adoption. Therefore, ensuring effective diffusion of the Model Law required multilateral institutions to engage with policymakers, regulators, legislators, judicial officers and practitioners in low GDP states. Collaboration with INSOL in the MENA and African regions has enabled the Bretton Woods institutions to leverage INSOL's extensive local contacts towards effective diffusion of global insolvency norms. INSOL, along with The World Bank, established the Africa Round Table to provide a platform for high-level dialogue on insolvency reform in Africa. In the MENA region, working with Hawkamah, The Institute for Corporate Governance, the OECD and The World Bank, INSOL established a regional forum on insolvency reform to share international and regional best practice experiences.[1013] Uttamchandani summed up the relationship as follows:

> Ever since, the Bank, other multilateral institutions and leading NGOs such as INSOL have benefitted by actively participating in numerous international events organized by both institutions such as the World Bank Forum on Insolvency Risk Management, the Forum

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[1012] *Ibid* at 761.

[1013] note 831.

on Asian Insolvency Reform, and the Forum on Insolvency in Latin America as well as INSOL World Congress and Regional Conferences.[1014]

5.5 Professionalization

Towards the end of the norm cascade, it mixes with the norm internalization stage. State delegates and observers in the UNCITRAL work method were crucial to the domestic adoption process by a critical mass of states. Many of them had the backing of their national and international professional associations. In the US, for instance, Glosband, an IBA observer at UNCITRAL, was part of the team that drafted and lobbied for the enactment of USC Chapter 15 of the *US Bankruptcy Code*. Others include Westbrook, a member of the US delegation to UNCITRAL WGV. Although there is blurring at the end of the cascade and internalization stages of norm evolution, the life cycle approach anticipates that the actors and their motivation at the internalization stage could be different. Some actors at one stage of the life cycle may continue or change roles at another stage, thereby giving credence and legitimacy to the process. INSOL and UNCITRAL legitimized each other, leading to the norm's cascade to a global norm.

The World Bank and IMF became active at the internalization stage of the Model Law's evolution. This stage requires compliance of insolvency regimes to the standards set by UNCITRAL as a basis of the assessment of World Bank and IMF client states policy and conditionalities for access to finance. In seeking to internalize the Model Law, the three multilateral agencies (UNCITRAL, World Bank and IMF) recognized the need to work with INSOL as the leading international professional association on insolvency.

Carruthers and Halliday tackled the power of professionals and professional associations in the sphere of lawmaking.[1015] They argue that crisis drives reform, which could be imposed or deliberately adopted but focused their study on the deliberate adoption of reforms. They sought to understand the influence of professionals' politics in the legislative adoption process compared

[1014] Uttamchandani, *supra* note 1001.

[1015] Bruce G Carruthers & Terence C Halliday, "Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act of 1986" (2000) 74 Am Bankruptcy Law J 35.

with rational planning and political trade-offs.[1016] They identified the factors for the success of professional associations in lawmaking as their ability to mobilize and resources available to the profession. Other factors include credibility and authority of the profession, other interests triggered by the profession's reform agenda, local political affiliations and differences, and the professionals' self-interest.[1017]

Using the bankruptcy politics of the 1978 US *Bankruptcy Code* and the English *Insolvency Act 1986* ("IA 1986") to illustrate their thesis, Carruthers and Halliday argue that the more a group of professionals can organize and mobilize, the greater their influence in lawmaking that affect their interest.[1018] Although the study of Carruthers and Halliday was regarding US domestic law, we argue that the thesis is also applicable in the internalization of global norms. This study found that INSOL's ability to organize and mobilize was responsible for its influence in the generation and cascade of the Model Law to a global norm at the UNCITRAL normative site. However, the diffusion of a global norm into domestic law and the achievement of behaviour change is more challenging. Domestic political actors and coalitions shoulder greater responsibility for policy implementation than international organizations who are not as authoritative as epistemic actors who contribute to policy ideas at the internalization stage.[1019] It follows that norm internalization is complete when the domestic profession absolves the norm now taken for granted as part of the domestic standards transmitted to generations through professional training.

The professionalization of insolvency commenced before adopting the Model Law in states with developed insolvency systems. For instance, in the UK, following the Cork Report, the IA 1986 as amended was enacted as a comprehensive general statute on UK insolvency dealing with all aspects of corporate rescue/insolvency and individual bankruptcy, including regulation of the insolvency profession with the support of subsidiary legislation made under it. Before this Act,

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[1016] *Ibid* at 36.

[1017] *Ibid* at 37–38.

[1018] *Ibid* at 38–39.

[1019] White, *supra* note 10 at 70.

there was no restriction on who may be an Insolvency Practitioner ("IP").[1020] It only required that the person not be bankrupt or disqualified from acting as a director under the *Companies Act 1985*.

Part XIII of IA 1986 deals with Insolvency Practitioners and their qualifications. It requires that an IP must be licensed or authorized before being allowed to practice and makes it a criminal offence for someone to act as an IP at a time when he is not qualified to do so.[1021] The IA 1986 and the *Insolvency Practitioners Regulations 1990* provide procedures and conditions under which authorization/license is given: the IP must be a member of one of the seven recognized professional bodies.[1022] An Applicant must also show that –

a) he/ she is a fit and proper person of prudence and proven integrity,[1023]

b) has the proper educational training and or experience.

Initially, no examination was required other than the applicant showing a degree or two A levels and 3 GCSEs unless he was born before 15 December 1951. In the absence of the above, he should show that he had at least ten years of experience in insolvency work. However, from April 1990, applicants had to show they had passed the Joint Insolvency Examination.[1024]

[1020] Similar to the situation under the old CAMA 1990 (Nigeria), S. 387. CAMA 2020 has now commenced the process of professionalization of insolvency in Nigeria.

[1021] Sections 389 & 390 IA 1986 (UK).

[1022] Under the Insolvency Practitioners (Recognised Professional Bodies) Order 1986: the Insolvency Practitioners Association (IPA and mother of INSOL), the Chartered Association of Certified Accountants, the Institute of Chartered Accountants in England and Wales, Northern Island, Scotland respectively, the Law Society and the Law Society of Scotland.

[1023] Not having engaged in any practice in the course of carrying business which is deceitful oppressive and or unfair and improper, not convicted of any offence involving fraud or dishonesty or violated the provisions of any Insolvency legislation, having a good record keeping culture and adequate systems of control of the practice prior to his application, etc.

[1024] Sections 390 to 398 of the IA 1986 (UK).

The licensing is renewable for three years based on a certain number of hours of insolvency-related work. The license grant attracts fees under the *Insolvency Practitioners and Insolvency Services Accounts (Fees) Order 2003.* All the recognized professional bodies have their disciplinary machinery to deal with erring IPs. In addition, a special Tribunal exists to deal with disciplinary matters for those who obtained authorization from the Secretary of State under the *Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986*.

The IP is required to provide security for the proper performance of its functions and guard against fraud or dishonesty.[1025] The security takes the form of two separate bonds, and an IP cannot act in addition to his formal authorization except and until he has complied with the bond requirement.[1026] In addition, the provisions of the *Insolvent Companies (Reports on Conduct of Directors) Rules, 1996,* mandate the IP to report to the Secretary of State for Trade and Industry on the conduct of the directors of companies that go into liquidation.[1027] The IP must also report to the Directors of Public Prosecution ("DPP") any conduct which may constitute a crime on the part of the perpetrators.

Karl Polanyi argues that "the victory of fascism was made practically unavoidable by the liberals' obstruction of any reform involving planning, regulation, or control."[1028] The regulation of IPs before the 1997 Model Law in the UK draws heavily from the rationale set out in the Cork Report that private insolvency practitioners be professionally regulated to ensure adequate

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[1025] Section 390 (3)(b) of the IA 1986 (UK).

[1026] There is the *general bond* that he must provide in the sum of GBP250, 000 and as well a *special bond* which follows each brief in which he is appointed and the amount of that bond must not be less than the value of the assets of the insolvent company, but if it appears to him at any time that the said assets are higher than the sum covered by the bond then he must obtain a further bond.

[1027] He is not bound to do so where he is appointed by the court.

