



**United Nations**

# **Report of the United Nations Commission on International Trade Law**

**Fifty-second session  
(8–19 July 2019)**

**General Assembly**

**Official Records  
Seventy-fourth Session  
Supplement No. 17**



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*Note*

Symbols of United Nations documents are composed of letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

[2 August 2019]

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## I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the fifty-second session of the Commission, held in Vienna from 8 to 19 July 2019.
2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

## II. Organization of the session

### A. Opening of the session

3. The fifty-second session of the Commission was opened on 8 July 2019. In their opening statements, newly elected members of UNCITRAL and other delegations underscored the importance of the work of UNCITRAL in removing legal obstacles to cross-border commerce and expressed their commitment to contributing to that work.

### B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 9 November 2015, 15 April 2016, 17 June 2016 and 17 December 2018, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:<sup>1</sup> Algeria (2025), Argentina (2022), Australia (2022), Austria (2022), Belarus (2022), Belgium (2025), Brazil (2022), Burundi (2022), Cameroon (2025), Canada (2025), Chile (2022), China (2025), Colombia (2022), Côte d'Ivoire (2025), Croatia (2025), Czechia (2022), Dominican Republic (2025), Ecuador (2025), Finland (2025), France (2025), Germany (2025), Ghana (2025), Honduras (2025), Hungary (2025), India (2022), Indonesia (2025), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2025), Kenya (2022), Lebanon (2022), Lesotho (2022), Libya (2022), Malaysia (2025), Mali (2025), Mauritius (2022), Mexico (2025), Nigeria (2022), Pakistan (2022), Peru (2025), Philippines (2022), Poland (2022), Republic of Korea (2025), Romania (2022), Russian Federation (2025), Singapore (2025), South Africa (2025), Spain (2022), Sri Lanka (2022), Switzerland (2025), Thailand (2022), Turkey (2022), Uganda (2022), Ukraine (2025), United Kingdom of Great Britain and Northern Ireland (2025), United States of America (2022), Venezuela (Bolivarian Republic of) (2022), Viet Nam (2025) and Zimbabwe (2025).

<sup>1</sup> Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 23 were elected by the Assembly on 9 November 2015, at its seventieth session, five were elected by the Assembly on 15 April 2016, also at its seventieth session, two were elected by the Assembly on 17 June 2016, again at its seventieth session, and 30 were elected by the Assembly on 17 December 2018, at its seventy-third session. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

5. With the exception of Burundi, Côte d'Ivoire, Lebanon, Lesotho, Mali, Sri Lanka and Zimbabwe, all the members of the Commission were represented at the session.
6. The session was attended by observers from the following States: Bahrain, Bolivia (Plurinational State of), Bulgaria, Cyprus, Democratic Republic of the Congo, Egypt, El Salvador, Greece, Kuwait, Luxembourg, Malta, Mauritania, Morocco, Myanmar, Netherlands, Paraguay, Portugal, Qatar, Republic of Moldova, Slovakia, Slovenia, Sudan, United Republic of Tanzania and Uruguay.
7. The session was also attended by observers from the European Union.
8. The session was also attended by observers from the following international organizations:
  - (a) United Nations system: World Bank;
  - (b) Intergovernmental organizations: Cooperation Council for the Arab States of the Gulf, Energy Community, European Bank for Reconstruction and Development (EBRD), International Institute for the Unification of Private Law (Unidroit), International Organization of la Francophonie (OIF), Organization for the Harmonization of Business Law in Africa (OHADA), Permanent Court of Arbitration (PCA) and South Centre;
  - (c) Invited non-governmental organizations: Advisory Council of the United Nations Convention for the International Sale of Goods; Alumni Association of the Willem C. Vis International Commercial Arbitration Moot; American Bar Association; American Society of International Law; ArbitralWomen; Association for the Promotion of Arbitration in Africa; Center for International Investment and Commercial Arbitration; China International Economic and Trade Arbitration Commission; Club of Arbitrators of the Milan Chamber of Arbitration; European Law Institute; European eCommerce and Omni-Channel Trade Association; Georgian International Arbitration Centre; Group of Latin American International Commercial Law Lawyers (GRULACI); Hong Kong Mediation Centre; Ibero-American Institute of Bankruptcy Law; Institute of International Law, Wuhan University, China; International Bar Association (IBA); International Federation of Freight Forwarders Associations (FIATA); International Law Institute; International Swaps and Derivatives Association; International Union of Notaries; International Women's Insolvency and Restructuring Confederation; Internet Corporation for Assigned Names and Numbers; Kozolchuk National Law Center (NatLaw); Madrid Court of Arbitration; New York International Arbitration Center; Regional Centre for International Commercial Arbitration; and Vienna International Arbitral Centre (VIAC).
9. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

### **C. Election of officers**

10. The Commission elected the following officers:

<i>Chair:</i>	Wisit Wisitsora-at (Thailand)
<i>Vice-Chairs:</i>	Roxanna de los Santos (Dominican Republic) Alex Ivanco (Czechia) Bruce Whittaker (Australia)
<i>Rapporteur:</i>	Emmanuel Ikechukwu Nweke (Nigeria)

## **D. Agenda**

11. The agenda of the session, as adopted by the Commission at its 1089th meeting, on 8 July, was as follows:
  1. Opening of the session.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Finalization and adoption of model legislative provisions on public-private partnerships with an accompanying legislative guide.
  5. Consideration of issues in the area of security interests:
    - (a) Finalization and adoption of a practice guide to the UNCITRAL Model Law on Secured Transactions;
    - (b) Correction of an error in article 64, paragraph 2, of the UNCITRAL Model Law on Secured Transactions.
  6. Finalization and adoption of texts in the area of insolvency law:
    - (a) Model law on enterprise group insolvency and its guide to enactment;
    - (b) Text on the obligations of directors of enterprise group companies in the period approaching insolvency.
  7. Consideration of draft UNCITRAL mediation rules and draft UNCITRAL notes on mediation.
  8. Review of draft UNCITRAL secretariat notes on the main issues of cloud computing contracts.
  9. Progress report of working groups.
  10. Work programme of the Commission.
  11. Date and place of future meetings.
  12. Coordination and cooperation.
  13. Secretariat reports on non-legislative activities:
    - (a) CLOUT and digests;
    - (b) Technical assistance and cooperation;
    - (c) Status and promotion of UNCITRAL legal texts and the 1958 New York Convention;
    - (d) Relevant General Assembly resolutions;
    - (e) Current role of UNCITRAL in promoting the rule of law;
    - (f) Bibliography of recent writings related to the work of UNCITRAL.
  14. Other business.
  15. Adoption of the report of the Commission.

## **E. Adoption of the report**

12. The Commission adopted the present report by consensus at its 1108th meeting, on 19 July 2019.

### III. Finalization and adoption of model legislative provisions on public-private partnerships with an accompanying legislative guide

#### A. Introduction

13. The Commission recalled that, at its forty-eighth and forty-ninth sessions, in 2015 and 2016, it had reiterated its belief in the key importance of public-private partnerships (PPPs) to infrastructure and development.<sup>2</sup> The Commission had decided that the Secretariat should consider updating where necessary all or parts of the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000)<sup>3</sup> and involve experts in the process.<sup>4</sup> At its fiftieth session, in 2017, the Commission had confirmed that the Secretariat (with the assistance of experts) should continue to update and consolidate the Legislative Guide, the accompanying legislative recommendations and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003)<sup>5</sup> and should report further to the Commission at its fifty-first session, in 2018.<sup>6</sup> The Secretariat thereafter organized and convened the Third International Colloquium on Public-Private Partnerships in Vienna on 23 and 24 October 2017.<sup>7</sup>

14. The Commission also recalled that at its fifty-first session, in 2018, it had taken note of the general policy proposals by the Secretariat for amending the Legislative Guide, as well as the specific amendments proposed by the Secretariat in the revised drafts of the introduction and of chapters I, II and III, contained in [A/CN.9/939/Add.1](#), [A/CN.9/939/Add.2](#) and [A/CN.9/939/Add.3](#). At the same session, the Commission had endorsed the general policy proposals for amending the Legislative Guide. The Commission had also approved in principle the nature of the amendments proposed by the Secretariat, subject to specific comments and further adjustments that might be proposed during the consultations with experts that the Commission encouraged the Secretariat to pursue, in order to submit to the Commission the complete set of all draft revised chapters of the Legislative Guide, to be renamed the UNCITRAL Legislative Guide on Public-Private Partnerships, for consideration and adoption at its fifty-second session, in 2019.<sup>8</sup>

15. The Commission noted that, with a view to advancing consideration of the revisions to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the Secretariat had convened an intergovernmental expert group meeting, to which several experts had also been invited by the Secretariat in their personal capacity. At its meeting held in Vienna from 26 to 30 November 2018, the intergovernmental expert group considered the revised drafts of the following chapters of the Legislative Guide: chapter IV, entitled “PPP implementation: legal framework and PPP contract” ([A/CN.9/982/Add.4](#)); chapter V, entitled “Duration, extension and termination of the PPP contract” ([A/CN.9/982/Add.5](#)); chapter VI, entitled “Settlement of disputes” ([A/CN.9/982/Add.6](#)); and chapter VII, entitled “Other relevant areas of law” ([A/CN.9/982/Add.7](#)). The intergovernmental expert group also considered a few selected questions in connection with the revised version

<sup>2</sup> *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 363; and *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 360 and 362.

<sup>3</sup> United Nations publication, Sales No. E.01.V.4.

<sup>4</sup> *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 362.

<sup>5</sup> United Nations publication, Sales No. E.04.V.11.

<sup>6</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 448.

<sup>7</sup> The documents presented at the colloquium and a summary report of the discussions are available in English at the colloquium website: [https://uncitral.un.org/en/colloquia/procurement/2017\\_colloquia](https://uncitral.un.org/en/colloquia/procurement/2017_colloquia).

<sup>8</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 136–137.

of chapter III, entitled “Contract award”, as considered by the Commission at its fifty-first session (A/CN.9/939/Add.3), which the Commission had requested the Secretariat to examine further in consultation with experts. The intergovernmental expert group generally approved the amendments to those chapters proposed by the Secretariat, while, at the same time, suggesting various additional amendments and adjustments.

16. The Commission had before it the following documents: (a) an explanatory note on the proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (A/CN.9/982/Rev.1); (b) notes by the Secretariat containing the revised text of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the Legislative Guide (jointly referred to as “the draft PPP texts” and separately as “the draft PPP model legislative provisions” and “the draft PPP guide”) (A/CN.9/982/Add.1, A/CN.9/982/Add.2, A/CN.9/982/Add.3, A/CN.9/982/Add.4/Rev.1, A/CN.9/982/Add.5/Rev.1, A/CN.9/982/Add.6/Rev.1 and A/CN.9/982/Add.7/Rev.1); and (c) comments received from the Government of Algeria (A/CN.9/1000). In addition, the Commission was informed orally of the comments received from the Government of the Plurinational State of Bolivia.

## **B. Consideration of the draft public-private partnership texts**

17. The Commission welcomed the draft PPP texts and commended the intergovernmental expert group and the Secretariat for the extensive revisions made to the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.

18. The Commission heard a statement by EBRD on the progress made by an expert group established by EBRD and the Economic Commission for Europe (ECE) to draft a model law on PPPs. It was reported that the joint ECE/EBRD project, which was being developed by a group of recognized international experts on PPPs was aimed at providing comprehensive legislative guidance to States, taking into account recurring criticisms about the shortcomings of existing PPP legislation in various countries, as well as lessons learned in international practice.

19. The Commission took note of the assessment by the Secretariat that the ECE/EBRD project could be an opportunity for the United Nations system to offer a useful new set of complementary international models, particularly if the ECE/EBRD draft would focus on important aspects that the model legislative provisions that would form part of the UNCITRAL PPP texts being finalized at the current session did not deal with in detail, since they exceeded the Commission’s international trade law mandate (primarily the institutional and planning aspects, but also those relating to government support and monitoring). At the same time, the Commission also took note of the concerns of the Secretariat about the considerable risk of unnecessary duplication or even inconsistency between what would become the UNCITRAL texts on PPPs and the foreseen ECE-EBRD model law on PPPs, if no satisfactory coordination of their respective scopes was achieved.

20. The Commission proceeded to consider the draft PPP texts. Apart from the substantial changes made by the Commission reported in the paragraphs below, the Commission requested the Secretariat to carry out consequential terminological and technical adjustments to the remainder of the draft PPP texts, as required, with a view to issuing the consolidated revised version later in the year. In particular, the Commission noted that paragraph numbers, internal cross references and footnotes as they appeared in the draft PPP texts would need to be corrected to reflect the substantial changes made to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects.

**Introduction (A/CN.9/982/Add.1)**

21. The Commission approved the introductory chapter of the draft PPP texts, as set out in document [A/CN.9/982/Add.1](#).

**Chapter I. General legal and institutional framework (A/CN.9/982/Add.2)**

22. The Commission agreed to delete the phrase “on the other hand” in the first sentence of chapter I, paragraph 6, and to insert the following sentence after the second sentence in that paragraph: “Finally, public interest refers to communities that may be directly affected by the development or implementation of the project particularly in large infrastructure projects.”

23. With a view to better reflecting the revised, broader scope of the draft PPP texts, the Commission agreed to delete the word “infrastructure” in subparagraph (a) of draft model provision 2 (“Definitions”) and to rephrase it as follows:

“(a) ‘Public-private partnership (PPP)’ means an agreement between a contracting authority and a private entity for the implementation of a project, against payments by the contracting authority or the users of facility, including both those projects that entail a transfer of the demand risk to the private partner (‘concession PPP’) and those other types of PPPs that do not entail such risk transfer (‘non-concession PPPs’);”

24. Subject to the above amendments, the Commission approved draft chapter I and the accompanying draft model provisions 1 to 4, as set out in document [A/CN.9/982/Add.2](#).

**Chapter II. Project planning and preparation (A/CN.9/982/Add.2)**

25. The Commission agreed to insert the words “advisability and” before the word “feasibility” in the first sentence of draft chapter II, paragraph 5, and to delete the word “economic” before the words “social and environmental impact”, which was already mentioned in the first clause of the same sentence.

26. The view was expressed that the title of draft chapter II, section B.1, should be amended – possibly by reversing its sequence – to give more prominence to the notion of “value for money”, which in itself captured the notions “economy” and “efficiency”. It was also suggested that paragraphs 6 to 10 might benefit from additional wording for that purpose. The Commission agreed to modify the heading to read “Value for money (‘economy and efficiency’)” and to make consequential changes to paragraphs 6 to 14 of draft chapter II.

27. The view was expressed that the word “fiscal” had a narrow connotation – at least in some languages – and that it would be better to use instead the word “budgetary” in the title of section B.2. Another view was that the word “fiscal” was sufficiently broad, but that the content of the discussion in paragraphs 15 and 16 would be better reflected by using the words “affordability assessment” or “fiscal impact assessment” rather than “fiscal risk assessment” in the title of the subsection. The Commission noted that the word “fiscal” was used in the International Monetary Fund documents referenced in paragraph 16 of draft chapter II, and that this was the preferred term, for instance in its translated equivalent in some, albeit not all, official languages of the United Nations. The Commission therefore agreed to amend the title of the subsection to “Fiscal impact assessment”, but to retain, in the French version, the word “budgétaire” instead of “fiscal”.

28. The Commission agreed to insert the following sentence after the third sentence of paragraph 18: “An assessment should be made to predict and mitigate negative impacts and to enhance benefit for local communities and society.” The Commission also agreed to delete the words “[i]n general” at the beginning of the penultimate sentence in the same paragraph.

29. The Commission agreed to insert the following sentence after the first sentence of paragraph 19: “An environmental impact assessment should identify environmental

risks, integrate environmental concerns into project risk and planning, and promote sustainable development.” The Commission also agreed to request the Secretariat to insert an appropriate reference in paragraph 19 to the finding of the International Court of Justice, in the *Pulp Mills* case, that environmental impact assessments had gained so much acceptance among States that they might now be considered a requirement under general international law “where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”<sup>9</sup>

30. The view was expressed that the titles of the subheadings in section C.1 should reflect more clearly the distinction between risks assumed by the public sector, risks assumed by the private sector and risks that could be shared by the parties. In that connection, the concern was voiced that subheadings (c) (“Construction and operation risks”) and (d) (“Commercial risks”) might mislead the reader to erroneous assumptions as to which party was responsible for those risks under the PPP contract. There was some sympathy for those concerns, and to the suggestions to add a clarifying reference to “operational” risks in the subheading preceding paragraph 30 and to insert the words “related to demand” in the subheading preceding paragraph 33, but the Commission eventually agreed that the terminology in section C.1 was merely descriptive and did not suggest any particular pattern of risk allocation.

