REPORT ON THE SIXTY-SEVENTH SESSION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW WORKING GROUP V (INSOLVENCY LAW)

by

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1. EXECUTIVE SUMMARY

The sixty-seventh session of the United Nations Commission on International Trade Law ("UNCITRAL") Working Group V (Insolvency Law) was held in Vienna from 8 to 10 December 2025. The session was attended by distinguished delegates of Member States, observers from certain States and a range of intergovernmental and non-governmental organizations.

The Working Group considered the draft Model Law on Applicable Law in Insolvency Proceedings (A/CN.9/WG.V/WP.204) and the accompanying draft Guide to Enactment (A/CN.9/WG.V/WP.205). The agenda included the opening of the session, election of officers, adoption of the agenda (A/CN.9/WG.V/WP.203), substantive consideration of the draft model law, and adoption of the report.

2. SUBSTANTIVE DISCUSSIONS ON THE DRAFT MODEL LAW

A. Article 7 – Special Rules for Set-off

The Working Group discussed Article 7, which concerns the treatment of set-off rights under insolvency law. The majority of delegations considered Option 2 easier to implement, providing greater legal certainty, better protection of legitimate interests, and alignment with the approach taken in Article 6 on avoidance. The key debate centered on the modal verb in Option 2: "may", "should", or "shall". Some delegations supported "may" for flexibility, others preferred "should" to establish a presumption, while others favoured "shall" as an imperative norm to enhance certainty. An alternative drafting suggestion proposed to state directly: "the law granting or denying the right of set-off shall be the insolvency law of the State…". The Working Group agreed to retain only Option 2 and deferred the choice of modal verb until consideration of other provisions is completed. Suggestions for the commentary included explaining the interconnection between Articles 7 and 8, providing practical examples of legitimate and illegitimate interests, and clarifying that Article 7 prevails over Article 5(h) as *lex specialis*.

B. Article 8 – Special Rules for Treatment of *right in rem*

The prevailing view was that the provision should apply to both tangible and intangible assets; accordingly, the word "immovable" was deleted. It was also agreed that the provision should refer solely to "*right in rem*" rather than "secured claims", with the commentary illustrating the concept by reference not only to secured claims but also to other property rights enforceable *erga omnes*. In light of the agreed deletion of "immovable", the reference to "*lex rei sitae*" in Article 8 and its proposed definition in Article 2 were considered inappropriate. The prevailing view was to delete both references and instead have Article 8 refer to the insolvency law of the State where the asset is situated or whose law governs the validity and effectiveness of the *right in rem*, as determined by the private international law rules of the forum State or by internationally accepted private international law rules. The Secretariat was requested to reflect the useful elements of the deleted definition either in the draft article or in the commentary.

Views diverged on the inclusion of the word "substantially" in the provision. Some considered it a necessary safeguard against abuse, while others viewed it as subjective and potentially leading to frivolous and vexatious proceedings. It was agreed to retain the term, with the commentary explaining its qualitative function. Views also differed on the reference to "timely liquidation", with proposals to align it with Recommendation 1(e)[1] of the Legislative Guide or to refer to "timely disposition of assets" to discourage hold-out behavior by secured creditors. As a consequence of these amendments, draft Article 5(j) and the heading of Article 8 would be revised to read "treatment of *rights in rem* in respect of the debtor's assets". Suggestions for the commentary included clarifying that the *lex fori concursus* does not displace laws governing pre-insolvency rights and cross-referencing paragraph 88 of the commentary to Recommendations 31–34 of the Legislative Guide.

C. Article 9 – Special Rules for Foreign Litigation and Arbitration

The purpose of Article 9 is to provide safeguards for the effects of the *lex fori concursus* on foreign litigation and arbitration. Three options were before the Working Group. Option 1 was criticized for its reliance on the vague concept of "substantial disadvantage". Option 2, which would impose a stay on foreign proceedings, received broad support as a practical solution but was viewed by some delegations as a procedural rather than a conflict-of-law rule. Option 3, a softer approach requiring the court to "take into account" the right of the insolvency representative to participate, was seen by many as too weak to be effective.