[1028] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time; foreword by Joseph Stiglitz; with a new introd. by Fred Block*, 2nd ed (Boston MA: Beacon Press, 1944) at 265.

standards of competence and integrity.[1029] Therefore, the need for reform to ensure a profession exists at the domestic level to implement the internalization of the Model Law was imperative.

5.5.1 Model Law and Regulation of the Profession

The Model Law has no provision for the regulation of the insolvency profession. The idea of regulation of the profession came later in the *Legislative Guide on Insolvency Law,* commissioned by UNCITRAL in December 1999 and realized on 25 June 2004 when UNCITRAL adopted the *Guide* and General Assembly also adopted it by resolution 59/40 of 2 December 2004.[1030] INSOL and IBA, both non-state entities, were significant in determining the key objectives and scope of the core features of an insolvency regime included in the *Guide* through the joint international colloquium, organized in conjunction with UNCITRAL held in December 2000.[1031] The *Guide* argues that using insolvency representatives to perform some functions that will reduce the court's role depends on the availability of a body of suitably qualified professionals to serve.[1032] It contends that an insolvency system depends on the courts and on insolvency representatives, legal advisers, accountants, valuation specialists, or other professional advisers who must adopt professional standards and training to develop capacity.[1033]

The 2001 version of the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems recognized the dilemma for low GDP states in adopting global norms. However, it also realized that setting global norms on cross-border insolvency when basic insolvency systems for developing countries were weak is a misnomer. It, therefore, took a slightly

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[1029] note 928.

[1030] UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law* (New York: United Nations Publication, 2005).

[1031] *Ibid* at iii Preface.

[1032] *Ibid* at 34 para 4.

[1033] *Ibid* at 35 para 8.

different approach from the Model Law norm evolution process by seeking to adapt to the needs of developing states when it stated:

> The principles are a distillation of international best practice in the design of insolvency and creditor rights systems. Adapting international best practices to the realities of developing countries, however, requires an understanding of the market environments in which these systems operate. The challenges include weak or unclear social protection mechanisms, weak financial institutions and capital markets, ineffective corporate governance and uncompetitive businesses, and ineffective laws and institutions. These obstacles pose enormous challenges to the adoption of systems that address the needs of developing countries while keeping pace with global trends and international best practices. The application of the principles in this paper at the country level will be influenced by domestic policy choices and by the comparative strengths (or weaknesses) of laws and institutions.[1034]

The 2001 World Bank Principles acknowledged INSOL and IBA Committee J as partners in the collaboration that led to the work.[1035] The Principles recognize the prior work like the Model Law and the INSOL Statement of Principles on Global Approach to Multi-creditor Informal Workout but justified its intervention based on its unique role of adapting best practices to developing countries. The World Bank Principles was the first to draw attention to the fact that strong institutions and regulations are crucial to an effective insolvency system, particularly in regulating the participants such as judges and insolvency practitioners. It follows that the *sine qua non* is the establishment of a regulatory or supervisory body for insolvency representatives, which is independent (autonomous) and sets standards based on impartiality, transparency, and accountability. Effective diffusion of insolvency norms requires that insolvency representatives be competent and have integrity, and capable of being held to the standards of accountability that eliminate incompetence, negligence, fraud, and other wrongful conduct and promotes objectivity, integrity, impartiality and independence.

[1034] note 1008 at 3 paragraph 6.

[1035] *Ibid* at 2 note 2.

While high GDP states had well-established professional associations before the Model Law, low GDP states did not. As shown during the norm emergence stage, INSOL sought affiliation with domestic professional associations in norm leader states. Also, these associations sought relationships with global federations that could prosper their agenda for influence in global norm making [see paragraph 3.5.2 above]. INSOL realized that without local affiliates in low GDP states, the last stage of the life cycle, internalization, could suffer resistance depriving it of the required domestic coalition for change. Examples of domestic professional associations which INSOL mushroomed include the Business Recovery and Insolvency Practitioners Association of Nigeria ("BRIPAN") and Ghana Restructuring and Insolvency Practitioners Association ("GRIPA").[1036] Other states like Uganda and South Africa either specified the existing professionals that can act as insolvency practitioners or created an entirely new business rescue profession in line with the UNICITRAL *Guide*.[1037]

These member Associations develop the standards of business rescue, restructuring, and insolvency focused on corporate entities' insolvency and individual and consumer insolvency. They also aim to professionalize and regulate those holding insolvency administration offices such as receivers, liquidators, monitors, examiner, managers, special managers, official receivers and turnaround managers and generally be the domestic voice of insolvency practice in their respective states. Their affiliation with INSOL is a relationship that has helped ensure that the Associations and their members are committed to international best practices in insolvency practice. The Associations have consistently attracted and retained leadership and membership of highly respected insolvency and related professionals. They are also involved with lobbying for law reform, including regulating the profession. BRIPAN, the Nigerian affiliate after 26 years of existence and intensive lobbying for law reform, succeeded in obtaining recognition as an

[1036] For list of INSOL federating associations, see note 3.

[1037] By sections 2, 204 and 205 of the Ugandan Insolvency Act 2011 only lawyers, accountants and chartered secretaries can be appointed insolvency practitioners. In South Africa by amendments to the Companies Act No 71 of 2008 and No 3 of 2011 a Companies and Intellectual Property Commission (CIPC) was created to among other duties license and regulate business rescue practitioners as a separate profession from liquidators regulated by the Master. Consequently the profession in SA is not fused but separate Anthony I Idigbe, *Developing a System for Regulation of Profession of Insolvency* (Entebbe, Uganda, 2011).

insolvency profession association in the 2020 *Companies and Allied Matters Act* ("CAMA 2020").[1038]

The professionalization of insolvency in states like Nigeria and Ghana is directly attributable to INSOL's effort. However, earlier focus on developing substantive domestic insolvency rather than the excessive attention given to cross-border insolvency would have reduced resistance to the Model Law's diffusion. The life cycle approach explains that considering low GDP states' concerns and interest at the emergence and cascade stages would have adverted the diffusion challenge at the internalization stage. Their low participation levels at emergence and cascade meant they had no voices during the norm definition. As a result, the Model Law's output did not suit low GDP states' need for more fundamental changes in their credit and insolvency infrastructure to generate domestic business that would result in cross-border business and insolvency. The differing outcome on adopting the Model Law in Nigeria and Ghana indicates that the mistrust over the diffusion of the global norm at the domestic level is yet to settle despite the strong INSOL domestic coalition. Other political actors remain relevant and can thwart the diffusion effort as happened at the Nigerian National Assembly.

5.6 Regional and Multilateral Cooperation

Simmons et al. argue that the mechanisms for diffusion include competition and coercion.[1039] Competition among states propels some states to cooperate as a trade block to offset disadvantages in the marketplace. In the absence of cooperation, the outcome could be that some states unilaterally assist a foreign insolvency representative or a local jurisdiction asserts authority over local assets and denying assistance to a foreign jurisdiction. In other situations, asserting authority over assets abroad using personal jurisdiction over the persons present within the jurisdiction and who has control of the assets located abroad.[1040] These

[1038] BRIPAN was founded on June 17, 1994 in Lagos Nigeria and CAMA 2020 in s.705(1)c now provides that a person is only qualified to act as an insolvency practitioner where the person has BRIPAN membership or membership of any other professional body recognized by the Corporate Affairs Commission.

[1039] Simmons, Dobbin, & Garrett, *supra* note 879.

[1040] See paragraph 3.2.1 above.

differences could become a severe impediment to business, necessitating some form of cooperation among states. Regional trade blocks enable groups of states to compete in the global market. Such trade groups include the European Union (EU), Economic Community of West African States (ECOWAS), North American Free Trade Agreement (NAFTA) and others. The World Trade Organization (WTO) deals with the rules of trade among states.[1041] WTO rules allow these customs unions or free trade areas and provide a forum to facilitate trade and resolve trade disputes.[1042]

Some custom unions or free trade areas seek harmonization of their members' approach to law and economic activity. Insolvency is one of those areas. The EU Insolvency Regulation 2000, amended by EU Insolvency Regulation 2015 (recast), is an example of a regional block effort to harmonize insolvency laws within the EU.[1043] The EU Regulation is a treaty directly applicable to member states, thereby directly impacting those states. Its impact is nonetheless limited because it does not apply to non-member states.[1044] Concerning the previous EU Insolvency Regulation 2000 and the Model Law, Roy Goode, an English Professor of Law, commented following his discussion of the EU regulations:

> We saw that the position was complex, even within a unified system of rules. How much more so is this the case in cross-border insolvencies involving parties outside the European Union, particularly in jurisdictions which have not adopted the 1997 UNCITRAL Model Law on Cross-border Insolvency.[1045]

[1041] "WTO | About the organization", online: <https://perma.cc/S9FV-992J>.