31. Subject to the above amendments, the Commission approved draft chapter II and the accompanying draft model provisions 5 to 7, as set out in document [A/CN.9/982/Add.2](#).

### **Chapter III. Contract award ([A/CN.9/982/Add.3](#))**

32. The Commission agreed to delete the word “infrastructure” in the second sentence of draft chapter III, paragraph 21, and in the second sentence of paragraph 55. The Commission agreed to request the Secretariat to delete the term “infrastructure” throughout the draft PPP guide whenever it appeared in statements or provisions that applied generally to all projects covered by the draft PPP texts, but to retain it instead when the draft PPP guide or the draft PPP model legislative provisions provided guidance on specific PPP projects related to infrastructure.

33. The view was expressed that it had been of utmost importance, since the very beginning of the selection phase, to make the potential bidders aware of the essential terms of the PPP contract. Therefore, it was suggested that the list of the so-called “essential terms” of the contract, under paragraph 76, be expanded by adding the following new elements: “(k) Whether the selected private partner is admitted to hire subcontractors and under which main conditions;” “(l) The indication of the main conditions under which the rights and obligations of the selected private partner might be assigned to third parties;” and “(m) The indication of the requirements for a shareholder to be deemed as essential for the successful maintenance and operation of the project as well as of the main conditions under which a controlling or ‘essential’ interest in the private partner may be transferred to third parties.” There was no support for those additions at the time, but the Commission agreed that it might revert to them once it had completed its consideration of draft chapter IV (see further paras. 49–51 below).

34. In relation to chapter III, section D (“Contract award through direct negotiation”), the view was expressed that paragraph 101 (b) might be inconsistent with the transparency objectives contained in the draft PPP guide, as it allowed direct award of PPP contracts for projects of short duration and with an anticipated initial investment value not exceeding a specified low amount. The Commission did not support the deletion of paragraph 101 (b) but agreed to add the following qualification: “In the interest of transparency, the contract authority should be

<sup>9</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 204.



encouraged to use a suitable competitive contract award procedure, as an alternative to the elaborate provisions set forth in the *Guide*.”

35. The Commission agreed to replace the words “only one source” with the words “only one private operator” in paragraph 101 (d).

36. Turning to the consideration of draft chapter III, section E (“Unsolicited proposals”), the Commission approved the insertion of a cross reference, at an appropriate place, to the documents approved by the World Bank in 2018 under the name “Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects”, to be included in a footnote to the title of the section.

37. The Commission agreed to insert the word “above” after the words “in subparagraphs (a), (b) and (c)”, in the second sentence of paragraph 136, to clarify the scope of the cross reference.

38. The Commission agreed to insert the words “for selection proceedings involving unsolicited proposals” before the words “to specify the extent” in the first sentence of paragraph 139, in order to better capture the context in which the recommendation was made.

39. The view was expressed that draft model provision 8, on the general rules to follow when selecting the private partner, needed to refer not only to the contract award procedure as such, but also to the miscellaneous matters referred to in draft model provisions 29 to 32. It was also suggested that the possibility of using direct negotiation or unsolicited proposals should be included in this provision, as an exception to the general rule. The Commission agreed to include in the first sentence, after the words “with model provisions 9–22”, the words “(or exceptionally model provisions 23–28) and model provisions 29–32.”

40. The view was expressed that the text of the draft model legislative provision 9, paragraph 3 (a), was too narrow in providing only for infrastructure facility requirements. With a view to better reflecting the revised, broader scope of the draft PPP texts, the Commission agreed to replace the sentence in draft model provision 9, paragraph 3 (a), with the following text: “A description of the infrastructure, facility or service systems, as appropriate;”.

41. The Commission agreed that in draft model provision 28, paragraph 4, the cross reference to draft model provision 19 should be replaced by a reference to draft model provision 24.

42. Subject to the above amendments, the Commission approved draft chapter III and the accompanying draft model provisions 8 to 32, as set out in document [A/CN.9/982/Add.3](#).

#### **Chapter IV. PPP implementation: legal framework and PPP contract** ([A/CN.9/982/Add.4/Rev.1](#))

43. The view was expressed that the conjunction “or” in the fourth sentence of draft chapter IV, paragraph 1, which related to non-concession PPPs, was misleading as it suggested a distinction between the construction and the operation of the project, although both could be suggested for the private partner in a PPP contract. The Commission agreed to modify the fourth sentence as follows: “In non-concession PPPs, the contract shall ensure that the infrastructure, facility or service is developed and operated in exchange for the payment by the contracting authority of the remuneration agreed.”

44. The view was expressed that the second sentence of chapter IV, paragraph 79, if misread, might lead to confusion on the allocation of construction risks agreed by the parties to the PPP contract. The Commission agreed in that respect to supplement the second sentence of paragraph 79, with words along the following lines: “the exercise of such monitoring right not entailing a transfer of construction risks agreed in the PPP contract from the private partner back to the contracting authority.”



45. The Commission agreed to proceed with several editorial changes aimed at improving the drafting of the draft PPP guide. In the first sentence of chapter IV, paragraph 82, it was decided to replace the word “in” by “of” before “the construction specifications”. In paragraph 82, it was decided to replace the words “change of orders” with “change orders”. In the last sentence of paragraph 87, it was agreed to replace the words “be provided” by the word “arise”.

46. The view was expressed that draft chapter IV, paragraph 91, should uphold the role of legislation in setting forth technical and service standards applicable to PPP contracts. The Commission therefore agreed to rephrase the opening of the third sentence along the following lines: “Legislation should generally set the principles that will guide the formulation of detailed standards ...”.

47. It was noted that the reference to “public contract” in the eighth sentence of chapter IV, paragraph 110, could create confusion as to the nature of the PPP contract. The Commission therefore agreed to replace “public contract” in that context with “PPP contract”.

48. The proposal was made to replace the word “fines”, which was said to have a narrow connotation in some languages, with the more broadly defined word “sanctions” in draft model provision 33, subparagraph (g). The Commission did not accept that proposal, noting that the term “fines”, which denoted a sanction of a pecuniary nature, was more adequate in the context of the financial set-off contemplated in draft model provision 33, subparagraph (g).

49. The Commission then turned to the consideration of draft model provision 42, recalling its earlier discussion regarding essential terms of the PPP contract that should be made available to the potential bidders with the request for proposals during the contract award procedure (see para. 33 above). The view was expressed that, as a matter of good practice, as many provisions of the draft contract as possible – ideally even its entire contents – should be included in the bidding documents. They included but were not limited to matters such as the conditions for a transfer of controlling interest in the private partner, limitations to the departure of key shareholders or the hiring of subcontractors.

50. The Commission considered the desirability of amending draft model provision 42 and reverted to the proposal to expand the list of the so-called “essential terms” of the contract contained in paragraph 76 of draft chapter III (“Contract award”). The view was expressed that there were situations in which the whole draft of the PPP contract might not be ready. Accordingly, disclosure of the entire PPP contract at that stage might not be in line with best practices. In addition, concerns were expressed as to the use of the word “essential”, owing to its highly subjective nature.

51. The Commission agreed on the importance of strengthening the recommendation for the contracting authority to circulate the draft PPP contract as early as possible during the contract award procedure. Accordingly, the Commission decided to delete the words “whenever possible” in the opening sentence of paragraph 76 of draft chapter III. Furthermore, it was agreed to delete the words “[e]ssential terms” at the beginning of the fourth sentence of paragraph 76, and to replace them with “[e]ssential elements”, so as to mirror the terms used in the third sentence of the paragraph. As regards the originally proposed additions to paragraph 76, the Commission agreed to insert the words “(k) [t]he indication of the main conditions under which the rights and obligations of the selected private partner might be assigned to third parties, any restriction to or conditions for the hiring of subcontractors, and any restrictions on the transfer of shares in the capital of the private partner to third parties.” In order to further clarify the indicative nature of the list in paragraph 76 of draft chapter III, the Commission also agreed to insert a final clause, as follows: “(l) [a]ny contract provisions required by the law of the country.”

52. With regard to draft model provision 45, the view was expressed that the term “shall” in the opening sentence would open the door too widely to renegotiation of the contract. In support of that view, it was observed that non-discriminatory changes

in the law impacting the project's costs should not lead to an automatic amendment of the contract. However, it was also reiterated that it was important for the contract to set forth mechanisms allowing for amendment of the contract. Examples were given of risks of changes in the legislation that were differently allocated depending on the construction or operation phase. The Commission eventually agreed to insert the words "whether and to what extent" to replace the words "the extent to which" before the phrase "the private partner is entitled to request the amendment of the PPP contract" in paragraph 1 of draft model provision 45.

53. Subject to the above amendments and the agreed amendments to be made to paragraph 60 (see para. 63 below), the Commission approved draft chapter IV and the accompanying draft model provisions 33 to 47, as set out in document [A/CN.9/982/Add.4/Rev.1](#).

#### **Chapter V. Duration, extension and termination of the PPP contract** ([A/CN.9/982/Add.5/Rev.1](#))

54. It was pointed out that, in practice, lenders might require additional time to exercise their right to appoint a substitute for a defaulting private partner in accordance with a direct agreement between them and the contracting authority. It was therefore suggested that the fourth sentence of draft chapter V, paragraph 20, should be amended to provide, on the one hand, that the period within which the lenders had to exercise that right was the time "between the notification to the lenders of the termination and its effective date", but that, on the other hand, the effective date of the termination could be extended if necessary. The Commission accepted those suggestions but requested the Secretariat to express them in two separate sentences when finalizing the draft PPP guide.

55. With respect to situations that justified termination of a PPP contract before the beginning of construction, it was suggested that a distinction should be made between reasons for cancelling the contract award before the conclusion of the contract and grounds for termination that arose after the contract had been concluded, but still at an early stage of the project. The first situation, which was covered in subparagraphs (a) and (b) of paragraph 21, was not strictly speaking an instance of termination, since the contract had not yet been concluded, unlike the second case, which was mentioned in subparagraph (c) of paragraph 21, where the private partner was in breach of a contract already in force. The Commission accepted those suggestions and agreed that the best way to make that distinction clearer was to remove the chapeau of paragraph 21, together with subparagraphs (a) and (b), and insert them at an appropriate place in subsection A.3 ("Conclusion of the PPP contract") of draft chapter IV ("PPP implementation: legal framework and PPP contract"), and to rephrase the remainder of paragraph 21 along the following lines:

"Examples of events that often justify the termination of the PPP contract before the beginning of construction include the following instances of breach by the private partner:

- (a) Failure to undertake the construction of the facility;
- (b) Failure to commence development of the project; or
- (c) Failure to submit the plans and designs required within a set period from the notification of the award of the contract."

56. The Commission noted that paragraph 30, dealing with termination for reasons of public interest, and paragraph 54, dealing with the financial arrangements upon such termination, were logically related, but not overlapping. Nevertheless, the relationship between them could be clarified.

57. The Commission requested the Secretariat to carefully verify all cross references within the document when finalizing the draft PPP guide.

58. Subject to the above amendments, the Commission approved draft chapter V and the accompanying draft model provisions 48 to 54, as set out in document [A/CN.9/982/Add.5/Rev.1](#).

#### **Chapter VI. Settlement of disputes (A/CN.9/982/Add.6/Rev.1)**

59. It was observed that, although draft chapter VI, paragraph 2 (c), indicated that disputes might arise between the private partner and third parties, such as people living in adjacent areas, indigenous groups affected by the project, or civil society representatives, sections C and D of draft chapter VI did not deal with the mechanisms for settling them. In response, it was pointed out that draft chapter VI of the draft PPP guide focused on the types of disputes more directly related to the implementation of PPP contracts and for which specific provisions were found in PPP legislation. The draft PPP guide assumed that countries had mechanisms for settling those other disputes. The Commission agreed that there was no need for an extensive discussion of the matter, but also agreed that it would be useful to mention expressly that the types of disputes mentioned in the third sentence of paragraph 2 (c) “are typically resolved in the domestic judicial system.”

60. The Commission did not accept a proposal to refer, at the end of draft model provision 55, to the “dispute settlement mechanisms agreed by the parties according to the type of investment (joint venture, partnership or other)”, but agreed to correct the reference to “PPP contract”. Also, the Commission did not accept a proposal to refer to “PPPs or other types of partnerships” in the footnote to the model provision, since the draft PPP guide only covered PPPs as defined in the draft introduction. Lastly, the Commission did not accept a proposal to mention, in the same footnote, that any legislative provisions on the matter were “subject to the applicable constitutional limitations”. The Commission noted, in respect of the latter proposal, that draft chapter I (“General legal and institutional framework”) already stressed the importance of constitutional law for PPP legislation.

61. In response to a query concerning the relationship between draft model provisions 56 and 57, the Commission noted that draft model provision 57 dealt with disputes among parties on an equal footing, who were therefore free to choose the final dispute settlement mechanism as they saw fit. Draft model provision 56, in turn, dealt with disputes between the private partner and weaker parties, who should benefit from simplified and efficient claims review mechanisms, without thereby waiving any rights to other dispute settlement, including judicial redress, that might be guaranteed to them under the laws of the country. For purposes of clarity, however, the Commission agreed to add the words “or other parties” to the title of draft model provision 56.

62. Subject to the above amendments, the Commission approved draft chapter VI and the accompanying draft model provisions 55 to 57, as set out in document [A/CN.9/982/Add.6/Rev.1](#).

#### **Chapter VII. Other relevant areas of law (A/CN.9/982/Add.7/Rev.1)**

63. During its consideration of draft chapter VII, paragraph 17, the Commission noted with satisfaction the reference to the most recent standards prepared by UNCITRAL on secured transactions. The view was expressed that a similar reference should also be made in paragraphs 60 and 61 of draft chapter IV (“PPP implementation: legal framework and PPP contract”), previously considered by the Commission (see paras. 43–53 above), which also dealt with security interests. The countervailing view was that the reference contained in draft chapter VII was sufficient, especially because the text of paragraph 60 had no direct link with the UNCITRAL Model Law on Secured Transactions.<sup>10</sup> Nonetheless, considering that the reference would be valuable for the reader of the draft PPP guide, the Commission eventually decided to replace the text in parentheses in the first sentence of

<sup>10</sup> United Nations publication, Sales No.: E.17.V.1.

paragraph 60 of draft chapter IV with the following text: “(for reference to laws on security interests, including standards prepared by UNCITRAL, such as the UNCITRAL Model Law on Secured Transactions, see Chapter VII, Other relevant areas of law)”.

64. In the same vein, it was proposed to add a reference to the UNCITRAL Model Law on Public Procurement<sup>11</sup> at an appropriate place in draft chapter VII, paragraphs 25 to 28, which dealt with rules relating to government contracts. Noting that draft chapter III (“Contract award”) already included extensive references to that Model Law, the Commission agreed that a short reference to domestic rules on public procurement, with a footnote with reference to that Model Law would be sufficient for the readers’ convenience.

65. It was agreed to insert in the sixth sentence of paragraph 58 the term “and fair labour conditions” after the term “fair wages” to reflect the best practices in that matter and ensure consistency with the sentence that followed.

66. In connection with the discussion on stakeholders’ engagement in PPPs, it was agreed to stress the importance of consultations by adding the following sentence after the first sentence of draft chapter VII, paragraph 59: “Such consultations can also serve to improve design by, for example, identifying better ways to facilitate access for the disabled, or improve affordability of service.”

67. The Commission considered at length the appropriate subheading preceding draft chapter VII, paragraphs 25 to 28, which currently read “Rules on government contracts and administrative law”. According to a strongly held view, that subheading was too narrow to capture both the variety of legal systems and the content of the subsection. Moreover, it was said that that subheading gave too much prominence to administrative law, which might not be desirable, considering the evolving roles of the private sector and public authorities in PPPs. It was suggested that an alternative title, such as “Government contracts” or “Contracts to which the government is a party” would be more adequate. Another alternative, which after extensive debate eventually gathered wide support within the Commission, was to use the phrase “Public contracts”, and to also amend the heading above paragraphs 29 and 30 to read simply “Private contracts”. At the closing of the debate, one delegation stated that it still maintained strong reservations against the proposed amendment, for which it saw neither a need nor sufficient support. Nevertheless, in the interest of compromise, that delegation declared that it would not object to the Commission’s decision. Taking note of that statement, the Commission approved the change in the subheading preceding paragraphs 25 to 28 to “Public contracts” and the change in the subheading preceding paragraphs 29 and 30 to “Private contracts”.