A new proposal was tabled: "Notwithstanding Article 5 of this Law, the effects of the opening of insolvency proceedings on foreign litigation or arbitration proceedings [pending at the time of such opening] relating to the insolvency estate, shall be governed by the *lex fori concursus* only to the extent that any [intervention] [stay] imposed pursuant to the *lex fori concursus* is required to fulfil the aims of the insolvency proceedings and does not unduly interfere with the [pending] arbitration or litigation." Some delegations supported using this as the basis for further work, while others preferred to retain and amend Option 2. The Chair summarized that there was strong support for the policy underlying Option 2 and identified two drafting paths: one retaining the structure of Option 2 but adding a reasonable time limitation, and another developing a new conflict-of-law formulation based on the new proposal. Proposals for the commentary included explaining the difference between insolvency and arbitral proceedings and emphasizing the autonomy of foreign proceedings.

D. Article 10 – Exceptions to the *lex fori concursus*

Discussion focused on paragraph 3 concerning close-out netting. A prevailing view emerged to delete the last sentence, which reserved the possibility for the *lex fori concursus* to impose a stay or avoidance actions on close-out netting arrangements. It was argued that this sentence contradicted the core objective of the exception, which is to provide certainty and prevent systemic risk. A minority argued for its retention in a revised form with appropriate safeguards. Regarding paragraph 2 on regulated markets, it was agreed that the commentary should clarify that the phrase "rights and obligations of participants" refers specifically to those arising from participation in the system or market itself. There was strong agreement that the commentary must emphasize that the fundamental policy objective of paragraphs 2

[1] The draft report of the Session, as prepared by the Rapporteur, referred to Recommendation 51(a). However, after reviewing the Legislative Guide, the Observer found Recommendation 1(e) more pertinent.

and 3 is the prevention of systemic risk in financial markets, and that key terms must be meticulously detailed in the Guide to Enactment.

E. Article 11 – Coordination of Concurrent Proceedings

The Working Group agreed to retain paragraphs 1 to 4 of draft Article 11. Several drafting suggestions were made, including revising the Article's heading, opening the Article with "Notwithstanding Article 5 of this Law", deleting the overly restrictive texts which are bracketed in the draft of paragraph 2, ensuring consistency between paragraphs 2 and 3 and with Chapter III, clarifying the reference to a "foreign planning proceeding" in paragraph 3, and considering the addition of a new paragraph addressing the interaction with the safeguard provisions in Articles 6 to 9.

F. Chapter III – Recognition and Relief

The importance of Chapter III and its close link with Chapter II was emphasized, as cross-border effect depends on recognition. The Working Group agreed to continue consideration on the basis of draft Articles 13, 16 and 17. For Article 13, Option 2, which provides a single discretionary rule ("the court may grant relief…") applicable upon recognition of any foreign proceeding, was agreed as the basis for further work, with the bracketed text suggesting the court consider whether the proceeding is a main proceeding. With the adoption of a broad Option 2 for Article 13, questions were raised about the necessity of Articles 14 and 15; their retention was not decided. Article 16 on the protection of creditors was generally supported.

G. Public Policy Exceptions (Articles 12 and 17)

Regarding Article 17, on public policy, a majority favoured merging it with Article 12 (Chapter II) into a single provision. The proposed text reads: "Nothing in this Law prevents the Court from refusing to apply a foreign law or refusing to grant relief by giving effect to the law applied by a foreign court, if the effects of the application of that law or the granting of that relief would be manifestly contrary to the public policy of the State." The merged approach was accepted as the basis for further work, with placement details to be resolved.

H. Definitions, Overall Coherence, and Possible Additional Provisions

The need for consistency in terminology across UNCITRAL insolvency instruments was stressed. It was suggested that cross-referencing techniques could be used rather than reproducing definitions. A specific point was raised regarding the need to explicitly address the relationship between this Model Law (particularly Chapter III) and the 1997 Model Law on Cross-Border Insolvency in the Guide to Enactment. The Secretariat was tasked with further work on definitional harmony and clarifying the instrument's interaction within the broader UNCITRAL insolvency framework. Discussion on the bracketed "possible additional provisions" concerning the relationship between Chapters II and III was deferred.

3. CONCLUSION

The session concluded with several key decisions that will shape the future drafting of the UNCITRAL Model Law on Applicable Law in Insolvency Proceedings. Work will continue at the next session, scheduled for April 2026 in New York. Observing how delegates negotiated complex, policy-sensitive issues across different legal traditions offered a compelling insight into the challenges and possibilities of harmonizing insolvency law.