[1042] "WTO | Trade facilitation", online: <https://perma.cc/3QAB-8QTA>.

[1043] EU Regulation 2000 on Insolvency has been replaced with the coming into force of reform Regulation (EU) Recast 2015/848 of The European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) "EUR-Lex - 32014L0059 - EN - EUR-Lex", online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059>; Further amended by the EU Preventive Insolvency Directive note 988.

[1044] Nisi, *supra* note 915.

[1045] Roy Goode, *Principles of Corporate Insolvency Law Student Edition*, fourth edition ed (London: Sweet & Maxwell Thomson Reuters, 2011) at 779–780 para 16–01.

While regional harmonization coerces diffusion within a trade block, as Goode pointed out, cross-border insolvency challenges remain in the absence of a universally diffused global norm outside the trade block. The challenge of diffusing insolvency norms outside a customs union now faces the UK and EU with the recent exit of Britain from the EU on January 1, 2021. There were three pillars of BREXIT, a free trade agreement, a close partnership on citizens' security and an overarching governance framework.[1046] Unfortunately, it was a hard exit for insolvency as the exit deal did not contain any provision as to cross-border insolvency.[1047] Although the UK has adopted the Model Law, only four EU states have, leaving open the question of recognition, access, cooperation and coordination of insolvency proceedings between the UK and EU states and opening up potential for competition among the various insolvency systems.[1048]

The need for a global framework for managing cross-border insolvency beyond voluntary assumption or regional harmonization is imperative, but the challenges are enormous. The executive summary of the International Monetary Fund (IMF) framework for the Resolution of Cross Border Banks captures this explicitly.

> Since many systemically important financial groups operate globally, an uncoordinated application of resolution systems by national authorities will make it much more difficult to both secure the continuity of essential functions (thereby limiting contagion) and ensure that shareholders and creditors bear the financial burden of the resolution process……A far-reaching solution to this problem would be the establishment of an international treaty that would obligate countries to defer to the resolution decisions of the jurisdiction where the financial institution or group has its main activities. Alternatively, one could envisage "de-globalizing" financial institutions so that they fit more comfortably within the national resolution frameworks in which they operate. The first solution, an international treaty, would necessitate a considerable sacrifice of national sovereignty

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[1046] European Union, "The EU-UK Trade and Cooperation Agreement | European Commission", online: <https://perma.cc/9LXF-G6UZ>.

[1047] "Trade and Cooperation Agreement between EU and UK", (31 December 2020), online: *Perma* <https://perma.cc/BWD3-J2TZ>.

[1048] The EU states that adopted the Model Law are Montenegro, Poland, Serbia and Slovania, see E Appendix V below.

> and would not appear to be feasible in the near term…The second alternative, the de-globalization of financial institutions, would result in significant efficiency losses and could undermine emerging market access to capital markets and the expansion of international trade more generally.[1049]

Ho and Lastra argue that the IMF framework admits diverse ways of advancing cross-border resolution of banking crises.[1050] It follows that while regional cooperation could accelerate the diffusion of a global norm within a trade block, it is not sufficient to ensure broad acceptance globally. Also, each trade group's priorities differ as to which global norm to integrate within their block. For instance, within ECOWAS, the members still have strong economic ties to their colonial heritage. Divided loyalty means that regional integration has not enjoyed adequate attention, particularly at the implementation stage. Francophone states patronize the OHADA system, while Anglophone states prefer the common law. Not surprisingly, the OHADA regional cross-border insolvency law applies only to Francophone states.[1051]

5.7 Conclusion

At the norm internalization stage of the Model Law's evolution, the actors and their motivation changed. While INSOL continued to play a significant role, its tactic evolved as it cooperated with other multilateral organizations other than UNCITRAL, such as the World Bank and IMF and the domestic coalition of professional associations. The World Bank and IMF have more coercive authority over low GDP states to influence state policy than UNCITRAL. This position is without prejudice to the sentiment of TWAIL and other scholars that capitalist states

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[1049] Rosa M Lastra, ed, *Cross-Border Bank Insolvency* (Oxford: Oxford University Press, 2011) at 451 IMF Resolution of Cross-Border Banks - A Proposed Framework for Enhanced Coordination attached as Appendix to the book.

[1050] Look Chan Ho & Rosa M Lastra, "International Developments" in Rosa M Lastra, ed, *Cross-Bord Bank Insolv* (Oxford: Oxford University Press, 2011) 204 at 211 para 9.23.

[1051] The recently adopted African Continental Free Trade Agreement AfCFTA present similar opportunity and challenges.

and multilateral institutions use evidence and materials to project neoliberal global norms without regard to perceptions of the Global South.

Multilateral institutions and non-state international organizations have challenges seeking domestic policy convergence with global norms. Domestic politics may pose resistance to the diffusion of global norms. These international organizations are not best suited to engage in the domestic sphere, and their governance rules may prevent them from engaging. The result is a need for cooperation with domestic coalitions and political interests. Professionalizing the global norm through professional regulation is a safe way of creating a domestic coalition to diffuse a global norm.

This study argues that the level of participation of states in norm definition at the global level and the prior existence of benefits from the new global norm in the form of a profession or business which the norm seeks to regulate determines the level of acceptance of the norm within the domestic sphere of states. The life cycle approach reveals that the Model Law's adoption and diffusion by low GDP states have not been significant. This finding enables an understanding of how to improve global lawmaking and sensitize non-state entities involved with norm generation in developing strategies for inclusiveness.

6 Chapter Six – Findings and Conclusion

6.1 Findings and Implications

This study's primary aim is to examine the evolution of the Model Law and determine the role of INSOL, a non-state entity, in the emergence, cascade and internalization of the global norm of cooperation and coordination on cross-border insolvency proceedings underpinning it. The life cycle theory postulates that norms evolve over three stages in their life cycle: emergence, cascade, and internalization. The actors and their motivation differ at each stage of the life cycle. The life cycle approach enables the evaluation of INSOL's role in global norm-making in insolvency.

The life cycle approach allows examination of the emergence, cascade and internalization of the Model Law and changing actors in the norm-making process and their changing role over the evolution of the norm. The study using the approach observes the different persuasion strategies utilized by INSOL, the norm entrepreneur, at each stage of the norm life cycle to persuade and socialize the norm leader and norm followers to accept the norm with varying degrees of success. The life cycle approach explains the complicated relationship between states, state-centred multilateral institutions and non-state entities in global norm making.

Many lessons arise from the study on global lawmaking, the role of non-state entities in global norm making and the relevance of the life cycle theory, including suggestions on remedying perceived shortcomings of the life cycle theory and areas for further research. This chapter presents the findings of the study.

6.1.1 Norm Emergence and the Norm Entrepreneur

The study reaffirms the theoretical suggestion that individuals and non-state entities now generate global norms under international law. The previous thought that international law is the preserve of states that create global norms is no longer tenable. Anyone can be the norm entrepreneur for the generation of global norms. The norm entrepreneur's motivation, while ideational, is also driven by self-interest. The self-interest of participating norm entrepreneurs may diminish those of non-participating states and non-members of the norm entrepreneur in the

process of norm definition. However, states remain dominant as norm leaders and followers even if they are not norm entrepreneurs.