68. The view was expressed that draft chapter VII, paragraphs 47 to 49, could be expanded to reflect the growing importance of planning for mitigating environmental risks already in the preparation phase of PPPs, to avoid costly project delays and disputes. The Commission heard a proposal to replace the fifth and sixth sentences of paragraph 47 with the following text:

“The legislative provisions related to the management of environmental risks aim to control any negative impact of projects on environment and population, which are the most frequent causes of disputes and project delay. These provisions can set forth different obligations, such as carrying out social and environmental studies, leading to a commitment to implement risk mitigation measures or an action plan for the resettlement allowing for compensation and support measures for the displaced populations or population whose means of subsistence have suffered a negative impact from the project.”

69. There was support for adding the proposed language, but the Commission found that the sixth sentence of paragraph 47 still contained important elements that should be retained. The Commission requested the Secretariat, when incorporating the

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<sup>11</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I.*

proposed text, to review the wording to align it with the style and terminology used in the draft PPP guide and to avoid any repetition or redundancy in the paragraph.

70. Subject to the above amendments, the Commission approved draft chapter VII as set out in document [A/CN.9/982/Add.7/Rev.1](#).

### C. Adoption of the UNCITRAL Model Legislative Provisions on Public-Private Partnerships and of the UNCITRAL Legislative Guide on Public-Private Partnerships

71. At its 1093rd meeting, on 10 July 2019, after consideration of the draft PPP texts, the Commission adopted the following decision:

*“The United Nations Commission on International Trade Law,*

*“Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Assembly established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

*“Recalling* General Assembly resolution 58/4 of 31 October 2003, in which the Assembly adopted the United Nations Convention against Corruption,

*“Recalling* General Assembly resolution 70/1 of 25 September 2015, in which the Assembly adopted the 2030 Agenda for Sustainable Development, as well as General Assembly resolution 69/313 of 27 July 2015, in which the Assembly endorsed the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,

*“Convinced* that public-private partnerships can play an important role in improving the provision and sound management of infrastructure and public services, and in supporting government efforts to achieve the Sustainable Development Goals,

*“Concerned* that the inadequacy of the legal framework and the lack of transparency may discourage investment in infrastructure and public services and lead to a greater risk of corruption and mismanagement of public funds,

*“Emphasizing* the importance of providing efficient and transparent procedures for the awarding of contracts for public-private partnerships and of facilitating project implementation by rules that enhance transparency, fairness and long-term sustainability and remove undesirable restrictions on private sector participation in development and operation of infrastructure and public services,

*“Recalling* the valuable guidance the Commission has provided to Member States towards the establishment of a favourable legislative framework in that respect through the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects<sup>12</sup> and the accompanying Model Legislative Provisions,<sup>13</sup> and the recommendation by the General Assembly, in its resolution 58/76 of 9 December 2003, that States give due consideration to those texts when revising or adopting legislation related to private participation in the development and operation of public infrastructure,

*“Expressing its appreciation* to the Secretariat for its work on updating and consolidating the Model Legislative Provisions and the Legislative Guide through consultations with experts, organization of colloquiums and convening of the intergovernmental expert group in November 2018, as well as all international intergovernmental and non-governmental organizations active in the field of public-private partnerships for their contributions in that process,

<sup>12</sup> United Nations publication, Sales No. E.01.V.4.

<sup>13</sup> United Nations publication, Sales No. E.04.V.11.

“1. *Adopts* the UNCITRAL Model Legislative Provisions on Public-Private Partnerships as they appear in annex I to the report of the fifty-second session of the Commission<sup>14</sup> and the UNCITRAL Legislative Guide on Public-Private Partnerships, consisting of the text set forth in the notes by the Secretariat on the proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects,<sup>15</sup> as amended by the Commission at its fifty-second session;<sup>16</sup>

“2. *Requests* the Secretary-General to publish the Model Legislative Provisions on Public-Private Partnerships and the Legislative Guide on Public-Private Partnerships, including electronically, in the six official languages of the United Nations, and to disseminate them broadly to Governments and relevant international intergovernmental and non-governmental organizations, private sector entities and academic institutions;

“3. *Recommends* that all States give due consideration to the Model Legislative Provisions on Public-Private Partnerships and the Legislative Guide on Public-Private Partnerships when revising or adopting legislation relevant to public-private partnerships and invites States that have used the Model Legislative Provisions on Public-Private Partnerships to advise the Commission accordingly.”

## IV. Finalization and adoption of a practice guide to the UNCITRAL Model Law on Secured Transactions

### A. Introduction

72. The Commission recalled that, at its fiftieth session, in 2017, it had decided to task Working Group VI (Security Interests) with preparing a practice guide on secured transactions in order to provide guidance to potential users of the UNCITRAL Model Law on Secured Transactions with respect to contractual, transactional and regulatory issues, as well as the financing of micro-businesses.<sup>17</sup>

73. The Commission further recalled that, at its fifty-first session, in 2018, it had expressed satisfaction with the progress made by Working Group VI, also noting the Secretariat’s efforts to coordinate with the Basel Committee on Banking Supervision with respect to the regulatory aspects. At that session, the Commission had requested the Working Group to complete the work expeditiously, with a view to presenting a final draft to the Commission for consideration in 2019.<sup>18</sup>

74. Working Group VI prepared a draft practice guide during its thirty-second to thirty-fourth sessions.<sup>19</sup> At its thirty-second session, held in Vienna from 11 to 15 December 2017, it was generally observed that the purpose of the practice guide would be to provide practical guidance to users of secured transactions in States that have enacted, or were considering enacting, the Model Law. It was stressed that the main objectives would be to illustrate how the Model Law operated and how potential users could benefit from such operation, as well as to bridge the gap between law and business practice. At its thirty-third session, held in New York from 30 April to 4 May 2018, it was generally agreed that the practice guide should retain the structure consisting of an introductory chapter, a chapter on contractual and transactional issues, and a chapter dealing with regulatory aspects, and the Secretariat was requested to prepare a second draft with potential secured creditors in mind, while at the same time addressing points of practical importance to other readers.

<sup>14</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*.

<sup>15</sup> *A/CN.9/982/Add.1, A/CN.9/982/Add.2, A/CN.9/982/Add.3, A/CN.9/982/Add.4/Rev.1, A/CN.9/982/Add.5/Rev.1, A/CN.9/982/Add.6/Rev.1 and A/CN.9/982/Add.7/Rev.1*.

<sup>16</sup> *Ibid.*, paras. 17 to 70.

<sup>17</sup> *Ibid.*, paras. 227 and 449.

<sup>18</sup> *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 163 and 238 (e).

<sup>19</sup> For the reports of Working Group VI on those sessions, see documents *A/CN.9/932, A/CN.9/938 and A/CN.9/967*.

75. At its thirty-fourth session, held in Vienna from 17 to 21 December 2018, the Working Group considered the second draft of the practice guide and adopted chapter I, chapter II, parts A–D, and chapter III. Considering that the Working Group was not able to adopt parts E to J of chapter II, the Working Group agreed that the Secretariat should be given flexibility in preparing a revised version of those parts and in making any necessary consequential revisions to other parts that were adopted by the Working Group. Accordingly, the Secretariat, in consultation with relevant experts, prepared a revised version of the practice guide. In accordance with the usual practice of UNCITRAL, that version was circulated by the Secretariat for comment to States invited to sessions of the Working Group.

76. At its fifty-second session, the Commission had before it a draft practice guide to the UNCITRAL Model Law on Secured Transactions as contained in the draft practice guide (see [A/CN.9/993](#)) and a note by the Secretariat ([A/CN.9/994](#)), in which it informed the Commission that no comments had been received from States as at 26 June 2019.

77. The Commission was informed that, after the Secretariat had circulated document [A/CN.9/994](#), it had received comments from the Governments of Algeria and Belarus as well as a proposal from the Government of the United States for reorganizing the material in part A of chapter II of the draft practice guide (see paras. 82–84 below). The Commission was also informed that the Secretariat had further coordinated the contents of chapter III of the draft practice guide with the Basel Committee on Banking Supervision.

## **B. Consideration of the draft practice guide**

### **Chapter I. Introduction ([A/CN.9/993](#), paras. 1–24)**

78. With respect to chapter I, the Commission agreed as follows:

(a) The words “that have enacted” in the first sentence of paragraph 1 should be replaced with the words “that enact”;

(b) The first and second sentences of paragraph 2 should be revised to read: “This Guide is for readers who wish to understand transactions governed by, and in many cases made possible by, the Model Law. Chapter I provides a summary ...”;

(c) The word “arbitrators” should be added after the word “judges” in paragraph 3 but not the word “practitioners”;

(d) The phrase “which is why legislative reforms based on the Model Law are recommended” should be deleted from the last sentence of paragraph 4;

(e) The first sentence of paragraph 5 should be revised to read: “A ‘security right’ under the Model Law is a property right in a movable asset that secures an obligation owed by a person (the ‘debtor’) to another person (the ‘secured creditor’)”;

(f) In relation to paragraph 6, chapter II, part H, should address the point that where a security right secured a non-monetary obligation, the security right would not be realized until, or would be realized to the extent that, the obligation was reduced to a sum of money;

(g) The heading of chapter I, part B, section 4, should be revised to read: “A functional and unitary approach to secured transactions”;

(h) The words “or who owns the assets” at the end of the first sentence in paragraph 10 should be revised to read: “whether the assets are owned by the debtor or the secured creditor”;

(i) The second and third sentences of paragraph 10 should be revised to read along the following lines: “This means that the Model Law applies not only to transactions in which the grantor grants a security right in an asset that it already owns, but also to transactions that take the form of the creditor retaining title to an



asset, to secure performance of an obligation, for example, retention-of-title sales and financial leases. Those transactions are all regarded as creating a security right under the Model Law and they are, therefore, subject to the same treatment. This is a major distinction from traditional positions in many legal systems under which some or all of these transactions would not be subject to the same requirements.”;

(j) Paragraph 12 should be retained in chapter I, and chapter II, part A, section 12, should mention that the parties were free to restrict the automatic extension of a security right to identifiable proceeds in accordance with article 3 of the Model Law;

(k) The first sentence of paragraph 17 should be revised to read: “This Guide is an introduction to good practices for the use of movable assets as security for obligations and for transactions involving receivables. In particular, it focuses on how transactions involving such movable assets can be effectively constructed and administered.”;

(l) The second and third sentences of paragraph 17 should form a separate paragraph and would not need to mention that the Model Law does not include specific provisions on security rights in attachments to immovable property;

(m) The first sentence of paragraph 20 should be revised to read: “This Guide explains transactions governed by the Model Law in a general and non-legalistic way without going into every detail of the Model Law.”;

(n) The heading of section 5 should read: “The Model Law interacts with other laws”;

(o) The word “may” in the last sentence of paragraph 23 should be replaced with the words “will generally”;

(p) The second sentence of paragraph 24 should read: “The law of some States may reduce the scope of the encumbered assets if their value substantially exceeds the amount of the secured obligation ...”;

(q) The text in the box following paragraph 24 should form an additional part of chapter I, with the heading “Secured transactions involving microenterprises” and the second paragraph within that box should be formulated as an example similar to the examples in chapter II.

79. Subject to the above-mentioned changes, the Commission approved chapter I of the draft practice guide.

## **Chapter II. How to engage in secured transactions under the Model Law (A/CN.9/993, paras. 25–360)**

80. With respect to paragraph 25, the Commission agreed to replace the words “insolvency representatives” in the last sentence with the words “the grantor’s insolvency representative”.

### **Part A. How to take an effective security right (A/CN.9/993, paras. 27–93)**

81. With respect to part A, the Commission agreed as follows:

(a) In the examples, where applicable, the phrase “wants a loan” should be replaced with the phrase “wants to borrow money”;

(b) Paragraph 29 should be revised to read along the following lines: “A person with a limited right in an asset is also able to grant a security right in that limited right even though that person is not the owner of the asset. For example, if Company X was renting a printing press under a short-term lease agreement, ...”;

(c) An additional sentence should be added at the end of paragraph 29 to read along the following lines: “This limited right of Company X in the printing press limits the value of the security offered by Company X and care should be taken by Bank Y to assess that value before entering into a transaction under such circumstances.”;



(d) The first and second sentences of paragraph 30 should be retained in its current place and the contents of the third sentence should be placed in part B, section 3, on verifying whether the grantor could grant a security right;

(e) The last sentence of paragraph 32 should be retained;

(f) The words “might not be fully protected” in the third sentence of paragraph 36 should be replaced with the words “will not be protected”;

(g) The last sentence of paragraph 40 should be revised to read: “If Bank Y takes possession of the jewellery, the security agreement can be oral and does not need to be in writing (Model Law, art. 6, para. 4) and Bank Y does not need to register a notice in the Registry to make its security right effective against third parties (ML, art. 18 (2)).”;

(h) Paragraph 41 should be revised to read along the following lines: “Even though the security agreement does not need to be in writing when Bank Y takes possession of the jewellery, it will be prudent to put the security agreement in writing to avoid later disputes over its terms. Also, while Bank Y does not need to register a notice to make its security right effective against third parties when it takes possession of the jewellery, it may be prudent to register a notice. A written security agreement and a notice registered in the Registry will help Bank Y keep an effective security right in the jewellery, should it later lose or agree to give up possession of the jewellery. Whether or not to take possession of the jewellery is largely a business decision and not a legal one.”;

(i) The phrase “see also Section II.E.11 for assets that might require registration in an asset-specific registry” at the end of paragraph 46 should be deleted;

(j) Examples 5A to 5D should be reformulated to deal with the same asset (for example, where Company X wants to purchase drilling equipment) and to highlight that the parties can structure their transaction into different forms;

(k) A sentence should be added at the end of paragraph 48 to read: “The choice of form is based on business considerations and the type of the person providing the financing.”;

(l) The word “uses” in the second sentence of paragraph 49 and in the third sentence of paragraph 52 should be replaced respectively with the words “retains title to” and “relies on the ownership of”;

(m) The words “bank and other financial institutions” in paragraph 53 should be replaced with the words “third-party financiers”;

(n) The last sentence of paragraph 54 should be revised to read: “the priority between competing secured creditors is usually determined by ...”;

(o) The second sentence of paragraph 56 should read: “..., Bank Y may require each of them to guarantee payment of Company A’s obligation ...”;

(p) The words “as in negotiable instruments (see section II.A.8 and example 8)” in paragraph 58 should be deleted;

(q) The word “usually” should be deleted from the second sentence of paragraph 63;

(r) The first sentence in paragraph 64 should be revised to read: “The control agreement needs to provide that Bank Z can instruct Bank Y to transfer the funds directly to it if Company X defaults.”;

(s) The third sentence in paragraph 64 should be revised to read: “If Bank Y is unwilling to agree to terms that Bank Z considers important, Bank Z can condition its willingness to extend credit on Company X moving its bank account to Bank Z or to another bank that will agree with those terms.”;

(t) The second and third sentences of paragraph 70 should be revised to read: “Sometimes they borrow money from a financier with the receivables serving as

security for their obligations. Sometimes they transfer ownership of the receivables to a financier outright, often at a discount.”;

(u) The first and second sentences of paragraph 71 should be revised to read: “The Model Law applies not only to security rights in receivables that secure an obligation but also to outright transfers of receivables (Model Law, art. 1, para. 2). Under the Model Law, the transferor of a receivable is considered as a grantor, ...”;

(v) The last sentences of both paragraphs 70 and 71 should be deleted;

(w) The second sentence of paragraph 75 should be revised to read: “That is because there is no obligation that is secured.”;

(x) The third and fourth sentences of paragraph 75 should be deleted and an additional paragraph should follow paragraph 75 to read: “In a factoring transaction involving an outright transfer of receivables, all economic benefits and risks are transferred to the factor. If more is collected from the receivables than the factor paid for them, the factor retains that benefit. Similarly, if there are receivables that cannot be collected, the loss is borne by the factor, unless the parties have agreed otherwise (referred to as ‘recourse factoring’).”;

(y) In example 10, the words “of the unpaid purchase price” in the first paragraph should be replaced with the words “to secure the unpaid purchase price” and the words “the pool of the encumbered assets can also constantly fluctuate” in the third paragraph should be replaced with the words “the pool of encumbered assets constantly fluctuate”;

(z) The contents of paragraph 77 should be revised and placed in part B, section 3, on verifying whether the grantor could grant a security right;

(aa) The last sentence of paragraph 82 should be deleted;

(bb) The word “may” in the last sentence of paragraph 86 should be replaced with the word “will”;

(cc) An additional sentence should be included at the end of paragraph 87 to read: “Bank Y could register a notice after the expiry period, but the third-party effectiveness would lapse and only be re-established as of the date of that registration.”;

(dd) The phrase “for example” in the first sentence of paragraph 88 should be deleted;

(ee) The last sentence of paragraph 90 should be moved to the beginning of paragraph 92 without the word “however”.