Avoidance of hardship to creditors and debtors and prevention of frustration experienced by insolvency practitioners in high GDP states respecting access to and resolution of assets or debtors located abroad were the primary motivations for the norm of cooperation and coordination cross-border insolvency underlying the Model Law. Where the credit and insolvency systems are weak within a state, cross-border insolvency business is not as developed. Therefore, there is no self-interest for low GDP states in pursuing a global norm focused only on cooperation and coordination concerning assets or persons located across borders. The differential in interest and participation of low and high GDP states implicates all three stages of the norm life cycle. These differentials affect norm definition and diffusion at the cascade and internalization stages.

The findings support the theoretical proposition that the emergence of a norm entrepreneur depends on an organizational platform's existence. INSOL's organizational platform and resources enabled it to become the norm entrepreneur for the Model Law, outperforming the IBA Committee J that was first in time in seeking a global norm for cross-border insolvency. The twin forces of globalization of businesses and the crisis of transition from a command economy in the late 1970s to 1980s motivated the desire for change in the global norm to reduce the obstacles to cross-border insolvency. A limited objective of cooperation and coordination on insolvency proceedings, which suited the business imperative of INSOL membership, was pursued instead of modernization and harmonization of substantive insolvency law considered a comparatively challenging objective. However, the finding is that INSOL had to confront the lack of harmonization identified but avoided at the emergence stage at subsequent stages of the Model Law's evolution. It follows that while the life cycle theory assists with observing the evolution of a global norm, it does not explain the tensions generated by the norm-making process.

6.1.2 Norm Cascade and Norm Definition

The findings support the theoretical proposition that the norm entrepreneur at the cascade stage requires a global organizational platform or multilateral norm modelling site to socialize states the dominant actors in global public norm making. The problem structure determines the method of socialization adopted. If the norm entrepreneur is a non-state entity, then the cascade stage's socialization method at a multilateral norm modelling site must be strategic to receive the

attention of the norm leader and followers. In some cases, it could be combative, but INSOL's method was subtle and non-obtrusive.[1052] Persuading the norm leader, the US, meant the leader could socialize the norm follower states, thereby insulating the norm entrepreneur from state sovereignty politics at the cascade stage within a multilateral norm modelling site.[1053] At the cascade stage, INSOL used various socialization techniques such as establishing collaboration with national insolvency associations, particularly those of the norm leader the US and UNCITRAL, organizing joint colloquia with UNCITRAL, providing support for UNCITRAL WGV secretariat, introducing discussion documents, participation in the formal and informal proceeding at WGV and providing state delegates for many member states of WGV.[1054]

Legitimacy gains exist for multilateral institutions from non-state entities' participation in global public norm making. The "origin of invention" of norms pursued by multilateral institutions whose processes allow participation of non-state entities requires a look back to norm generation before cascade to the multilateral modelling site. A key finding is that states' participation level and input into the definition of a global norm affect acceptance at the diffusion stage.[1055] Thus, it is daunting to balance state sovereignty, state participation, and legitimacy and accountability provided by non-state entities' involvement in the cascade stage.

6.1.3 Norm Internalization and Norm Diffusion

The institutionalization of the Model Law as a global norm through the UN General Assembly's adoption did not immediately translate to members' behaviour change, particularly

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[1052] See above **Chapter Four – Norm Cascade at UNCITRAL and the making of the Model Law.**

[1053] For instance, Franken's argument that the Model Law was reflective of the US as dominant state application of section 304 of US Bankruptcy Code without the reciprocity requirement, while partly true does not reflect that the fact that the US preferred option was the IBA MIICA convention which would have been mandatory. Also, Franken argument confirms the success of INSOL's socialization method as most scholars did not look beyond the norm leader to understand the origin of the norm Franken, "Cross-border insolvency law", *supra* note 682.

[1054] See above **Chapter Four – Norm Cascade at UNCITRAL and the making of the Model Law**

[1055] See paragraph 5.3 above on Norm Internalization.

among low GDP states. The finding of this study explains the theoretical proposition that cascade is not the end of the evolution of a norm as it still has to be internalized, a process by which the norm diffuses into domestic policy, law and change of behaviour. Participation in the dynamic process of norm definition at the cascade stage renders acceptance easier at internalization. However, the study found low participation by low GDP states at the cascade stage resulting in resistance or inappropriate diffusion.[1056] There is a correlation between low participation and diminished acceptance levels at the internalization stage. Also, low involvement and absence of modern insolvency systems in low GDP states rendered the Model Law of limited relevance to them, affecting their response to diffusion at the internalization stage. The assumption of norm life theory that the stages are an irreversible growth pattern is incorrect as there is reflexivity among the life cycle stages.

This study's finding supports the theoretical proposition that a norm becomes widely accepted at the internalization stage and taken for granted. The internalization of a global norm is complicated as it has to be institutionalized as a global norm and within the domestic law. The change of behaviour has to occur at both the global and national levels. There is a complex interaction between international non-state entities, multilateral institutions with coercive authority, domestic coalitions and political associations, and states. Convergence is not guaranteed. States could resist convergence for many reasons.

The site for normative modelling changes at the internalization stage of a global norm's life cycle. Multilateral institutions that possess coercive authority are more prominent at this stage in persuading states to adopt the global norm as part of policy conditionalities for access to finance. The study's finding is that UNCITRAL receded to the background, and the World Bank and IMF moved to the forefront at the internalization stage.[1057] INSOL, as the norm entrepreneur,

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[1056] See **Chapter Five – Norm Internalization – The Challenge of Acceptance and Diffusion of the Model Law**

[1057] *Ibid*

utilized its relationship with multilateral institutions with coercive authority in its pursuit of domestic institutionalization and diffusion.[1058]

The study supports the theoretical proposition that the professionalization of insolvency at the domestic level is evidence of norm internalization. At this stage, the norm is taken-for-granted. The insolvency profession has long existed in high GDP states, but for low GDP states, the existence and regulation of insolvency practice are emergent. There is insufficient knowledge within the profession in low GDP states to drive policy and behaviour change in the domestic forum. INSOL changed the narrative by encouraging the mushrooming of national associations and developing training curricula and recognition through domestic law reform.

6.1.4 Limitations of the Life Cycle Theory

While the life cycle approach explains the evolution of the Model Law and the role of INSOL, a non-state entity in the process, it does not provide answers for the observed non-participation of low GDP states in setting global cross-border insolvency norms. It also does not explain the tension between those norms and the needs of the Global South resulting in challenges of diffusion at the internalization stage. Another implication of this study for the life cycle theory is that the three life cycle stages are not distinct. Instead, relationships exist between the different stages that affect the diffusion of the norm at the last stage.

The following section presents the primary data obtained through elite interviews. It also analyzes the data supporting the findings of the study.

6.2 Data Presentation and Analysis

Besides interviews, existing and conducted, the study collected other primary data through the legal history method from several archival sources. The discussion on the research methodology for this study is in an earlier chapter of this study.[1059] The interview data is presented

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[1058] *Ibid*

[1059] See Chapter **Chapter Two – Research Design and Methodology** above.

and analyzed in this section. The other data are presented and analyzed with the interview results by contextual reconstruction in other chapters of this dissertation.[1060] This section offers an interpretation of the preliminary and elite interview data. The variables collated in the study and interpreted enable an understanding of the relationships between them.

6.2.1 Analysis of Interview Respondents

Four respondents participated in the elite interview, while ten respondents participated in the preliminary interview. Of the ten preliminary interview respondents, two also participated in the elite interview. Two other preliminary interview subjects had no objection to using the data they supplied at the preliminary interview. Consequently, the analysis is on six respondents, four from the elite interview and two from the preliminary interview. All six respondents were male.[1061] Between 1982 and 1997, five of the respondents were insolvency lawyers and an academic. One respondent was an insolvency practitioner with a background in accounting. At the time of the interview, three of the respondents had retired as insolvency practitioners, one had retired as a judge, with one currently a judge and the last an emeritus academic. All six respondents (100%) were involved with cross-border insolvency practice between 1982 and 1997.

Four of the respondents were from the United States (66%). One Canada (17%) and the last the UK (17). In terms of their involvement with cross-border insolvency, fifty percent of the respondents stated that they were involved with cross-border insolvency practice between 1982 and 1997, while fifty percent stated that they were only involved with domestic insolvency or academic work at the time. Approximately sixty-six percent (66%) of the respondents had affiliation and involvement with the IBA Committee J between 1982 and 1997, while thirty-three percent (33%) were not. Conversely, sixty-six percent of the respondents had an affiliation with INSOL during the period, and thirty-three percent did not.