82. Having considered a proposal to reorganize the material in part A of chapter II of the draft practice guide, the Commission agreed as follows.

83. First, it was agreed that the following text would be inserted as the first two introductory paragraphs of part A, along with examples 1A and 2:

“There are only two requirements that must be satisfied for a security right in movable property to be effective against the grantor:

- The asset to be encumbered must be one in which the grantor can grant a security right; and
- There must be a security agreement.

A security right that is effective against the grantor, however, has little practical value unless steps are taken to make the security right effective against third parties. There is no requirement that the secured creditor take possession of tangible assets to be encumbered either for effectiveness against the grantor or effectiveness against third parties. Thus, the decision as to which party retains possession of the encumbered assets (subject to the grantor’s default) is largely a business decision as illustrated by the following examples, each of which is

facilitated by the Model Law. The transaction contemplated by example \*\* will create what is commonly referred to as a non-possessory security right. The transaction contemplated by example \*\* will create what is commonly referred to as a possessory security right, or pledge.”

84. Second, it was agreed that the remainder of part A would be structured as follows (references to sections and paragraphs below refer to those in document [A/CN.9/993](#)), incorporating the changes already agreed by the Commission with regard to part A (see para. 81 above):

#### **A. How to take an effective security right**

##### **1. Can the grantor grant a security right in the asset? (paras. 28–30)**

##### **2. What are the requirements for a security agreement?**

- Transactions in which the secured creditor does not take possession of the encumbered asset (paras. 33–35)
- Transactions in which the secured creditor takes possession of the encumbered asset (parts of para. 41)

##### **3. What must the secured creditor do in order for its security right to be effective against third parties?**

- Non-possessory security rights (paras. 36–37)
- Possessory security rights (para. 34, last sentence of para. 40 and parts of para. 41)

##### **4. Whose obligation can be secured?**

- A security right may secure an obligation owed by a person other than the grantor (paras. 31–32)

##### **5. Can a security right be created over more than a single asset of the grantor?**

- Security over more than one asset of the grantor (example 1B, para. 38)
- Security over future assets (example 3, paras. 42–44)
- Security over all movable assets of the grantor (example 4, paras. 45–47)

##### **6. Common types of secured transaction**

In addition to those that have already been discussed in the above sections, the following are common types of secured transaction possible under the Model Law. (The current sections 5 to 11 of part A will form subsections of this section in the same order.)

##### **7. Proceeds, products, and commingling**

(The current sections 12 and 13 of part A will form subsections of this section in the same order.)

#### **Part B. A key preliminary step for secured financing: due diligence ([A/CN.9/993](#), paras. 94–128)**

85. With respect to part B, the Commission agreed as follows:

(a) The second sentence of paragraph 101 should be deleted;

(b) The third sentence of paragraph 103 should be revised to read along the following lines: “A secured creditor should also ask if the grantor had any other names in the past ...”;

(c) The terms “competing claimants” and “rights of the competing claimants” should be used in the draft practice guide instead of the term “competing claims”;

(d) The words “some assets” in paragraph 109 should be replaced with the words “representative sample of the assets”, the word “uncomfortably” in paragraph 114 with the word “disproportionately” and the words “quite high” in paragraph 115 with the word “uneconomic”;

(e) Paragraph 121 should further provide that as the deposit-taking bank was not obliged to disclose information on whether it had a security right in a bank account or on whether it had entered into a control agreement with another secured creditor, the secured creditor should ask the grantor to direct the deposit-taking bank to provide such information;

(f) The phrase “whether that other asset is subject to a security right” in paragraph 123 should be replaced with the phrase “whether that other asset was subject to a security right”;

(g) The third and fourth bullets of paragraph 126 should be combined to read along the following lines: “If there is a higher-ranking security creditor, the secured creditor can ask the grantor to pay the obligation secured by the higher-ranking security right or advance the funds to the grantor to do so. Payment of the obligation will usually extinguish the security right of the higher-ranking secured creditor (ML, art. 12; see part G bis). Once the security right is extinguished, the secured creditor can require the grantor to request the higher-ranking secured creditor to register a cancellation notice if it does not do so voluntarily (see part E, section 10).”;

(h) The words “unilaterally or” in the fifth bullet of paragraph 126 should be replaced with the word “, for example”;

(i) An additional sentence should be included in paragraph 127 to read along the following lines: “A secured creditor should also manage the risk that the higher-ranking secured creditor could advance further credit and retain its priority, which would reduce the residual value of the asset”;

(j) Paragraph 128 should be revised to read along the following lines: “An enacting State may require that the maximum amount ... In such a State, if the residual value of the asset is greater than the maximum amount set out in the notice, the secured creditor can be comfortable in extending credit on the basis of the value in excess of the maximum amount, as the priority of the higher-ranking secured creditor would be limited to the maximum amount.”

### **Part C. Searching the Registry (A/CN.9/993, paras. 129–151)**

86. With respect to part C, the Commission agreed as follows:

(a) The last sentence of paragraph 135 should be revised to read: “This also applies to a right to use a tangible asset ...”;

(b) The definition of “judgment creditor” as found in paragraph 287 should be included in paragraph 137 and the first two sentences of paragraph 137 should be revised to read: “A judgment creditor should search the Registry to determine which assets of the judgment debtor may be subject to a security right. While it may be possible for a judgment creditor to execute the judgment against the residual value of an encumbered asset, it would be easier to execute the judgment against an unencumbered asset (on the priority of a judgment creditor, see chapter II, part G, section 6, and example 26).”;

(c) The third sentence of paragraph 137 should be revised to read: “An insolvency representative should search the Registry to see whether there may be any security rights in the debtor’s assets.”;

(d) The second sentence of paragraph 139 should be revised to read: “A secured creditor will often also search using the name of the debtor (if the debtor is

not the grantor) and any guarantors as part of its overall assessment of the creditworthiness of the counterparties to the transaction.”;

(e) The second sentence of paragraph 140 should be revised and placed in a separate paragraph to read: “It may also wish to search the business or trade name of the grantor as part of its overall credit assessment.”;

(f) The words “may need to” in the last sentence of paragraph 140 should be replaced with the words “will need to”;

(g) The third sentence of paragraph 142 should be deleted;

(h) The first sentence of paragraph 144 should be revised to read: “The registration of an initial notice might not have been authorized by the grantor and the registration of an amendment or cancellation notice might not have been authorized by the secured creditor.”;

(i) The last two sentences of paragraph 146 and the last sentence of paragraph 150 should be deleted as they are dealt with in part E, section 8;

(j) The parenthetical in paragraph 150 should also include a reference to option B of article 26 of the Model Registry Provisions contained in the Model Law.

#### **Part D. Preparing the security agreement (A/CN.9/993, paras. 152–171)**

87. With respect to part D, the Commission agreed as follows:

(a) The first sentence of paragraph 160 should be revised to read: “If the encumbered assets are of a generic category”;

(b) The last sentence of paragraph 162 should be revised to read: “A secured creditor should bear in mind the amount it is owed, any unpaid interest and the potential enforcement cost when it sets the maximum amount.”;

(c) At the end of paragraph 164, the following phrase should be added “in determining the amount of credit it will be prepared to provide.”;

(d) The second sentence of paragraph 166 and the fifth sentence of paragraph 167 should be deleted;

(e) A sentence should be added at the beginning of paragraph 171 to read: “Business considerations and the type of financing which the creditor provides would determine whether the creditor would take a security right in the form of retention-of-title.”

#### **Part E. Registering a notice in the Registry (A/CN.9/993, paras. 172–251)**

88. With respect to part E, the Commission agreed as follows:

(a) The first sentence of paragraph 177 should read: “A secured creditor should be aware that advance registration may not be sufficient to protect its security right as against certain types of competing claimants who have acquired rights in the asset before the security agreement is entered into.”;

(b) The first sentence of paragraph 190 should be shortened to read: “The secured creditor should also enter the accurate address of the grantor.”;

(c) The first sentence of paragraph 196 should be revised to read: “If a generic category of assets is encumbered, ...”;

(d) Paragraph 200 should be deleted;

(e) The last sentence of paragraph 217 should read: “Depending on the option chosen by the enacting State, the secured creditor can either register a global amendment notice (Model Registry Provisions, art. 18, option A) or request the Registry to globally amend the information (Model Registry Provisions, art. 18, option B).”;

(f) The explanatory notes at the end of examples 15 and 19 should be deleted;

(g) The words “it submits” in paragraph 235 should be replaced with the words “when deciding to submit” and a sentence should be added after the second sentence to indicate what the secured creditor should do instead;

(h) The phrases “The results are the same as under option ...” in the right-hand column of the table following paragraph 243 should be qualified as being subject to the exceptions listed in the left-hand column.

**Part F. The need for continued monitoring (A/CN.9/993, paras. 252–266)**

89. With respect to part F, the Commission agreed as follows:

(a) The last sentence of paragraph 252 should be revised to read: “This will increase the likelihood that the secured creditor will ultimately recover all that it is owed, either directly from the grantor or by enforcing its security right in the encumbered asset.”;

(b) The fifth sentence of paragraph 260 should be revised to read: “In such circumstances, a secured creditor may need to register ...”;

(c) The word “frequently” at the end of paragraph 261 should be replaced with “on an ongoing basis”;

(d) A sentence should be added in paragraph 262 to read: “In order to do so, a secured creditor should ensure that the security agreement provides that the secured creditor can undertake appropriate monitoring and lists methods of such monitoring.”

**Part G. Determining the priority of a security right (A/CN.9/993, paras. 267–291)**

90. With respect to part G, the Commission agreed as follows:

(a) The words “or the fact that Bank Y registered a notice ... to obtain priority over Bank Z” in paragraph 271 should be deleted;

(b) The words “or rights in the asset” should be inserted after the words “acquire the asset” in the second sentence of paragraph 272;

(c) The words “a right in the asset” in the first sentence of paragraph 278 should be replaced with the words “the encumbered asset”;

(d) A new paragraph should be inserted after paragraph 278 to read along the following lines: “It is important to note that this is different from the position of many traditional legal systems where, for example, Vendor Z, which retains ownership, would have priority over the rights of competing claimants regardless of whether Vendor Z had registered its right. In essence, the Model Law achieves similar results based on the special priority rule for acquisition secured creditors but does generally condition priority on timely registration.”;

(e) The last two sentences in paragraph 279 should be merged, the words “after it delivers the computer to Company X” in the second sentence should be placed at the end of the paragraph, and the words “and the notice needs to be registered” in the third sentence should be deleted;

(f) Paragraph 282 should include a reference to article 24 of the Model Law and mention that a secured creditor would need to first determine the threshold amount in the enacting State and, while the secured creditor would not need to take any steps if the amount of financing provided was below the threshold, it would need to take certain steps if the amount was greater than the threshold amount to have priority over a competing non-acquisition secured creditor;

(g) In relation to paragraph 283, part B, section 2, should mention that a creditor should take into account the risks of a grantor’s insolvency as part of its creditworthiness assessment;

(h) Paragraph 283 should mention the possible consequences of insolvency avoidance actions and the last sentence of paragraph 283 should be revised to read: "... the insolvency representative may have priority over secured creditors in recovering the costs of the insolvency proceedings.";

(i) The fourth sentence of paragraph 285 should be revised to read: "The Guide to Enactment of the Model Law suggests that any such claims be listed ...";

(j) The words "and up to £10,000" should be inserted after the words "three months" in paragraph 286;

(k) In example 26, the words "and intends to enforce the judgment against an asset" should be deleted;

(l) The words "to acquire rights in the debtor's assets" should be added at the end of the first paragraph in example 26 and in paragraph 287;

(m) In paragraph 290, the words "to check whether a notice of security right has been registered in relation to any of the debtor's assets" should be added at the end of the first sentence, the second sentence should be deleted, and the third sentence should read: "Whether or not a notice was registered in the Registry, the judgment creditor should take steps required by the enacting State to acquire rights in the debtor's assets and notify ...";

(n) Paragraph 291 should be deleted.

#### **Part G bis. Extinguishment of a security right (A/CN.9/993, paras. 292–293)**

91. With respect to part G bis, the Commission agreed that it should form part H of the draft practice guide, with consequential numbering changes to the remaining parts of chapter II. The Commission further agreed as follows:

(a) The heading of the new part should be "Extinguishment of a security right by satisfaction of the secured obligation";

(b) The reference to "revolving loan" in example 27C should be replaced with the words "revolving line of credit" and the same reference in paragraph 292 should be replaced with the words "outstanding loan";

(c) The words "amendment or" and "to reflect the extinguishment" in paragraph 293 should be deleted.

#### **Part H. How to enforce a security right (A/CN.9/993, paras. 294–330)**

92. With respect to part H, the Commission agreed as follows:

(a) The words "subject to limitations imposed by other laws" should be inserted at the end of paragraph 294;

(b) Paragraph 295 should begin along the following lines: "In the event of default, the secured creditor is entitled to seek enforcement of its security right as described in this part. However, there are also a number of other things that a secured creditor can do ...";

(c) Paragraph 296 should be deleted;

(d) A new paragraph should be inserted in section 1 or 2 describing a situation where a security right secured a non-monetary obligation;

(e) The heading of section 2 should be "Basics of enforcement under the Model Law";

(f) The second sentence of paragraph 297 should read: "The Model Law provides for a number of methods to go about this.";

(g) The words "to the extent not in conflict with the provisions of the Model Law (Model Law, art. 72, para. 1)" should be inserted at the end of paragraph 297;

(h) The possible stay on enforcement imposed by insolvency law should be mentioned in the second sentence of paragraph 298;

(i) The second sentence of paragraph 299 should include cross-references to the conditions imposed by the Model Law;

(j) The third sentence of paragraph 301 should note that the secured creditor “may have” other options;

(k) The words “with respect to which the secured creditor has a control agreement providing that the deposit-taking institution agrees to follow instructions from the secured creditor regarding payment of funds,” should be inserted in the last sentence of paragraph 301;

(l) The words “firstly”, “secondly” and “thirdly” in paragraph 305 should be deleted;

(m) In paragraph 307, the words “use them” should be replaced with the words “realize their value” and a sentence should be added at the end of paragraph 307 to read: “When the encumbered asset is intangible, it would not be possible for the secured creditor to obtain possession of the asset, but the secured creditor may similarly want to sell the asset.”;

(n) The words “or the most suitable option” in paragraph 308 should be replaced with the words “or might not yield enough proceeds to pay what is owed to the secured creditor.”;

(o) Paragraph 309 should make clear that the sale by Bank Y would be subject to the condition set forth in article 78 of the Model Law;

(p) Reference to “disposing” of the encumbered assets in sections 4 and 5 should be to “selling” the encumbered asset;

(q) The last two bullet points in paragraph 311 should be combined to indicate that the first applied to private sales, whereas the second applied to public sales;

(r) Paragraph 313 should include a sentence indicating that a secured creditor may also license the encumbered asset and the heading should be changed accordingly;

(s) The second and third sentences of paragraph 314 should be deleted and a sentence should be added at the end of paragraph 314 to read: “Company X can also request Bank Y to make a proposal to acquire the vans (Model Law, art. 80, para. 6)”;

(t) The first sentence of paragraph 321 should be revised to read: “However, outright transfers of receivables are not subject to the same enforcement provision of the Model Law that otherwise apply to security rights (Model Law, art. 1, para. 2).”;

(u) The second sentence of paragraph 321 should be deleted and the fourth sentence should be revised to read: “This is because there is no secured obligation and the outright transferee is entitled to keep whatever it collects, ...”;

(v) Sections 4 and 5 should be merged to form a new section entitled “Methods of enforcement”, with four subsections, entitled as follows: “Sale of the encumbered asset”, “Leasing or licensing the encumbered asset”, “Acquisition of the encumbered asset in satisfaction of the secured obligation” and “Collection of payment from third parties”;

(w) The heading of section 6 should read: “Right of the grantor and affected persons to terminate enforcement”;

(x) The last sentence of example 30 should be revised to read: “Bank Z believes that its prospects of being paid are greater if Company X continues its business with the printing press and is therefore willing to advance additional credit to Company X so that it can repay the loan to Bank Y.”;



(y) The words “at any time before the enforcement process is completed” should be inserted at the end of paragraph 322;

(z) The heading of section 7 should read: “Higher-ranking secured creditor’s right to take over enforcement”;

(aa) The words “is not able” in the last sentence of example 31 should be replaced with the words “does not”;

(bb) The words “and protect its rights in these types of situations” in paragraph 326 should be deleted;

(cc) The heading of section 8 should read: “Distribution of proceeds of enforcement and rights of the buyer”;

(dd) Example 32 should further provide that loans to both Bank Y and Z were due;

(ee) An additional sentence should be added before paragraph 327 to indicate that the section deals only with sales directly by the secured creditor and not with judicial sales;

(ff) An additional sentence should be added at the end of paragraph 328 to read: “In this case, as Ms. X still owes ¥15,000, Bank Z can further request Ms. X to pay the outstanding amount as an unsecured creditor.”;

(gg) A sentence should be added at the end of paragraph 330 to read: “It may do so if it is sure that it can pay off the obligations of the higher-ranking secured creditor.”

#### **Part I. Transition to the Model Law (A/CN.9/993, paras. 331–344)**

93. With respect to part I, the Commission agreed as follows:

(a) The first two sentences of paragraph 331 should read: “The Model Law contains rules that determine its effect on transactions that were entered into before the Model Law came into force. A secured creditor involved in such transactions should understand the effect that the entry into force of the Model Law would have on its rights arising from those transactions.”;

(b) The words “situations where” should be inserted in the heading of section 3;

(c) The first sentence of paragraph 338 should read: “The third-party effectiveness requirements of the Model Law also apply to a secured creditor with a prior security right (Model Law, art. 102).”;

(d) The words “before the time period specified by the enacting State expires” should be added at the end of the first sentence of paragraph 339;

(e) The words “of the new law” should be inserted after the words “third-party effectiveness requirements” in the last paragraph of example 33.

#### **Part J. Issues arising from cross-border transactions (A/CN.9/993, paras. 345–360)**

94. With respect to part J, the Commission agreed as follows:

(a) In the first sentence of paragraph 345, it should be mentioned that the remaining parts of the practice guide addressed transactions in which all relevant elements, including the parties and the encumbered assets, were located in a single State;

(b) The words “court proceeding” in paragraph 347 should be replaced with the word “dispute”;

(c) The subsection entitled “Other things to bear in mind” should become a separate section with a new heading and be further elaborated to mention key

qualifications and exceptions to the general conflict-of-law rules, including those relating to the rights and obligations of third-party obligors;

(d) The heading of section 4 should read: “Effectiveness of choice of law and choice of forum clauses”;

(e) In paragraph 359, it should be emphasized more strongly that the parties are free to choose the law that applies to their mutual rights and obligations, further noting that, in the absence of a choice of law, the law governing the security agreement would apply;

(f) In paragraph 360, reference should be made to article 93 of the Model Law.

95. Subject to the above-mentioned changes (see paras. 80–94 above), the Commission approved chapter II of the draft practice guide.

### **Chapter III. The interaction between the Model Law and the prudential regulatory framework (A/CN.9/993, paras. 361–386)**

96. The Commission approved chapter III, without modification.

#### **Annexes (A/CN.9/993)**

97. With respect to the annexes of the draft practice guide, the Commission agreed to the following changes, including the revisions to their headings:

##### *Annex I*

In the first row of the table, the first bullet point should read “Provides uniform rules on the international assignment of receivables ...” and the second bullet point should read “Includes conflict-of-laws rules”;

##### *Annex II*

(a) The introductory paragraph should mention that the glossary describes the key terms in the practice guide in conformity with the definitions as provided in article 2 of the Model Law;

(b) The term “borrowing base” should be defined as “the value of the encumbered asset provided by the grantor on the basis of which the creditor is willing to loan” and reference to a specific percentage should be deleted;

(c) The term “debtor of the receivable” should be defined separately from the term “debtor” and the phrase “which is provided as security” in its description should be deleted;

(d) A material breach by the grantor of a provision in the security agreement should be included as another example of the term “default”;

(e) The final examples provided for the definitions of “encumbered asset” and “grantor” should be differentiated from the preceding examples;

(f) The first example of the definition of “proceeds” should read “whatever is received upon sale of an asset” and royalty payments under a licence should be included as another example;

(g) A security agreement for a simple transaction should be included as an example of the definition of “security agreement”;

(h) The word “secured” in the term “security right” should be deleted and a possessory pledge should be included as an additional example.

*Annex III*

The clause starting with “such as” in the last sentence of the introduction and the phrase “securities account or commodity account” in section 3 (b) of the Sample Diligence Questionnaire should be deleted.

*Annex IV*

(a) An introductory paragraph should be added making reference to paragraph 165, along with the following sentence: “As with all sample forms, the sample security agreements should be read in the light of other laws that might have an impact on the transaction, particularly as they may limit the effectiveness of some of the clauses therein.”;

(b) In sample security agreement A, the words “applicable law” should be replaced with the words “law under which it was constituted” and the words “agrees to grant” should be replaced with the words “hereby grants”.

*Annex V*

In the introductory paragraph, readers should be reminded that the use of the retention-of-title clauses creates a security right under the Model Law, and the following should be added at the end of that paragraph: “..., as opposed to being held by the grantor as inventory for sale or manufacturing”.

*Annex VI*

The words “before the conclusion of a security agreement” should be added at the end of the heading and the final sentence starting with the words “This authorization” should be deleted.

*Annex VII*

The heading should be revised to read “Sample template for request by the grantor to register an amendment or cancellation notice” and the words “unless, in the meantime, you register an order of a court maintaining the registration” in the final sentence should be deleted.

*Annex VIII*

The words “Beginning balance (from previous certificate)” should be deleted and the word “revolver” should be replaced with the word “credit”.

*Annex IX*

(a) The heading should be revised to read “Sample template for a secured creditor’s notice of intention to sell the encumbered asset” and the introductory paragraph should reflect the revised heading and note that the notice should be given in accordance the article 78 of the Model Law;

(b) The sample template should be revised to accommodate both private and public sales.

*Annex X*

The heading should be revised to read “Sample template for the secured creditor proposing the acquisition of the encumbered asset”.

*Annex XI*

The final sentence, beginning with the words “you will”, should be deleted.

98. Subject to the above changes, the Commission approved the annexes to the draft practice guide.

### Concluding remarks

99. Following consideration of agenda item 5 (a), it was stated that the preparation of the draft practice guide could have benefited greatly from an additional session of Working Group VI devoted to the project. It was further suggested that, in the future, sufficient time should be allocated to working groups to complete their work, so that the text to be considered by the Commission could be fully prepared and readily presented for adoption.

100. The Commission agreed that the Secretariat should be given the mandate to make the changes to the draft practice guide as approved by the Commission at its current session, as well as any consequential editorial changes, as necessary. The Commission also requested the Secretariat to review the entire draft practice guide to ensure consistency. Lastly, the Commission further requested the Secretariat to make the final practice guide available to the greatest extent possible in accessible and reader-friendly formats.

## C. Adoption of the UNCITRAL Practice Guide to the UNCITRAL Model Law on Secured Transactions

101. At its 1098th meeting, on 12 July 2019, the Commission adopted the following decision:

*“The United Nations Commission on International Trade Law,*

*“Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Assembly established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

*“Recalling also* General Assembly resolutions 56/81 of 12 December 2001, 63/121 of 11 December 2008, 65/23 of 6 December 2010 and 68/108 of 16 December 2013, in which the Assembly recommended that States consider or continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)<sup>20</sup> and give favourable consideration to the UNCITRAL Legislative Guide on Secured Transactions (2007),<sup>21</sup> the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010)<sup>22</sup> and the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013),<sup>23</sup> respectively,

*“Recalling further* General Assembly resolution 71/136 of 13 December 2016, in which the Assembly recommended that States give favourable consideration to the UNCITRAL Model Law on Secured Transactions (2016)<sup>24</sup> and that, at its fiftieth session, in 2017, the Commission adopted the UNCITRAL Model Law on Secured Transactions: Guide to Enactment (2017)<sup>25</sup> for the benefit of States when revising or adopting legislation relevant to secured transactions,

*“Recognizing* that an efficient secured transactions regime with a publicly accessible security rights registry of the kind provided for in the Model Law is likely to increase access to affordable secured credit and thus promote economic

<sup>20</sup> General Assembly resolution 56/81, annex.

<sup>21</sup> United Nations publication, Sales No. E.09.V.12.

<sup>22</sup> United Nations publication, Sales No. E.11.V.6.

<sup>23</sup> United Nations publication, Sales No. E.14.V.6.

<sup>24</sup> United Nations publication, Sales No. E.17.V.1.

<sup>25</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 216.

growth, sustainable development, the rule of law and financial inclusion, as well as assist in combating poverty,

“*Noting* that, at its fiftieth session, in 2017, the Commission decided that Working Group VI (Security Interests) should prepare a draft practice guide to the Model Law on Secured Transactions,<sup>26</sup> and that, at its fifty-first session, in 2018, the Commission requested the Working Group to complete the work expeditiously, with a view to presenting a final draft to the Commission for consideration at its fifty-second session, in 2019,<sup>27</sup>

“*Noting also* that Working Group VI devoted three sessions, in 2017 and 2018, to the preparation of the draft practice guide,<sup>28</sup> and that, at its thirty-fourth session, in 2018, the Working Group adopted parts of the draft practice guide and agreed that the Secretariat would be tasked with and should be given flexibility in preparing the final draft,<sup>29</sup>

“*Noting with satisfaction* that the draft practice guide provides guidance to parties involved in secured transactions as well as other relevant parties in States that have enacted the Model Law on Secured Transactions, by describing the types of secured transactions that creditors and other businesses can undertake under the Model Law and providing step-by-step explanations on how to engage in the most common and commercially important transactions,

“*Expressing* its appreciation to international intergovernmental and non-governmental organizations active in the reform of secured transactions law for their participation in and support for the development of the Model Law on Secured Transactions, the Guide to Enactment and the draft practice guide,

“*Expressing also* its appreciation to experts and practitioners in the area of secured transactions who have contributed their expertise to the Secretariat in preparing and revising the draft practice guide,

“*Having* considered the draft practice guide at its fifty-second session, in 2019,

“1. *Adopts* the Practice Guide to the UNCITRAL Model Law on Secured Transactions, consisting of the text contained in document [A/CN.9/993](#), with amendments adopted by the Commission at its fifty-second session,<sup>30</sup> and authorizes the Secretariat to make the necessary consequential revisions;

“2. *Requests* the Secretary-General to publish the Practice Guide, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

“3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to secured transactions, taking also into account the information in the Guide to Enactment, and invites States that have used the Model Law to advise the Commission accordingly;

“4. *Also recommends* that the Practice Guide be made broadly available and that States consider undertaking capacity-building efforts based on the Practice Guide to assist parties in transactions enabled and facilitated by the Model Law.”

<sup>26</sup> *Ibid.*, paras. 227 and 449.

<sup>27</sup> *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 163.

<sup>28</sup> For the reports of those sessions of the Working Group, see [A/CN.9/932](#), [A/CN.9/938](#) and [A/CN.9/967](#).

<sup>29</sup> [A/CN.9/967](#), paras. 11 and 79.

<sup>30</sup> *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 78–98.

## V. Correction of an error in article 64, paragraph 2, of the UNCITRAL Model Law on Secured Transactions

102. The Commission considered the suggestion to correct an error in article 64, paragraph 2, of the UNCITRAL Model Law on Secured Transactions, which had come to the attention of the Secretariat while it was preparing a revised draft of the practice guide to the UNCITRAL Model Law on Secured Transactions (see chapter IV above).

103. After considering the relationship of article 64, paragraph 2, with article 13 of the same Model Law and on the basis of the legislative history of article 64, paragraph 2, the Commission decided to replace, in article 64, paragraph 2, the word “grantor” with the words “secured creditor”, to ensure consistency within the Model Law and between the Model Law and other UNCITRAL texts on secured transactions. The Commission, therefore, confirmed that article 64, paragraph 2, should read as follows:

“Notwithstanding paragraph 1, the debtor of the receivable may not raise a breach of an agreement referred to in article 13, paragraph 2, as a defence or right of set-off against the secured creditor.”

## VI. Finalization and adoption of texts in the area of insolvency law

### A. Finalization and adoption of a model law on enterprise group insolvency and its guide to enactment

#### 1. Introduction

104. The Commission recalled that, at its forty-seventh session, in 2014, it had expressed support for Working Group V (Insolvency Law) continuing its work on the insolvency of enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (1997)<sup>31</sup> and part three of the UNCITRAL Legislative Guide on Insolvency Law (2010),<sup>32</sup> which deals with the treatment of enterprise groups in insolvency and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).<sup>33, 34</sup>

105. The Commission noted that Working Group V had discussed the topic at its forty-fifth to fifty-fifth sessions.<sup>35</sup> The Commission also noted that the Working Group, at its fifty-fourth session, held in Vienna from 10 to 14 December 2018, had approved the text of the draft model law on enterprise group insolvency annexed to the report on that session (A/CN.9/966) and had requested the Secretariat to transmit it to the Commission for finalization and adoption at its fifty-second session, in 2019 (A/CN.9/966, para. 110). The Commission was informed that, pursuant to the request of the Working Group (A/CN.9/966, para. 110) and in accordance with the usual practice of UNCITRAL, the draft model law had been circulated by the Secretariat for comment to States and international organizations invited to sessions of the Working Group.

106. The Commission was informed that the Working Group, at its fifty-fifth session, held in New York from 28 to 31 May 2019, had introduced some editorial changes in the draft model law (A/CN.9/972, annex) and finalized the draft guide to enactment.

<sup>31</sup> General Assembly resolution 52/158, annex.

<sup>32</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 233.

<sup>33</sup> United Nations publication, Sales No. E.10.V.6.

<sup>34</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 155.

<sup>35</sup> For the reports of Working Group V on those sessions, see A/CN.9/803, A/CN.9/829, A/CN.9/835, A/CN.9/864, A/CN.9/870, A/CN.9/898, A/CN.9/903, A/CN.9/931, A/CN.9/937, A/CN.9/966 and A/CN.9/972.

The Commission was also informed that the Working Group had requested the Secretariat to transmit the draft guide to enactment as contained in document [A/CN.9/WG.V/WP.165](#) together with the amendments thereto listed in paragraphs 13 and 14 (c) of the report on that session to the Commission for finalization and adoption together with the draft model law ([A/CN.9/972](#), para. 10).

107. At its fifty-second session, the Commission had before it: (a) a draft model law on enterprise group insolvency ([A/CN.9/972](#), annex); (b) comments by States and international organizations on the draft model law on enterprise group insolvency as contained in the annex to the report of the fifty-fourth session of Working Group V (Insolvency Law) ([A/CN.9/989](#) and [A/CN.9/989/Add.1](#)); and (c) a draft guide to enactment of the model law on enterprise group insolvency ([A/CN.9/WG.V/WP.165](#)) with amendments introduced by the Working Group at its fifty-fifth session ([A/CN.9/972](#), paras. 13 and 14 (c)).