[1060] See **Chapter Three – INSOL as Norm Entrepreneur in Norm Emergence**, **Chapter Four – Norm Cascade at UNCITRAL and the making of the Model Law**, and **Chapter Five – Norm Internalization – The Challenge of Acceptance and Diffusion of the Model Law** above.

[1061] See the research method in Chapter 2 above. Also, the additional data from the preliminary interviews contributed to contextual reconstruction in Chapters 3, 4 and 5 above.

The respondents involved with cross-border insolvency practice and reform gave reasons for their involvement. Legal uncertainty of the impact of foreign law on domestic insolvency and assets or persons located abroad and opportunity for cross-border insolvency work rated the two highest reasons for their involvement with cross-border insolvency at 32% each. The next was frustration with their experience abroad at 21% and hardship and inconvenience of practicing cross-border insolvency at 14%. Finally, the respondents expressed how their involvement with cross-border insolvency reform contributed to solving the problems and opportunities they identified that drew them to this area of practice. They rated knowledge and contact with foreign insolvency practitioners as the highest benefit they derived at 43%, followed by cooperation and coordination with foreign insolvency practitioners and later among state courts at 39%. Other benefits were flipping knowledge of foreign laws at 13% and unification and harmonization at 4%. It follows that they did not perceive unification and harmonization as essential benefits. This significant finding confirms INSOL's approach of seeking a practical solution for its members to overcome dealing with insolvency assets and persons located abroad rather than harmonizing laws.

The study sought to know more about the respondents' involvement with cross-border insolvency between 1982 and 1997. Unfortunately, all the respondents indicated that they were not involved with the UNCITRAL Congress of 1992 in New York. Luckily other archival materials of the 1992 Congress enabled the contextual reconstruction of what happened at the Congress regarding insolvency and its impact on the subsequent development of cross-border insolvency regulation [see paragraph 3.5.10 above]. However, two-third of the respondents were involved with UNCITRAL INSOL joint colloquium of 1994 in Vienna, with one-third not involved. Also, 50% of the respondents attended UNCITRAL INSOL joint judicial colloquium in Toronto in 1995, with the other 50% not attending. One of the respondents attended the Toronto colloquium as a private legal practitioner but later became a judge. Two-third of the respondents attended the UNCITRAL WGV sessions between 1995 and 1997, and the other 50% did not during that period. Again after the adoption of the Model Law in 1997, two-third of the respondents attended WGV sessions on cross-border insolvency. 50% of those who attended post-1997 were those who did not participate in WGV pre-1997.

83% of the respondents preferred the Model Law rather than a treaty to regulate cross-border insolvency. However, 17% chose a treaty solution. Two-third perceived the most significant

factor for building consensus on the Model Law before 1995 as the joint colloquia organized by UNCITRAL and INSOL in Vienna and Toronto and the report of the Committee of Experts and Panel of Evaluators [see paragraphs 3.5.12 and 3.5.13 above]. Other factors were the UNCITRAL 1992 Congress and the IBA Committee J MIICA proposal, which 17% of respondents perceived significant. Unfortunately, 17% of respondents could not provide their perception of this period because of lack of involvement at the time.

For the period 1995 to 1997, two-third of the respondents attributed the consensus on the Model Law to discussions at formal and informal sessions of delegates at WGV, inclusive of coffee breaks and discussions groups. The one-third of respondents not involved during this period did not have perception. The respondents recalled their preferences between the Model Law and a treaty solution. Two-thirds identified the challenging and protracted treaty process as the main reason for rejecting the treaty option for the Model Law. 17% identified political impediments with a treaty as the reason, while another 17% offered no comment on this issue.

The study sought to know the positions, if any, held by the respondents in INSOL. One-third of them have held positions in INSOL, including as president, and two-third held no position. At the WGV, one-third of the respondents were state delegates between 1995 and 1997, 16% IBA observer delegates, 16% INSOL observer delegates, 16% state delegates post 1997, and 16% were also WGV secretarial support at some point. On their perception of what was responsible for INSOL's influence in the UNCITRAL work process between 1993 and 1997, 83% of the respondents stated that it was INSOL's specialized knowledge, expertise and resources. The remaining 17% did not offer any comment. Finally, the study sought to know the respondents' involvement with the Model Law after its adoption at UNCITRAL and the UN in their respective countries. Two-third indicated that they were involved with the internalization of the Model Law through the facilitation of training programs for insolvency practitioners in their country of practice and abroad, while one-third was not so involved. One-third of the respondents' engagement with training is with INSOL and fifty percent through the US ABA/ABI bankruptcy training program. 17% of the respondents are no longer involved with training. The summary of the profile of interviewees is in Appendix B.

6.2.2 Analysis of Research Objectives

The consequences of states' different cross-border insolvency approaches were legal uncertainty, hardship, and frustration, as identified by the literature review and the study's findings. Thus, one of the research objectives is to determine the role of INSOL in states resolving the issue of regulation of cross-border insolvency. Another objective was to study and observe UNCITRAL and WGV adopting the Model Law in 1997 and categorize the actors and their influence on the UNCITRAL work process. Finally, the study seeks to determine whether the role of INSOL in the process leading to the adopting and subsequent internalization of the UNCITRAL Model Law corroborates the norm life cycle theory.

Research Objective No. 1

Determine the role of INSOL in how states resolved the cross-border insolvency quagmire between 1982 and 1997.

Finding

All the respondents (100%) agreed that INSOL contributed to resolving cross-border insolvency challenges between 1982 and 1997. Furthermore, 83% of respondents believe that the INSOL contributed to the fullest extent of searching for a solution for cross-border regulation of insolvency. In addition, 17% of the respondents acknowledge the contribution of INSOL but place more credit on state delegates and other non-state entities. All the other non-state entities such as the ABA are INSOL members except the IBA, which as an institution is not a member of INSOL.

Archival materials corroborate the perception of the respondents from the elite interview. For example, INSOL engaged with UNCITRAL in 1992 on the cross-border insolvency project [see paragraph 3.5.10 above]. The engagement resulted in a study of insolvency systems in about 30 states which formed the fulcrum of UNCITRAL secretariat reports to the Commission.[1062] Furthermore, INSOL organized the UNCITRAL INSOL joint colloquia in Vienna in 1994 and

[1062] Cooper & Jarvis, *supra* note 415.

Toronto in 1995 [see paragraphs 3.5.12 and 3.5.13 above]. Two vital reports emerged from those colloquia, the Expert Committee Report and Judges Evaluation.

Furthermore, the Provisional Agenda for WGV's first consideration on cross-border insolvency introduced the Expert Committee Report and Judges Evaluation as discussion papers. They remained on the agenda throughout the work of WGV on the Model Law.[1063] Finally, a review of the Model Law against the ideas of INSOL reflected in the Expert Committee Report discloses that the Model Law did not fall far from INSOL's thoughts on non-reciprocal recognition, access, relief and cooperation and coordination among state courts.[1064]

Conclusion on Research Objective No. 1

All the respondents stated that INSOL contributed to resolving cross-insolvency challenges between 1982 and 1997. For example, a respondent recalled that following the *Maxwell Communication plc* case *Protocol's* success in 1993, the need for a Model Law framework became apparent, leading to the approach to Gerold Herrman, who headed UNCITRAL at the time. He said, "[A]nd the shorthand of the story is that Gerold and I met and we decided that this was a project that the world needed, that UNCITRAL would put its shoulder behind the project working jointly with INSOL and we would undertake the project."[1065] However, another respondent stated that INSOL merely provided UNCITRAL Working Group V secretariat personnel and observers who occasionally contributed to the Working Group discussions. The data reviewed and the application of the norm life cycle theory explain the respondents' different perspectives. The perception that INSOL only provided low-level support to the UNCITRAL WGV secretariat and had no significant role at the WGV sessions is consistent with INSOL's strategy of remaining in the background and focusing on socializing the norm leader who then socializes

[1063] UNCITRAL, *supra* note 749; UNCITRAL Working Group V, *supra* note 361; UNCITRAL, *supra* note 361.