## 2. Consideration of the draft model law on enterprise group insolvency

108. The Commission approved the draft model law on enterprise group insolvency without modification.

## 3. Consideration of the draft guide to enactment

109. The Commission approved the draft guide to enactment without modification.

## 4. Adoption of the UNCITRAL Model Law on Enterprise Group Insolvency and its Guide to Enactment

110. At its 1099th meeting, on 15 July 2019, after consideration of the text of the draft model law on enterprise group insolvency and the draft guide to enactment, the Commission adopted the following decision:

*“The United Nations Commission on International Trade Law,*

*“Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Assembly established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

*“Recognizing* that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as of fostering entrepreneurial activity and preserving employment,

*“Noting* the significance of enterprise groups, whether formed domestically or internationally, to international trade and commerce in an increasingly globalized world economy,

*“Recognizing* that, where the business of an enterprise group fails, it is important not only to know how the enterprise group will be treated in insolvency proceedings, but also to ensure that such treatment facilitates, rather than hinders, the fast and efficient conduct of the insolvency proceedings,

*“Being aware* that very few States, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency, including effective mechanisms for coordination and cooperation in cases of insolvency involving enterprise groups, the development of a group insolvency solution and cross-border recognition and implementation of that solution in multiple States,

*“Recalling* the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (1997)<sup>36</sup> which deals with cross-border coordination, cooperation and recognition in relation to insolvency proceedings concerning a single debtor,

<sup>36</sup> *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, para. 221.



and part three of the UNCITRAL Legislative Guide on Insolvency Law (2010)<sup>37</sup> which deals with the treatment of enterprise groups in insolvency,

“*Recalling also* the mandate given to Working Group V (Insolvency Law) to continue work on insolvency of enterprise groups with the aim of developing a set of model legislative provisions or a model law focusing on insolvency proceedings relating to multiple debtors that are members of the same enterprise group,<sup>38</sup> thereby extending the provisions of the Model Law on Cross-Border Insolvency and part three of the Legislative Guide on Insolvency Law,

“*Expressing its appreciation* to Working Group V for the preparation of a draft model law on enterprise group insolvency and its draft guide to enactment, which provide for the fair and efficient administration of enterprise group insolvencies, the protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole, the facilitation of rescue of financially troubled enterprise groups and the adequate protection of creditors and other interested persons, including debtors,

“*Appreciating* the participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in that work,

“*Drawing attention* to the fact that the text of the draft model law approved by Working Group V at its fifty-fourth session (A/CN.9/966, annex) was circulated for comments before the fifty-second session of the Commission to all States and to organizations invited to attend the sessions of Working Group V as observers, and the comments received were taken into account by the Commission in finalizing the draft model law,

“*Convinced* that a model law on enterprise group insolvency adopted on the basis of the draft model law prepared by the Working Group (A/CN.9/972, annex) will be generally acceptable to States and will contribute to the establishment of fair and internationally harmonized legislation on enterprise group insolvency that respects national procedural and judicial systems,

“1. *Adopts* the UNCITRAL Model Law on Enterprise Group Insolvency as contained in annex II to the report of the fifty-second session of the Commission,<sup>39</sup> and its Guide to Enactment, contained in document A/CN.9/WG.V/WP.165, as amended by Working Group V (Insolvency law) at its fifty-fifth session (A/CN.9/972, paras. 13 and 14 (c));

“2. *Requests* the Secretary-General to publish, including electronically, the Model Law and its Guide to Enactment in the six official languages of the United Nations and to disseminate them broadly to Governments and other interested bodies;

“3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to insolvency and invites States that have used the Model Law to advise the Commission accordingly;

“4. *Also recommends* that all States, when revising or adopting legislation on enterprise group insolvency, also make use of part three of the UNCITRAL Legislative Guide on Insolvency Law (2010),<sup>37</sup> which deals with the treatment of enterprise groups in insolvency, and part four of the UNCITRAL Legislative Guide on Insolvency Law (2013),<sup>40</sup> which deals with directors’ obligations in the period approaching insolvency, and whose

<sup>37</sup> Ibid., *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 233.

<sup>38</sup> Ibid., *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 155.

<sup>39</sup> Ibid., *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, annex II.

<sup>40</sup> Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 204.



additional section, adopted at the fifty-second session of the Commission,<sup>41</sup> addresses obligations of directors of enterprise group companies;

“5. *Further recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency (1997)<sup>42</sup> and of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018);<sup>43</sup>

“6. *Requests* the Secretariat to ensure close cooperation and coordination with international organizations active in the field of insolvency law reform to ensure consistency and alignment of that work with all UNCITRAL texts in the area of insolvency law, including the Model Law on Enterprise Group Insolvency (2019), the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) and part four of the Legislative Guide on Insolvency Law (2013) as amended by the Commission at its fifty-second session.”

## **B. Finalization and adoption of a text on the obligations of directors of enterprise group companies in the period approaching insolvency**

### **1. Introduction**

111. The Commission recalled that, having completed part four of the Legislative Guide on Insolvency Law,<sup>44</sup> which deals with obligations of directors in the period approaching insolvency, Working Group V, at its forty-fourth session, held in Vienna from 16 to 20 December 2013, agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and the identification of additional issues (e.g., conflicts between a director’s duty to his or her own company and the interests of the group) would be helpful (A/CN.9/798, para. 23). The Commission also recalled that the Working Group had discussed the topic at its forty-sixth, forty-seventh, forty-ninth, fifty-second and fifty-fourth sessions<sup>45</sup> in parallel with work on a legislative text on enterprise group insolvency.

112. The Commission further recalled that, at its forty-eighth to fiftieth sessions, it had noted that, while the work on the topic had already been well developed, it would not be referred to the Commission for finalization and approval until the work on enterprise group insolvency was sufficiently advanced in order to ensure consistency of approach between the related texts.<sup>46</sup> The Commission recalled that, at its fifty-first session, it had noted that a draft commentary and recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency had been prepared and it was likely that the text could be finalized and adopted at the same time as a draft model law and guide to enactment on enterprise group insolvency.<sup>47</sup>

113. The Commission noted that the Working Group, at its fifty-fourth session, had approved a text addressing the obligations of directors of enterprise group companies in the period approaching insolvency contained in document A/CN.9/WG.V/WP.153 as amended at the session. The Commission was informed that the Working Group

<sup>41</sup> Ibid., *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 116.

<sup>42</sup> General Assembly resolution 52/158, annex.

<sup>43</sup> General Assembly resolution 73/200 and *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, annex III.

<sup>44</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 204.

<sup>45</sup> For the reports of Working Group V on those sessions, see A/CN.9/829, A/CN.9/835, A/CN.9/870, A/CN.9/931 and A/CN.9/966.

<sup>46</sup> *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 235; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 243; and *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 269.

<sup>47</sup> Ibid., *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 132.

had requested the Secretariat to transmit the text to the Commission for finalization and adoption at its fifty-second session, in 2019 (A/CN.9/966, para. 113).

114. At its fifty-second session, the Commission had before it a note by the Secretariat (A/CN.9/990) transmitting the text addressing the obligations of directors of enterprise group companies in the period approaching insolvency, as approved by the Working Group at its fifty-fourth session for finalization and adoption by the Commission at its fifty-second session.

## **2. Consideration of the draft text on the obligations of directors of enterprise group companies in the period approaching insolvency**

115. The Commission approved the draft text on the obligations of directors of enterprise group companies in the period approaching insolvency without modification.

## **3. Adoption of an additional section of part four of the UNCITRAL Legislative Guide on Insolvency Law addressing the obligations of directors of enterprise group companies in the period approaching insolvency**

116. At its 1099th meeting, on 15 July 2019, the Commission adopted the following decision:

*“The United Nations Commission on International Trade Law,*

*“Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Assembly established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,*

*“Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as of fostering entrepreneurial activity and preserving employment,*

*“Considering that effective insolvency regimes should provide a predictable legal process for addressing the financial difficulties of troubled enterprises and the necessary framework for their efficient reorganization or orderly liquidation, and should also permit an examination of the circumstances giving rise to insolvency, in particular the conduct of directors of such enterprises in the period approaching insolvency,*

*“Recalling the adoption of part four of the UNCITRAL Legislative Guide on Insolvency Law (2013),<sup>48</sup> which deals with obligations of directors of an individual company in the period approaching insolvency,*

*“Noting the significance of enterprise groups, whether formed domestically or internationally, to international trade and commerce in an increasingly globalized world economy,*

*“Recalling the adoption of part three of the Legislative Guide on Insolvency Law (2010),<sup>49</sup> which deals with the treatment of enterprise groups in insolvency, and the UNCITRAL Model Law on Enterprise Group Insolvency (2019),<sup>50</sup>*

*“Recalling also that the work on the obligations of directors of enterprise group companies in the period approaching insolvency proceeded in Working Group V (Insolvency Law) in parallel with work on a draft model law on enterprise group insolvency, recognizing that neither part three nor part four of the Legislative Guide on Insolvency Law addressed the situation in which a*

<sup>48</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), para. 204.*

<sup>49</sup> *Ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 233.*

<sup>50</sup> *Ibid., Seventy-fourth Session, Supplement No. 17 (A/74/17), para. 110 and annex II.*

director is appointed to, or holds a managerial or executive position in, more than one enterprise group member and a conflict arises in discharging the obligations owed to the different members,

“*Expressing its appreciation* to Working Group V for its work in preparing an additional section of part four of the Legislative Guide on Insolvency Law that addresses the obligations of directors of enterprise group companies in the period approaching insolvency, with a focus on discharging the obligations of a director owed to the different enterprise group members,

“*Appreciating* the participation in that work of international intergovernmental and non-governmental organizations active in the field of insolvency law reform,

“*Convinced* that a legal framework that addresses a conflict of obligations in relation to the creditors and other stakeholders of different enterprise group members, with due regard to other considerations, in particular business recovery, should be part of an effective insolvency regime,

“1. *Adopts* an additional section of part four of the United Nations Commission on International Trade Law Legislative Guide on Insolvency Law addressing the obligations of directors of enterprise group companies in the period approaching insolvency, as contained in document [A/CN.9/990](#);

“2. *Requests* the Secretary-General to publish, including electronically, in the six official languages of the United Nations, part four of the Legislative Guide on Insolvency Law, incorporating an additional section on the obligations of directors of enterprise group companies in the period approaching insolvency, and to disseminate it broadly to Governments and other interested bodies;

“3. *Recommends* that all States utilize the Legislative Guide on Insolvency Law to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the Legislative Guide when revising or adopting legislation relevant to insolvency, and invites States that have used the Legislative Guide to advise the Commission accordingly.”

## **VII. Consideration of the draft UNCITRAL mediation rules and the draft UNCITRAL notes on mediation**

### **A. General remarks and decision by the Commission**

117. The Commission recalled that, at its fifty-first session, it had heard the proposal that the Secretariat could undertake work on (a) updating the UNCITRAL Conciliation Rules (1980)<sup>51</sup> to both reflect current practice and ensure consistency with the contents of the instruments finalized by the Commission at that session, and (b) preparing notes on organizing mediation proceedings.<sup>52</sup> At that session, the Commission had finalized the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation)<sup>53</sup> and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.<sup>54</sup> After discussion, the Commission had decided that the Secretariat would prepare notes on organizing mediation

<sup>51</sup> *Ibid.*, *Thirty-fifth Session, Supplement No. 17 (A/35/17)*, chap. V, sect. A, para. 106. See also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI, 1980, part three, annex II ([United Nations publication, Sales No. E.81.V.8](#)).

<sup>52</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 246.

<sup>53</sup> *Ibid.*, para. 49 and annex I.

<sup>54</sup> *Ibid.*, para. 68 and annex II.

proceedings and update the UNCITRAL Conciliation Rules in the light of the mediation framework.<sup>55</sup>

118. At its current session, the Commission had before it the draft UNCITRAL mediation rules (A/CN.9/986, the “draft rules”) and the draft UNCITRAL notes on mediation (A/CN.9/987, the “draft notes”) (referred to jointly as the “draft mediation texts”) prepared by the Secretariat in broad consultation with experts. The Commission was informed that the draft mediation texts were prepared to ensure consistency with the legal framework on mediation, further reflecting current mediation practice.

119. Delegations expressed satisfaction with the draft mediation texts, noting that they provided a good basis for the discussion. It was also mentioned that the draft mediation texts would provide useful guidance to parties wishing to engage in mediation.

120. While there was some support for the Commission to proceed with the finalization of the draft mediation texts, concerns were also expressed. One was that there had been insufficient time for States to consult with experts and local stakeholders to prepare comments on the draft mediation texts and that it would be preferable to postpone their adoption until the next session of the Commission. It was stated that the draft rules, being a normative text, needed careful consideration by the Commission to ensure that substantive inputs by States would be adequately addressed.

121. While a suggestion was made that the draft mediation texts would benefit from deliberations at the working group level, it was recalled that the Commission, in 2018, had decided not to assign the task of preparing the mediation texts to a working group. It was generally felt that the preparation of the draft mediation texts would not need to involve a working group and could continue to be carried out by the Secretariat as long as there was sufficient time for States to comment on those texts.

122. It was noted that the finalization and adoption of the draft mediation texts should be considered in the broader context of providing a comprehensive framework on mediation, in particular in the light of the fact that the Singapore Convention on Mediation would be opened for signature on 7 August 2019. It was further mentioned that such a comprehensive framework would also be useful for the Secretariat in conducting relevant technical assistance activities. It was pointed out that, regardless of the decision by the Commission on the draft mediation texts, the Secretariat should have a broad mandate to provide guidance material for States and parties in relation to the implementation of the Singapore Convention on Mediation and the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.

123. Acknowledging that the Commission would not be in a position to adopt the draft mediation texts at its current session, it was agreed that the Commission would consider both texts at its next session, in 2020. In order to ensure that comments from States and other interested organizations would be further reflected in the drafts to be presented to the Commission at its next session, States and other interested organizations were invited to submit comments on the current draft mediation texts by 15 September 2019. The Secretariat was requested to prepare revised drafts based on the comments received, possibly with the assistance of experts, and to circulate them for an additional round of comments by mid-January 2020. It was suggested that comments on the revised drafts should be received by the Secretariat by 15 April 2020 so as to ensure that they could be made available in time for consideration by the Commission. Furthermore, it was agreed that the Secretariat should be given flexibility in allocating adequate time at the next session of the Commission for the finalization and adoption of both texts. It was also suggested that the documents to be presented to the Commission should be in a format that would make it easy for the

<sup>55</sup> Ibid., para. 254.

readers to understand the background of the text, possibly by placing the annotations closer to the relevant provisions.

124. In the light of the above, the Commission heard preliminary suggestions on the draft rules.

## **B. Consideration of the draft UNCITRAL mediation rules**

125. The Commission noted that the draft UNCITRAL mediation rules had been prepared with a view to aligning the UNCITRAL Conciliation Rules with the mediation framework referred to in paragraph 117 above and to take into account recent practices in the field, including the development of court-ordered mediation and mediation based on mandatory statutory provisions.

126. The Commission noted that the draft mediation rules emphasized the fact that mediation was an interest-based process, and therefore terms that were normally used in connection with adversarial proceedings were intentionally avoided (for instance, the word “proceedings”). The Commission also noted that the draft mediation rules were a contractual text for application by parties to a dispute and thus different from the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, which was a model for use by States in enacting legislation on mediation. It further noted that the structure of the UNCITRAL Conciliation Rules had been adjusted for the sake of simplicity.

127. While suggestions were made that the word “international” should appear in the title of the draft mediation rules and that an additional provision on key definitions (for example, “parties”) was required, they did not receive support. It was generally stated that the flexible nature of the draft mediation rules should be maintained.

### *Article 1 (Application of the Rules)*

128. The Commission noted that paragraph 1 clarified that the draft mediation rules could apply to mediation regardless of the origin of the process (for example, agreement by the parties, an international instrument such as an investment treaty, a court order or a mandatory statutory provision). In that regard, it was suggested that the words “court order” would need to be clarified so that they did not imply that a court could impose the rules on the parties. It was also suggested that the meaning of the terms “whether contractual or not” and “mandatory statutory provision” might need clarification.

129. Regarding paragraph 2, the Commission noted that the definition of “mediation” mirrored the definition contained in the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. In that context, it was suggested that the word “neutral” should be inserted before the word “third party”. However, it was questioned whether that addition would be needed, in the light of the fact that the word “neutral” appeared neither in the Model Law on International Commercial Mediation nor in the Singapore Convention on Mediation and might add a layer of uncertainty. It was further suggested that paragraph 2 should clarify that the mediator would be chosen by the parties jointly.

130. Regarding paragraph 3, the Commission noted that it was a new provision addressing the temporal application of the draft mediation rules. It was explained that paragraph 3, as a default rule, provided for the application of the draft rules in effect at the date of the commencement of the mediation.

131. The Commission noted that paragraph 4 provided the parties with an adequate level of flexibility. In that context, it was suggested that the words “at any time” be included at the end of paragraph 4, in line with article 1, paragraph 2, of the UNCITRAL Conciliation Rules. In response, it was noted that corresponding provisions in the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation did not contain the words “at any time” and that exclusion of those words from the [draft] mediation rules

would not preclude parties from varying any provisions of the rules at any time. It was also suggested that the relationship between paragraphs 1 and 4 could be clarified.

132. The Commission noted that paragraph 5 mirrored article 1, paragraph 3, of the UNCITRAL Conciliation Rules. It was suggested that it be clarified that the law referred to in paragraph 5 should be any law applicable to the mediation, including mandatory provisions therein “from which the parties cannot derogate”.

*Article 2 (Commencement of mediation)*

133. The Commission noted that article 2 of the draft mediation rules mirrored article 5 of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, with some adjustments. It was explained that, under paragraph 1, mediation would commence when the parties to a dispute “agree(d) to engage” in the mediation and that the effect of that paragraph was that, even if a contract included a provision to mediate or a court or an arbitral tribunal directed parties to mediation, such proceedings would not commence until the parties actually agreed to engage in such proceedings. It was suggested that such clarification could be usefully included in the draft mediation rules on the basis of the explanation provided in paragraph 11 of document [A/CN.9/986](#).

134. It was questioned whether the clause in paragraph 1 regarding the different bases for mediation (contractual, court order or mandatory statutory provision) should be retained given that they were already addressed in article 1, paragraph 1. It was also questioned whether the words “unless otherwise provided by the agreement to mediate” should be retained, as those words did not appear in the corresponding provision of the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation. It was further stated that the draft mediation rules might not need to duplicate the provisions of the Model Law on International Commercial Mediation but rather could complement them as needed.

135. The Commission noted that paragraph 2 addressed the invitation to mediate. It was suggested that the parties should agree on the period of time within which the invitation was to be accepted. It was mentioned, in response, that it might not be possible for parties to agree on such a period of time, depending on the stage at which the invitation was being made.

## **VIII. Review of the draft UNCITRAL secretariat notes on the main issues of cloud computing contracts**

### **A. Consideration of the draft notes on the main issues of cloud computing contracts ([A/CN.9/974](#))**

#### **1. Introduction**

136. The Commission recalled that it had considered the topic of contractual aspects of cloud computing at its forty-seventh to fiftieth sessions, on the basis of proposals by Canada ([A/CN.9/823](#) and [A/CN.9/856](#)), progress reports of Working Group IV (Electronic Commerce) and oral reports by the Secretariat.<sup>56</sup> The Commission also recalled that, at those sessions, it had requested the Secretariat, within its existing resources, and Working Group IV to conduct preparatory work on the topic.<sup>57</sup> The Commission noted that the Working Group had considered the topic in detail at its fifty-fifth session, held in New York from 24 to 28 April 2017, on the basis of a note by the Secretariat ([A/CN.9/WG.IV/WP.142](#)), and at its fifty-sixth session, held in New York from 16 to 20 April 2018, on the basis of a draft checklist on contractual

<sup>56</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, para. 150; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, para. 358; and *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 229.

<sup>57</sup> *Ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 235 and 353; and *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 127.



aspects of cloud computing prepared with the input of experts, including during an expert group meeting convened by the Secretariat in Vienna on 20 and 21 November 2017 ([A/CN.9/WG.IV/WP.148](#)).

137. The Commission recalled that, at its fifty-first session, it had considered the recommendation of Working Group IV that the Commission should review the draft notes on the main issues of cloud computing contracts at its fifty-second session, in 2019, and authorize their publication or issuance in the form of an online reference tool, in both cases as a work product of the Secretariat ([A/CN.9/936](#), para. 44). The Commission also recalled that, after the discussion at that session, it had decided to review the draft notes on the main issues of cloud computing contracts at its fifty-second session, in 2019.<sup>58</sup>

138. At its fifty-second session, the Commission had before it the draft notes on the main issues of cloud computing contracts ([A/CN.9/974](#)), prepared by the Secretariat on the basis of the comments on the draft notes made by Working Group IV at the fifty-first session of the Commission.

## 2. Comments on the draft notes

139. The Commission agreed to amend the draft notes by:

(a) Reflecting also in an introductory part and in part one aspects of shared responsibility between the provider of cloud computing services and the customer, in particular in the context of cyber security;

(b) Reflecting in part one, section A, that parties might also need to take into account consumer protection laws and regulations;

(c) Adding in part two, section A, under the heading “Contract formation”, a reference to electronic signatures and UNCITRAL texts addressing that subject;

(d) Replacing the word “Minimum” with the word “Usual” in the heading above paragraph 42 and adding the content of the last sentence of paragraph 5 to paragraph 42;

(e) Reflecting in part two, section M, under the heading “Post-contract retention of data”, issues arising from the retention and storage of digital signature certificates, in particular in the cross-border context.

140. In response to a query regarding the meaning of the term “interoperability”, reference was made to the glossary of the draft notes, which contained a definition of the term based on applicable technical standards developed by an international standardization body specifically for the cloud computing context.

141. A doubt was expressed about the feasibility of ensuring that the content of the draft notes remained current in the light of the rapidly evolving nature of the cloud computing environment. In response, it was explained that the draft notes were aimed at addressing a minimal set of core issues that were expected to remain relevant regardless of the evolution of cloud computing services.

142. Another concern was that the draft notes should not attempt to define terms, such as “data subject” or “data protection”, since definitions of those terms would vary from jurisdiction to jurisdiction. In response, it was explained that the glossary was not an attempt to define the terms used in the draft notes but rather to describe them with a view to facilitating their understanding, as noted in paragraph 7 of the draft notes.

143. An additional concern was that the draft notes touched upon issues, such as data localization requirements and electronic commerce law, that went beyond cloud computing issues. In response, it was explained that the draft notes were aimed at alerting contracting parties about the main issues that parties might face when considering whether to enter into a cloud computing contract and during negotiation

<sup>58</sup> Ibid., *Seventy-third Session, Supplement No.17 (A/73/17)*, para. 150.

of a cloud computing contract. Data localization requirements and personal data protection regulations were cited as examples of important issues that should be brought to the attention of contracting parties. It was also considered worthwhile to flag to contracting parties that the customer data might include personal data or other subsets of data that might be the subject of more stringent regulation.

144. It was pointed out that the draft notes should highlight the accountability of cloud service providers in the context of the layered infrastructure and subcontracting that were often involved in the provision of cloud computing services. In response, it was observed that issues arising from layered cloud computing services, as that term was described in the glossary, were discussed in the draft notes (e.g., paras. 116–119).

## **B. Consideration of issues relating to the preparation of an online tool containing a legal text, as set out in the note by the Secretariat on that topic (A/CN.9/975)**

145. The Commission recalled that, at its fifty-first session, it had requested the Secretariat to prepare, within existing resources, a pilot online tool containing the draft notes on the main issues of cloud computing contracts, for consideration by the Commission at its fifty-second session, in 2019. The Commission also recalled that, at the same session, it had requested the Secretariat to prepare a note illustrating the considerations relating to the preparation of the pilot online tool, including budgetary and other implications, and the departure from the existing UNCITRAL publication policy.<sup>59</sup>

146. The Commission had before it a note by the Secretariat on considerations relating to the preparation of an online tool containing a legal text (A/CN.9/975). At the same session, it also took note of the pilot online tool containing the draft notes, made available in English at <https://uncitral.un.org/en/cloud>.

147. General support was expressed for the pilot online tool and for prominently placing a disclaimer on the home page of the tool explaining that the draft notes did not intend to provide legal advice on the drafting of cloud computing contracts.

148. The Commission also heard a presentation by the Electronic Publishing Unit (EPU) of the United Nations Office at Vienna on electronic publications, interactive PDF publications and web-based publications prepared by EPU for other Vienna-based organizations of the United Nations system. During that presentation, the advantages and disadvantages of the different electronic publishing options were described. It was highlighted that, in addition to the standards for the web presence of United Nations publications and tools outlined in document A/CN.9/975, modern forms of publication should be aimed at increasing the discoverability of United Nations texts.

149. The Commission expressed appreciation to EPU for its informative presentation. Exploring modern forms of publication was considered important for efforts to increase the outreach and accessibility of UNCITRAL texts. Nevertheless, it was emphasized that the current publishing practice should be retained and that the need to make a given UNCITRAL text available in the form of an online tool, in addition to its standard form of publication, should be assessed on a case-by-case basis, taking into account the nature of the text in question and the added value of presenting it as an online tool. In that connection, it was noted that online interactive presentations might be less appropriate for conventions and model laws than for texts of the same or similar nature as the draft notes.

150. Concerns were expressed about the cost implications of preparing online tools highlighted in paragraph 32 of document A/CN.9/975. It was noted that the pilot online tool had been prepared within the existing resources of the UNCITRAL secretariat and for that reason was not illustrative of the costs that would have been

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<sup>59</sup> Ibid., para. 155.



involved had its preparation been contracted out. The view was expressed that the added value of preparing an online tool should outweigh costs of preparing it, and it remained to be assessed whether the preparation of the pilot online tool was worth the effort.

### C. Decision

151. With the amendments listed in paragraph 139 above, the Commission approved the publication of the notes on the main issues of cloud computing contracts as notes by the Secretariat. The Commission authorized the publication of the notes in the form of an online tool in the six official languages of the United Nations, using the format of the pilot online tool as a basis, and including any improvements that could be made within the existing resources of the UNCITRAL secretariat. The Commission requested the Secretariat to also publish the approved notes in the usual forms, as a paper and electronic booklet, in the six official languages of the United Nations.

## IX. Micro, small and medium-sized enterprises: progress report of Working Group I

152. The Commission had before it the reports of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its thirty-first and thirty-second sessions ([A/CN.9/963](#) and [A/CN.9/968](#), respectively), which outlined the progress made on the draft legislative guide on an UNCITRAL limited liability organization, which was aimed at reducing the legal obstacles faced by micro, small and medium-sized enterprises throughout their life cycles and, in particular, those in developing economies.<sup>60</sup> It was stressed that the draft legislative guide was aimed at creating an innovative legal form characterized by flexibility, and freedom of contract, while preserving transparency and protecting third parties through several default rules. It was further stressed that such an innovative legal form would benefit micro, small and medium-sized enterprises worldwide.

153. The Commission noted that Working Group I had resumed consideration of the draft legislative guide at its thirty-first session, held in Vienna from 8 to 12 October 2018, after having devoted its previous two sessions to the review of the draft legislative guide on key principles of a business registry, which had been finalized and adopted by the Commission at its fifty-first session, in 2018.<sup>61</sup> Progress made at the thirty-first session of the Working Group had included deliberations on draft recommendations 7 to 12 (sections B, on formation, and C, on organization, of the UNCITRAL limited liability organization), except for recommendation 10 and its attendant commentary; recommendation 15 (section D, on management); and recommendations 16 and 17 (section E, on the percentage of the ownership of the UNCITRAL limited liability organization and contributions by members), as contained in the annex to a note by the Secretariat on the draft legislative guide ([A/CN.9/WG.I/WP.112](#)).

154. The Commission also noted that the first two days of the thirty-second session of Working Group I, held in New York from 25 to 29 March 2019, had been devoted to a colloquium on contractual networks and other forms of inter-firm cooperation<sup>62</sup> (see also paras. 197–199 below) and that the Working Group had been convened from 27 to 29 March. With respect to its deliberations regarding the creation of a simplified business entity, the Working Group had continued the work begun at its thirty-first session and had considered the following recommendations (and related commentary) contained in the annex to the note by the Secretariat containing

<sup>60</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321; the mandate was also reiterated in *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 220 and 225.

<sup>61</sup> *Official Records of the General Assembly, Seventy-third session, Supplement No. 17 (A/73/17)*, para. 111.

<sup>62</sup> *Ibid.*, para. 253 (c). The proceedings of the colloquium are reported in [A/CN.9/991](#).

the draft legislative guide on an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.114): recommendation 10 (section C, on organization of the UNCITRAL limited liability organization); recommendations 11 to 16 (section D, on management of the UNCITRAL limited liability organization); and recommendation 17 (Section E on Members' share of and contributions to the UNCITRAL limited liability organization).

155. After discussion, the Commission commended Working Group I for the progress it had made on the topic and encouraged States to participate in the deliberations of the Working Group and share the practical experiences of their relevant government bodies in that area of law reform.

## **X. Dispute settlement reform: progress report of Working Group II**

156. The Commission recalled that, at its fifty-first session, it had approved a mandate for Working Group II (Arbitration and Conciliation/Dispute Settlement) to take up issues relating to expedited arbitration.<sup>63</sup> The Commission noted that the Working Group, at its sixty-ninth session, held in New York from 4 to 8 February 2019, had commenced its deliberations on expedited arbitration. The Commission had before it the report of the Working Group on its sixty-ninth session (A/CN.9/969).

157. The Commission noted that Working Group II had held a preliminary discussion on the scope of its work, the key characteristics of expedited arbitration, and the possible form of its work and had requested the Secretariat to prepare draft texts on expedited arbitration and to provide relevant information.

158. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat.

## **XI. Investor-State dispute settlement reform: progress report of Working Group III**

159. The Commission recalled that, at its fiftieth session, in 2017, it had approved a mandate for Working Group III to work on the possible reform of investor-State dispute settlement. It further recalled that the Working Group was, in discharging that mandate and in line with the UNCITRAL process, to ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led, with high-level input from all Governments, consensus-based and fully transparent.<sup>64</sup>

160. The Commission had before it the reports of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth and thirty-seventh sessions (A/CN.9/964 and A/CN.9/970).

161. The Commission took note of the discussions of the Working Group, which had focused on the second stage of the mandate (consideration of whether reform was desirable in the light of any identified concerns regarding investor-State dispute settlement) and the preparation of the third stage of the mandate (development of any relevant solutions to be recommended to the Commission).

162. The Commission also took note of the decision of the Working Group to discuss, elaborate and develop multiple potential reform solutions simultaneously, and to that end, to prepare a project schedule to move the proposed solutions forward in parallel, to the maximum extent of the Working Group's capacity and in the light of the tools available.

<sup>63</sup> Ibid., *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 252.

<sup>64</sup> Ibid., *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 264.

163. The Commission further took note of the various means and tools considered by the Working Group to advance its work (A/CN.9/970, paras. 53–61), including the request by the Working Group to consider allocating to it an additional week of conference time available in 2019 in the light of the anticipated workload (for the decision on that matter, see below, para. 329). The Commission took note of the additional request by the Working Group that, if and when conference time were to become available in the future, the Commission, at that point, consider allocating it to the Working Group (A/CN.9/970, paras. 86 and 87).

164. Recalling that the process in the Working Group should be Government-led, the Commission welcomed the participation of 90 States and 50 intergovernmental organizations and invited non-governmental organizations in the thirty-sixth session of the Working Group, and of 106 States and 70 organizations in the thirty-seventh session. The Commission expressed its satisfaction regarding the increased participation in the sessions of in the Working Group, in particular the participation of developing States, which exemplified the importance of the topic and the continued interest of States in investor-State dispute settlement reform. It was stressed that the enhanced participation in the Working Group depended heavily on the financial resources available to States.

165. In that context, the Commission expressed its appreciation to the European Union, the Swiss Agency for Development and Cooperation (SDC) and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) for their contributions to the UNCITRAL trust fund for granting travel assistance to developing countries, aimed at enabling the participation of representatives of developing States in the deliberations of the Working Group, as well as in regional intersessional meetings, and was informed about ongoing efforts by the Secretariat to secure additional voluntary contributions. States were urged to contribute to and support those efforts.

166. The Commission welcomed the outreach activities of the Secretariat aimed at raising awareness about the work of the Working Group and ensuring that the process would remain inclusive and fully transparent.

167. In that context, the Commission expressed its appreciation to the Governments of the Republic of Korea and the Dominican Republic for having organized, jointly with UNCITRAL, regional intersessional meetings on investor-State dispute settlement reform. The Commission noted that the meetings provided an open forum for high-level government representatives and relevant stakeholders to discuss on a regional basis issues being deliberated by the Working Group. The Commission noted that the Government of Guinea would host, jointly with UNCITRAL and OIF, a regional intersessional meeting on investor-State dispute settlement reform in Conakry in September 2019.

168. The Commission also expressed its appreciation for the provision of information by various stakeholders to assist the Working Group in its deliberations.

169. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group through a constructive, inclusive and transparent process and with the decision of the Working Group to elaborate and develop multiple potential reform solutions simultaneously. The Commission also expressed its appreciation for the support provided by the Secretariat.

## **XII. Electronic commerce: progress report of Working Group IV**

170. The Commission recalled that, at its fifty-first session, it had decided that Working Group IV (Electronic commerce) should conduct work on legal issues relating to identity management and trust services with a view to preparing a text aimed at facilitating cross-border recognition of identity management and trust services.<sup>65</sup> It was indicated that the outcome of the work of the Working Group would

<sup>65</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 159.

provide, *inter alia*, legal treatment to trust services other than electronic signatures, which were of significant importance for the digital economy but had not yet been dealt with in UNCITRAL texts.

171. The Commission had before it the reports of Working Group IV on the work of its fifty-seventh session, held in Vienna from 19 to 23 November 2018 (A/CN.9/965), and its fifty-eighth session, held in New York from 8 to 12 April 2019 (A/CN.9/971). At its fifty-eighth session, the Working Group continued its work on the basis of draft provisions prepared by the Secretariat, without prejudice to any decision on the form of an eventual instrument.

172. The Commission noted that, given the early stage of the project, the Working Group should work towards an instrument that could apply to both domestic and cross-border use of identity management and trust services. It also noted that the outcome of that work had implications for matters beyond commercial transactions.