[1064] note 661 at 160–161 for summary of Expert Committee recommendation on cross-border regulation based on non-reciprocal recognition, access, relief and cooperation and coordination among state courts. UNCITRAL Commission Secretariat, *supra* note 436.

[1065] Interview of February 13 and 17, 2020.

the norm followers. Thus, the archival data disclose the substantive contribution of INSOL in setting the agenda for WGV.

Research Objective No.2

Determine how INSOL exercised influence within the UNCITRAL Work process.

Finding

The respondents (100%) stated that INSOL exhibited specialized expertise and knowledge of insolvency than IBA, resulting in more effective participation in agenda-setting for cross-border insolvency. Also, INSOL mobilized its members' resources to support its global norm-making agenda mainly through its Group 36 funding. INSOL provided secretariat support to WGV and achieved 100% participation at all WGV sessions while considering the Model Law.

INSOL's contribution to the UNCITRAL Work Process is summarized in the figure below.

Figure 3 Contribution of INSOL to UNCITRAL Model Law Work Process

Two of the respondents attended the 1994 UNCITRAL INSOL Joint Colloquium in Vienna. One participated at the 1995 UNCITRAL INSOL Judicial Colloquium in Toronto as a practitioner

and not a judicial officer; he later became a judge. Two of the respondents were observers at the UNCITRAL WGV between 1995 and 1997, representing INSOL and the IBA, respectively. One respondent was a member of a state delegation at UNCITRAL WGV between 1995 and 1997. The other two respondents participated in WGV sessions after 1997 as state delegates.

Conclusion on Research Objective No. 2

INSOL persuaded UNCITRAL to adopt the Model Law approach because it had an array of experts with special knowledge of insolvency among its membership. It also was an inclusive organization that brought together the different shades of expertise in insolvency. Further, it pursued a strategy of including judicial officers as the plank for a Model Law framework based on cooperation and coordination among state courts. One of the respondents stated that "[W]e realized it was important to have the judges talking to each other because, the only way, without a treaty, is whether the judges were willing to cooperate, as Judge Brozman did with Lord Hoffman." [1066] Even though they were observers, members took INSOL's interventions during UNCITRAL WGV sessions seriously because of the acknowledgement of their expertise. One of the respondents stated that the IBA, on the other hand, was not sufficiently focused on insolvency even though they sent an observer and organized dinners and receptions for delegates, just like INSOL did as well.[1067] He further stated that reports to IBA Committee J on UNCITRAL WGV did not receive any response.[1068]

Research Objective No. 3

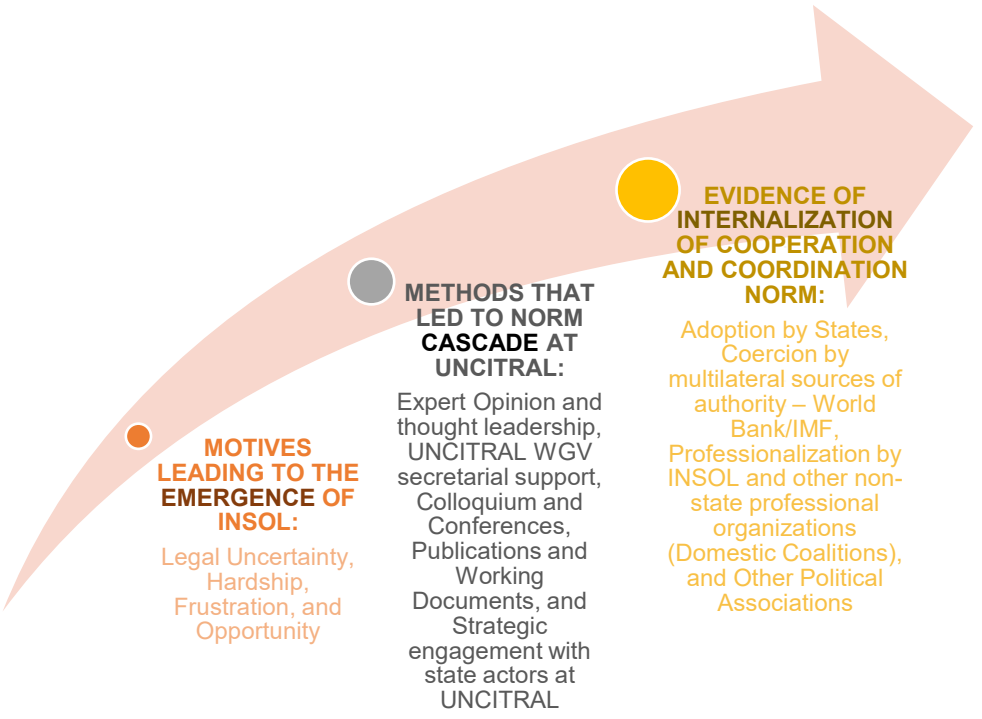
Determine whether the role of INSOL in delivering UNCITRAL Model Law corroborates the norm life cycle theory.

[1066] *Ibid*.

[1067] Interview of February 14, 2020.

[1068] *Ibid*.

Finding



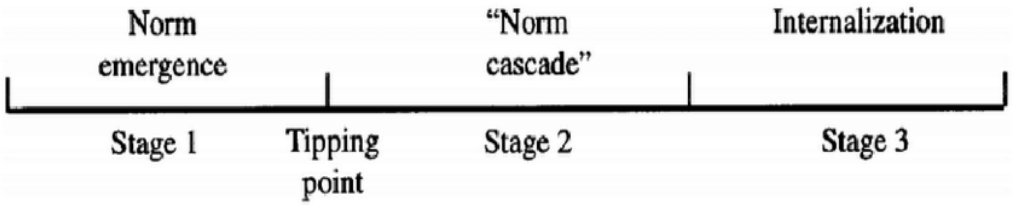


Figure 4 Details evolution of norm of "cooperation and coordination" from emergence to cascade to internalization. This figure includes the norm life cycle stages as postulated by Finnemore and Sikkink.

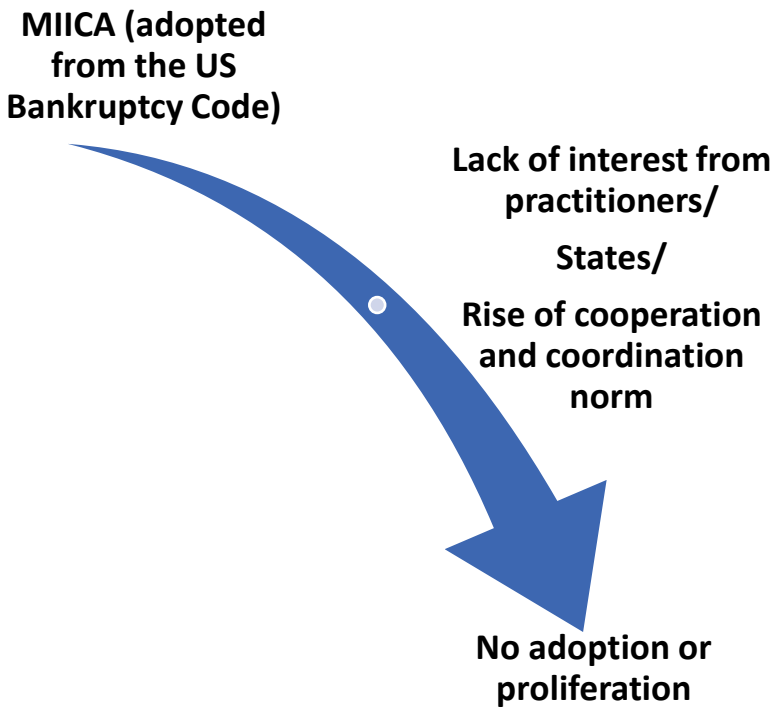


Figure 5 IBA MIICA contribution failed to launch

Conclusion on Research Objective 3

INSOL came into existence in 1982 as a forum for articulating a coordinated approach to resolving the cross-border insolvency conundrum. Its processes encouraged cooperation and coordination among practitioners from many jurisdictions, which climaxed in the *Maxwell Communication plc* case in 1993. One of the interview respondents played a prominent role in the *Maxwell Communication plc* case. Others played roles acting for creditors in the case. Using protocols in the case to ensure cooperation and coordination between courts of two states and insolvency practitioners appointed by both courts over the same company spurred the confidence of INSOL to escalate the norm to a global norm. At the emergence stage, the actor was INSOL, a non-state entity.

The study found that the norm cascade stage was between 1992 and 1997 when INSOL engaged with UNCITRAL, a UN multilateral body for negotiation among states on harmonization and modernization of international commercial laws. After that, the norm's evolution shifted to UNCITRAL as the global normative modelling site for cross-border insolvency cascade. At

UNCITRAL, the actors were state delegates who adopted the Model Law and INSOL and other non-state entities active in normative modelling on insolvency. INSOL employed a series of tactics to socialize and persuade state delegates to accept the Model Law approach to regulating cross-border insolvency. The technique utilized by INSOL includes expert knowledge and thought leadership, organization of joint UNCITRAL INSOL colloquium and conferences, providing secretarial support to UNCITRAL Working Group V, production of working documents, publications, participation in WGV proceedings and strategic engagement with state delegates at UNCITRAL.

The internalization stage is when states now accept the global norm as part of their domestic law. The study's finding is that a critical mass of states who were producers or users of insolvency adopted the Model Law. However, those primarily low GDP states had challenges adopting the law. In addition, other data analyzed indicate that low participation levels in norm definition at the cascade stage affected low GDP states' ability to internalize the global norm and change behaviour. For instance, all the respondents were active participants at WGV, as observers or state delegates, and were involved in the process of internalization in their respective states through participation in ABA and INSOL cross-border insolvency training programs. However, low GDP states could not produce such opinion leaders for their domestic markets. The limited credit market meant fewer cross-border investments and insolvencies and a lack of interest in internalizing cross-border insolvency norms in low GDP states.

6.2.3 Analysis of Other Primary Data

The study analyzed levels of participation of state member delegates and non-state and non-member observers at UNCITRAL WGV to determine whether there was any correlation to the Model Law's adoption and diffusion rates. In other words, how participation at WGV relates to the diffusion and internalization of the Model Law after its adoption.

Finding

The study found a correlation between non-state entities' participation at UNCITRAL WGV 18th to 21st sessions between December 1995 and December 1997 and their influence on its output, the Model Law. Fourteen (14) non-state observers attended the sessions, and only about two were multilateral institutions, and the rest were non-state entities [see Table 2 above at

paragraph 4.1.4]. Only three organizations achieved 100% attendance at all four sessions. These are EIPA, INSOL and IBA. 57% of non-state observers attended at least one out of the four sessions, and 21% attended two or three sessions. INSOL had the most impact, as shown in the contextual reconstruction and analysis in Chapter 4, paragraph 4.1.4.

The data from the partial transcript of the WGV 21st session can be presented by classifying the states according to the World Bank ranking of high and low GDP (Gross Domestic Product) and then comparing their participation at the session in terms of the number of words spoken with non-state entities.[1069] This analysis shows that the highest GDP states were also the top 12 participants at the WGV session in May 1997 in terms of words spoken. High GDP states spoke 31,177 words (Top 12 GDP), Low GDP states spoke 21,924 words (Bottom 25 GDP), UNCITRAL officials said 10,702 words, International Organizations spoke 5834 words making a total of 69,637 words spoken at the May 1997 WGV session.

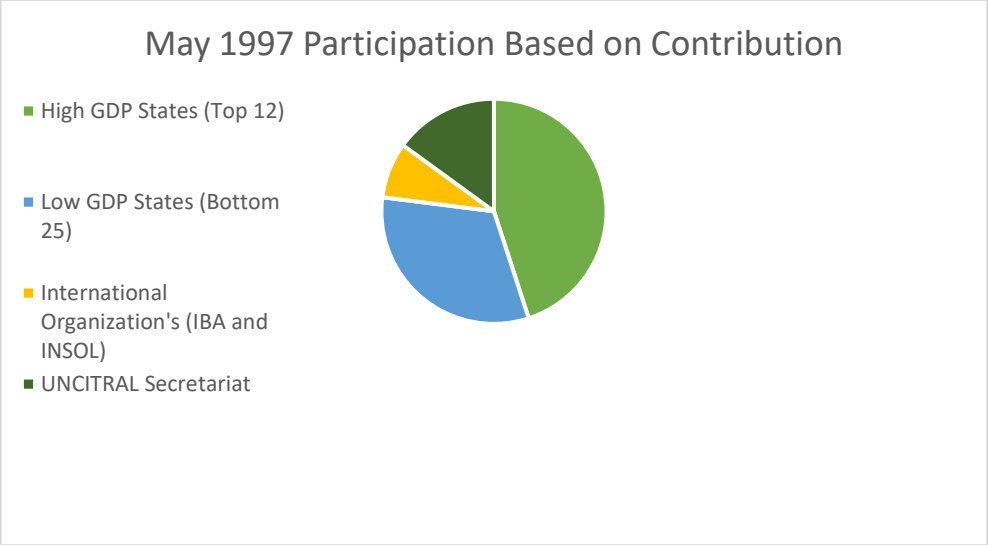


Figure 2 UNCITRAL WGV May 1997 Session Transcript Analysis

[1069] note 787.

The top 12 high GDP states predictably contributed significantly to WGV session discussions (45%) than the bottom 25 low GDP States (32%). In addition, UNCITRAL Secretariat contributed substantially to the discussions, indicating evidence of the transfer of expert knowledge from INSOL to UNCITRAL secretariat staff.

Two non-state international organizations (IO) participated: INSOL and IBA. They contributed 8% to the May 1997 transcripts of overall discussions. Still, compared to individual states, they had the second-highest level of participation (5834 words combined), just following the United States with (5996 words). INSOL among the IO's contributed 59% of the discussion compared with IBA.

In terms of adoption rates, between 1997 and 2003, only seven states adopted the Model Law, and they were high GDP states. By 2012 18 states had adopted the law dominated by high GDP states. As of August 20, 2021, 49 states and 53 territories adopted the Model Law.[1070] The study's finding is that the most significant economies that provide the highest participation in the norm-making process were also the first to adopt the Model Law, leading to norm evolution from cascade to internalization as postulated by the life cycle approach. EU members adopt a similar standard of cooperation and coordination among themselves, not applicable to non-EU members. However, almost half of the adopting states as of August 2021 have no significant cross-border insolvency business. They are states that comply based on presumed multilateral institutional exertion of authority for policy change.

Conclusion on Analysis of Other Data

The participation of non-state entities and low GDP states in the norm-making process of multilateral institutions has implications for the legitimacy, accountability and diffusion of global public norms. There remains a significant discrepancy in the life cycle theory, which assumes irreversible progression from one stage to the other on the attainment of the tipping point of each stage. Despite the transition to internalization as postulated by the life cycle approach, the Model Law's diffusion experiences resistance in many low GDP states. The low levels of engagement of

[1070] note 890.

low GDP states at the earlier life cycle stages affected the Model Law's convergence at the domestic level during internalization. INSOL's effort, including its collaboration with multilateral organizations with coercive authority over low GDP states such as the World Bank, had a limited impact on the diffusion and internalization of the Model Law in those states.

6.3 Analysis of Statements

6.3.1 Statement 1

Ho: The legal uncertainty and frustration experienced by INSOL members in cross-border insolvency adversely affected their interest, motivating them to organize and cooperate and coordinate among their members and transform the norm into a global norm adopted in the UNCITRAL Model Law on Cross-Border Insolvency using socialization and persuasion of state actors at UNCITRAL.

H1: The legal uncertainty and frustration experienced by INSOL members in cross-border insolvency did not adversely affect their interest, motivating them to organize and cooperate and coordinate among their members and transform the norm into a global norm adopted in the UNCITRAL Model Law on Cross-Border Insolvency using socialization and persuasion of state actors at UNCITRAL.

6.3.2 Statement 2

Ho: INSOL between 1982 and 1997 preferred the limited objective of cooperation and coordination among state courts as the basis for the UNCITRAL Model Law on Cross-Border Insolvency because it avoided a long-protracted state-controlled process of unification of insolvency laws that would have depended for effectiveness on state parties over whom it had no control or influence.

H1: INSOL between 1982 and 1997 did not prefer the limited objective of cooperation and coordination among state courts as the basis for the UNCITRAL Model Law on Cross-Border Insolvency because it avoided a long-protracted state-controlled process of unification of insolvency laws that would have depended for effectiveness on state parties over whom it had no control or influence.

6.3.3 Conclusion on Analysis of Statements

The findings and analysis of the data considered above enable responses to the statements. Therefore, the null Statements 1 and 2 must be accepted, and the alternate Statements 1 and 2 rejected from the findings and analysis.

6.4 Summary of Conclusions and Recommendations

The study reviews the role of INSOL, a non-state international federation of insolvency practitioners, in the shaping of UNCITRAL Model Law on Cross-border Insolvency twenty-four years after its adoption by the UN General Assembly following its earlier adoption by UNCITRAL Commission and WGV. The study found that understanding the challenges of diffusion of a global norm to the domestic forum of states require a look back to the motivations and interest of the norm entrepreneur at the earlier stages of the evolution of the norm. The economic and political crisis within high GDP states in the late 70s and early 90s and the self-interest of creditors, debtor and insolvency practitioners in those states led to INSOL's formation and the emergence of cooperation and coordination norms among practitioners and state courts that underpins the Model Law. The norm developed out of the crisis and the processes of INSOL. However, it did not intend to address the concerns and needs of low GDP states to modernize their credit and insolvency business systems.

Although the legitimacy and accountability gains of participation of non-state entities in the lawmaking process of multilateral normative modelling institutions are significant, the study draws attention to the low participation levels of low GDP states in the emergence and cascade of international commercial norms and laws. Like in human rights and policy areas where the life cycle approach emanated, the finding is that the participation of low GDP states is also crucial for legitimacy and the diffusion of global norms. The life cycle approach is applicable to explain the Model Law's evolution. Still, the study draws attention to the gap between the norm entrepreneur's motivations and the low GDP states' needs, which the life cycle approach did not adequately explain.

Another area of divergence between the study's findings and the life cycle theory approach is the motivation of the norm entrepreneur. Finnemore and Sikkink argue that ideational commitment is the primary motivation of the norm entrepreneur, and the norm or ideas they

promote may have “no effect on their well-being.”[1071] However, the study found that alleviating the challenges of INSOL members was a primary consideration for INSOL’s engagement with cross-border insolvency regulation. It is, therefore, argued that self-interest is also a motivator for the norm entrepreneur.

The global public policy process is complex and complicated, particularly in commercial and trade law, where non-state entities' interests intermingle with sovereign states. Non-state entities must be involved in setting global norms because the public policy process could negatively regulate their business environment or public confidence in their ability to deliver their services. However, non-state entities must balance their interests against sovereign rights, especially disadvantaged states. Such flexibility would guarantee the seamless diffusion of global norms generated by non-state entities. For example, the recent changes in UNCITRAL procedure and work method in response to the Coronavirus pandemic allowing virtual proceedings offer an opportunity for a post-pandemic system that would enable low GDP states effective participation in global lawmaking by multilateral agencies.

The stealth strategy has been successful in non-state entity engagement with states at multilateral normative sites. However, the need for transparency and historical recall requires that such non-state entities develop a policy to catalogue their records and make them available to researchers and the public over time. Thus, this research's knowledge mobilization objective is to campaign for INSOL to catalogue its record and create a public archive. Another knowledge mobilization objective is to create awareness of the global norm-making process within low GDP states, multilateral organizations, and non-state entities, emphasizing the need for more involvement of low GDP states.

6.5 Further Research

Perhaps, INSOL is the unsung trailblazer in new governance under international law. INSOL methods, socialization and persuasion processes for norm leaders and multilateral agencies are consistent with the life cycle approach. However, compared with norm

[1071] Finnemore & Sikkink, *supra* note 7 at 898.

entrepreneurs in international human rights and policy, INSOL strategy was not combative and aligned closely with the interest of high GDP states. This alignment possibly partly accounts for its success leaving low GDP states unaccounted for in the policy space for cross-border insolvency norm making.

Further study could identify how low GDP states could participate more effectively in global norm definition in modernizing commercial trade laws as they have achieved in human rights and policy. In addition, the research from observation of the power dynamics at the UNCITRAL multilateral normative modelling site recommends that TWAIL scholars consider using the norm life cycle approach to address their observed inadequacy of modern international lawmaking. Perhaps subsequent work that integrates both methods could expand the gains of the TWAIL approach in international commercial law outside the confines of TWAIL's greatest successes in human rights and policy as well as the environment. For instance, we may better understand the various political backlash, norm regression, and norm erosion that TWAIL propagated norms experience through the life cycle frame. Further research, as suggested, could improve solutions towards TWAIL norm progression and successful norm evolution.

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Appendices

A. Appendix A: Coded Interview Population

Coded Interviewees Directory

Number	Interviewees	Status	Coded Name
1	[redacted]	Contacted	CA
2	[redacted]	Contacted	CB
3	[redacted]	Contacted/Prelim Interviewee	CC
4	[redacted]	Contacted	CD
5	[redacted]	Contacted	CE
6	[redacted]	Contacted	CF
7	[redacted]	Contacted/Prelim Interviewee	CG
8	[redacted]	Contacted	CH
9	[redacted]	Contacted	CI
10	[redacted]	Declined/ Prelim Interviewee	DA
11	[redacted]	Contacted	CJ
12	[redacted]	Contacted	CK
13	[redacted]	Contacted	CL
14	[redacted]	Contacted/Prelim Interviewee	CM
15	[redacted]	Contacted	CN
16	[redacted]	Contacted	CO
17	[redacted]	Contacted	CP
18	[redacted]	Contacted	CQ
19	[redacted]	Contacted	CR
20	[redacted]	Contacted (added)	AA
21	[redacted]	Contacted (added)	AB
22	[redacted]	Interviewed	IA
23	[redacted]	Interviewed	IB
24	[redacted]	Interviewed	IC
25	[redacted]	Interviewed	ID

C-= Contacted
D-= Declined
I-= Interviewee
A= Amended/added to the list

B. Appendix B: Interviewees Summary Profile

Final Summary of Interviewees Profile

	American	Canadian	British	Practitioner	Academic	INSOL President	Maxwell Comm pic case	IBA Committee J	Joint Colloquium 1994 1995	WGV 1995-1997	WGV after 1997	Total
Nationality	4	1	1									6
Experience before 1982				5	1							6
Experience with cross-border insolvency 1982 to 1995				6			3					
Participation with UNCITRAL									5	3	5	
Position held at INSOL						2						2
Membership of IBA Committee J								1				1

C. Appendix C: List of INSOL Presidents

LIST OF INSOL PRESIDENTS

Date of Presidency	Name of President	Country	Gender
1982 - 1985	Ian Strang	Canada	Male
1985 - 1989	Richard Turton	Britain	Male
1989 - 1991	C. Garth MacGirr	Canada	Male
1991 - 1993	Richard Gitlin	USA	Male
1993 - 1995	Stephen Adamson	UK	Male
1995 - 1997	Dennis Cougle	Australia	Male
1997 - 1999	Gordon Marantz	Canada	Male
1999 - 2001	Neil Cooper	UK	Male
2001 - 2003	John Lees	Hong Kong	Male
2003 - 2005	Robert Hertzberg	USA	Male
2005 - 2007	Sijmen de Ranitz	Netherland	Male
2007 - 2009	Robert Sanderson	Canada	Male
2009 - 2011	Sumant Batra	India	Male
2011 - 2013	Gordon Stewart	UK	Male
2013 - 2015	James H M Sprayregen	USA	Male
2015 - 2017	Mark Robinson	Australia	Male
2017 - 2019	Adam Harris	South Africa	Male
2019 - 2021	Julie Hertzberg	USA	Female
2021 -	Scott Atkins	Australia	Male