173. The Commission heard that, further to a request made by the Working Group at its fifty-eighth session (A/CN.9/971, para. 67), the Secretariat was developing proposals that dealt specifically with the reliability of identity management systems and had convened a meeting of experts to consult on those proposals and related issues concerning the obligations and liability of identity management service providers. It also heard that the Secretariat would consult with those experts to further refine the draft provisions dealing with trust services, and that the outcome of the consultations would be reflected in a revised set of provisions to be submitted to the Working Group for consideration at its next session.

174. Different views were expressed as to the time frame for the Working Group to fulfil its current mandate. On the one hand, it was suggested that aspiring to finalize the work by the fifty-fourth session of the Commission, in 2021, would encourage the Working Group to maintain the momentum of its work on the draft provisions. On the other hand, it was emphasized that the Working Group had only commenced consideration of the draft provisions at its most recent session, and that, given the complexity of the matters dealt with, it would be premature to set a rigid time frame for fulfilment of the mandate.

175. The Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat and encouraged the Working Group to continue its work on the basis of the revised set of provisions to be prepared by the Secretariat.

### **XIII. Insolvency law: progress report of Working Group V**

176. The Commission recalled that, at its forty-sixth session, in 2013, it had requested Working Group V (Insolvency Law) to conduct, at its session in the first half of 2014, a preliminary examination of issues relevant to the insolvency of micro, small and medium-sized enterprises, and in particular to consider whether the UNCITRAL Legislative Guide on Insolvency Law provided sufficient and adequate solutions for micro, small and medium-sized enterprises. If it did not, the Working Group had been requested to consider what further work and potential work product might be required to streamline and simplify insolvency procedures for micro, small and medium-sized enterprises.<sup>66</sup> The Commission also recalled that the conclusions of the Working Group on those issues had been included in its progress report to the Commission in 2014, which highlighted that the issues facing micro, small and medium-sized enterprises were not entirely novel and that solutions for them should be developed in the light of the key insolvency principles and the guidance already provided by the Legislative Guide (A/CN.9/803, para. 14).

177. The Commission also recalled that, at its forty-ninth session, in 2016, it had agreed that the Working Group should develop appropriate mechanisms and solutions,

<sup>66</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of micro, small and medium-sized enterprises. While the key insolvency principles and the guidance provided in the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address micro, small and medium-sized enterprises and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost-efficient. The form the work might take should be decided at a later time, and should be based on the nature of the various solutions that were being developed.<sup>67</sup>

178. The Commission had before it the reports of Working Group V on the work of its fifty-fourth and fifty-fifth sessions, held in Vienna from 10 to 14 December 2018 and in New York from 28 to 31 May 2019, respectively, which, inter alia, described the progress of the Working Group in its work on the insolvency of micro, small and medium-sized enterprises (A/CN.9/966, chapter VI, and A/CN.9/972, chapter V). The Commission was informed that the Working Group had decided to focus on the needs of micro and small entities in the first instance (A/CN.9/966, para. 118), deferring the definition of such entities to States, and that that approach was in line with the approach taken by the World Bank, which was working in parallel with UNCITRAL on a standard that would address the insolvency of micro and small entities (A/CN.9/972, para. 28). The Commission was also informed that the Working Group, at its fifty-fifth session, having completed its work on enterprise group insolvency, had commenced detailed deliberations on the features of a simplified insolvency regime, on the basis of a note by the Secretariat (A/CN.9/WG.V/WP.166).

179. The Commission took note of the various views expressed in the Working Group about the form that a text on a simplified insolvency regime might take, whether it would be a supplement to the UNCITRAL Legislative Guide on Insolvency Law, a stand-alone document or a list of principles applicable to a simplified insolvency regime that would supplement the texts of Working Group I (Micro, Small and Medium-sized Enterprises) (A/CN.9/972, paras. 24, 25, 31 and 58). Furthermore, the Commission noted that the Working Group had been informed by the Secretariat about the desirability of ensuring a closer coordination with Working Group I (A/CN.9/972, paras. 24–27), with a view to contributing to the work aimed at reducing the legal obstacles faced by micro, small and medium-sized enterprises throughout their life cycles.<sup>68</sup>

180. The Commission took note of the view of the Working Group that more time for additional work, whether in-session or between sessions, including consultations and the appropriate use of expert groups, might be needed to make progress on that work (A/CN.9/972, para. 59). The Commission was informed that informal consultations held on the margins of the current session on 14 July revealed some preference for preparing a stand-alone comprehensive legislative guide on the insolvency of micro and small entities. The Commission was also informed that the next round of intersessional informal consultations was scheduled for 2 and 3 September 2019 and that both in-person and remote participation would be possible. The Commission noted that, for invitation to intersessional informal consultations, the Secretariat had been using the delegate contacts list compiled by the Secretariat, further to a request made to the Commission at its fifty-first session.<sup>69</sup> While support was expressed for holding intersessional informal consultations and expert group meetings, the need for endorsement by the Working Group of conclusions reached at those informal meetings was emphasized.

181. The Working Group was congratulated for completing its work on the texts on enterprise group insolvency adopted at the current session (see chapter VI above).

<sup>67</sup> Ibid., *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 246.

<sup>68</sup> Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 321 and 322.

<sup>69</sup> Ibid., *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 268.

Appreciation was expressed to Wisit Wisitsora-at, the outgoing Chair of Working Group V, for his long-standing and successful chairmanship of the Working Group.

182. Support was expressed for the Working Group to continue its work on the insolvency of micro and small entities. Recognizing that that work was of relevance to the work of Working Group I and that the end product of that work would contribute to the UNCITRAL texts addressing the entire lifecycle of micro, small and medium-sized enterprises, views were expressed that delegates to Working Group I should also be represented in Working Group V to ensure coordination between the two working groups. The need for holding joint sessions of the two working groups was, however, questioned. It was considered important instead to allocate sufficient time to Working Group V to allow it to resolve complex issues arising from the insolvency of micro and small entities and produce a useful work product on that subject.

183. The Commission acknowledged the importance of coordinating the work of UNCITRAL with that of the World Bank while the World Bank was updating its Principles for Effective Insolvency and Creditor/Debtor Regimes in order to deal with specific aspects of the insolvency of micro and small entities. The Commission was reminded of the Insolvency and Creditor Rights Standard (the ICR Standard), comprising the World Bank Principles and the recommendations made in the UNCITRAL Legislative Guide on Insolvency Law. The Commission was invited to consider in due course how an UNCITRAL text on the insolvency of micro and small entities would be integrated into the ICR Standard if it were not a supplement to the Legislative Guide. The importance of the Legislative Guide to World Bank operations in the area of insolvency law was highlighted.

#### **XIV. Judicial sale of ships: progress report of Working Group VI**

184. The Commission recalled that, at its fifty-first session, it had agreed to allocate working group time to the topic of the judicial sale of ships.<sup>70</sup> The Commission also recalled that the topic had been allocated to Working Group VI (Security Interests) after completing its work on a draft practice guide to the UNCITRAL Model Law on Secured Transactions at its thirty-fourth session, held in Vienna from 17 to 21 December 2018.

185. The Commission considered the report of the Working Group on its thirty-fifth session, held in New York from 13 to 17 May 2019 (A/CN.9/973), and noted that the Working Group had commenced its consideration of the topic on the basis of two notes prepared by the Secretariat (A/CN.9/WG.VI/WP.81 and A/CN.9/WG.VI/WP.82). It was explained that document A/CN.9/WG.VI/WP.82 contained a draft international convention on foreign judicial sales of ships and their recognition prepared by the Comité Maritime International. The Commission took note of the Working Group's preliminary discussions on the scope of the legal issues on the topic and the Working Group's agreement to focus on the issues of clean title and deregistration in its future work.

186. A concern was expressed about the use of the draft international convention prepared by the Comité Maritime International as a basis for the Working Group's deliberations, noting that the draft represented the interests of a particular industry. It was added that a balanced instrument was needed in order to secure broad support among States. In response, it was noted that the Working Group had engaged in wide-ranging discussions at its thirty-fifth session, during which the interests of a variety of stakeholders were put forward. It was further noted that the discussions at the thirty-fifth session demonstrated that the Working Group did not contemplate merely endorsing the draft international convention, but had instead considered critically the issues with a view to developing a balanced instrument. In that regard, it was emphasized that the Working Group was still in the early stages of its consideration of the topic.

<sup>70</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 252.



187. A concern was expressed about the overlap between an eventual new instrument and the recently concluded Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In response, it was noted that that issue had been addressed by the Working Group at its thirty-fifth session, during which a distinction had been drawn between the judicial sale and a decision on the merits in the proceedings giving rise to the judicial sale. The view was expressed that there was little risk of interference between the two regimes. The point was made that a discussion of the relationship with the Hague Convention presupposed that the eventual instrument would take the form of a treaty, and that the Working Group had agreed at its thirty-fifth session that it would be premature to consider the form of the instrument in the early stages of its consideration of the topic.

188. It was noted that the project evoked sensitive issues relating to the recognition and prioritization of maritime liens. In response, the narrow scope of the project was emphasized, and it was reiterated that the mandate of the Working Group was not to address those issues.

189. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group. It welcomed the work of the Secretariat in preparing a revised draft instrument incorporating the outcome of the deliberations of the Working Group at its thirty-fifth session, and noted with appreciation that the Working Group would continue its deliberations on the basis of the revised draft, without prejudice as to the form of any eventual instrument. In that regard, the point was made that particular attention should be placed on the scope of the instrument and definitional issues, which had only been touched on at the thirty-fifth session.

## XV. Work programme

190. The Commission recalled its agreement to reserve time for discussion of its overall work programme as a separate topic at each session, to facilitate the effective planning of its activities.<sup>71</sup>

191. The Commission took note of the documents prepared to facilitate its discussions on the topic (A/CN.9/981 and the documents referred to therein, including the proposals contained in documents A/CN.9/992, A/CN.9/995, A/CN.9/996, A/CN.9/997 and A/CN.9/998) and of the topics that the Commission, in previous sessions, had decided to retain for further discussion at a future session, without assigning any priority to them.<sup>72</sup>

### A. Current legislative programme

192. The Commission took note of the progress of its working groups as reported earlier in the session (see chapters IX to XIV of the present report) and reaffirmed the programme of current legislative activities set out in table 1 of document A/CN.9/981 as follows:

(a) As regards micro, small and medium-sized enterprises, the Commission confirmed that Working Group I should continue its work to prepare a legislative guide on an UNCITRAL limited liability organization. Mindful of the mandate given to the Working Group, at its forty-sixth session, in 2013, to work on reducing the legal obstacles faced by micro, small and medium-sized enterprises throughout their life cycles, in particular in developing economies,<sup>73</sup> the Commission agreed to strengthen

<sup>71</sup> *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 310.

<sup>72</sup> *Ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 124 (intellectual property licensing) and 125 (other topics); and *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 225 (warehouse receipt and alternative dispute resolution in secured transactions) and 229 (other topics).

<sup>73</sup> *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 321.

and complete that work by requesting the Secretariat to start preparing draft materials on access to credit for micro, small and medium-sized enterprises, drawing, as appropriate, on the relevant recommendations and guidance contained in the UNCITRAL Model Law on Secured Transactions, with a view to their consideration by Working Group I in due course;

(b) With respect to dispute settlement, the Commission agreed that Working Group II should continue its work on expedited arbitration;

(c) With respect to investor-State dispute settlement reform, the Commission agreed that Working Group III should continue its work programme as mandated;

(d) As regards electronic commerce, the Commission confirmed that Working Group IV should proceed with the preparation of an international instrument on legal issues related to identity management and trust services;

(e) With respect to insolvency, the Commission confirmed that the work on the insolvency of micro and small enterprises should continue in Working Group V. To ensure coordination with Working Group I, States were requested to consider including in their delegations to Working Group V their representatives to Working Group I in addition to experts in the insolvency of micro and small enterprises, with a view to including the output of work on the insolvency of micro and small enterprises into the series of legislative guidance documents prepared by Working Group I on the life cycle of micro, small and medium-sized enterprises;

(f) As regards the judicial sale of ships, the Commission confirmed that Working Group VI should continue its work to prepare an international instrument on that subject.

## **B. Future legislative programme**

193. The Commission recalled the importance of a strategic approach to the allocation of resources to legislative development and its role in setting the work programme of UNCITRAL and the mandates of working groups.<sup>74</sup> On that basis, the Commission considered several proposals for possible future legislative development, including both of the proposals discussed at earlier sessions and new proposals.

### **1. Proposals considered at earlier sessions of the Commission**

#### **(a) Warehouse receipts**

194. The Commission recalled that, at its fifty-first session, it had requested the Secretariat to conduct exploratory and preparatory work on warehouse receipts with a view to referring that work to a working group in due course.<sup>75</sup> At the current session, the Commission took note with appreciation of a note by the Secretariat (A/CN.9/992) providing an overview of a study presented to the Secretariat by the Kozolchyk National Law Center (NatLaw) on possible future work on warehouse receipts. The study had examined the legislative and regulatory frameworks governing warehouse receipts in several States, illustrating a wide range of different approaches to warehouse receipts. While divergence of approaches to, and legal treatment of, warehouse receipts was not in and of itself a problem, the study suggested that a certain level of harmonization could facilitate the use of warehouse receipts, in particular across sectors and in the cross-border context. The study also pointed out that several States, in particular those with a common law tradition, did not yet have a legislative or regulatory framework on warehouse receipts, whereas in other States, the framework had only been developed partially, thus requiring a more comprehensive solution to facilitate the use of warehouse receipts. The study suggested that the Commission should consider developing a model law on warehouse

<sup>74</sup> Ibid., paras. 294 and 295.

<sup>75</sup> Ibid., *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 249 and 253 (a).



receipts in consultation with international and regional organizations that have already undertaken work in that field.

195. The Commission noted the practical relevance of the project, given the importance of warehouse receipts to agriculture and food security, and their use in supply and value chains. The Commission confirmed its earlier decision to include the topic in its work programme but agreed that it still needed to consider several important elements before embarking on the development of an international legal instrument on warehouse receipts, such as: how such work should be undertaken (whether by a working group or the Secretariat with the assistance of experts); the scope of such work (for example, whether to address all substantive legal aspects of warehouse receipts, whether to focus on their use for financing purposes or on their cross-border use and whether to cover their use more generally or in a specific sector); whether the work should focus on dematerialized forms of warehouse receipts and the legal nature of such warehouse receipts in the digital economy and their use; the form of such work (a convention, a model law or a guidance text). The Secretariat was requested to examine the relationship of the topic with existing UNCITRAL texts, mainly the Model Law on Secured Transactions and the Model Law on Electronic Transferable Records.<sup>76</sup>

196. There was general agreement that the work should be comprehensive, as suggested in the study, and not only limited to the use of warehouse receipts as collateral in secured transactions. While there was a preference for referring the work to the first available working group, the Commission reserved its position as to whether the project could be integrated into the longer-term work programme of any existing working groups. The Commission agreed to request the Secretariat to proceed with its preparatory work and to convene a colloquium with other organizations having relevant expertise, with a view to considering the questions of scope and nature of the work discussed at the current session (see para. 195 above) and possibly advancing the preparation of initial draft materials.

#### **(b) Contractual networks**

197. The Commission recalled its earlier deliberations on the subject of contractual networks, and the decision taken at its fifty-first session, that a colloquium should be held in the context of a session of Working Group I to further analyse the relevance of contractual networks to the current work on developing an enabling legal environment for micro, small and medium-sized enterprises and the desirability of taking up the work of those networks.<sup>77</sup>

198. The Commission had before it the report of the colloquium on contractual networks and other forms of inter-firm cooperation (A/CN.9/991), which was held on the first two days (25 and 26 March) of the thirty-second session of Working Group I. The Commission welcomed the participation of experts from different geographic regions, including specialists from governments, international organizations, non-governmental organizations, the private sector and academia, in addition to the delegates to the Working Group. Furthermore, the Commission took note with appreciation that the colloquium had showed the relevance of the current mandate of Working Group I, in the light of the role micro, small and medium-sized enterprises played in most economies around the world and the challenges they faced.

199. The Commission noted that the different legal models of cooperation among businesses presented at the colloquium helped micro, small and medium-sized enterprises to overcome their vulnerability and harness opportunities in domestic and international markets. More competitive micro, small and medium-sized enterprises could play a major role in achieving the Sustainable Development Goals and support the development of women's entrepreneurship. The Commission took note of the diverging views expressed at the colloquium on the desirability of a harmonized legal

<sup>76</sup> United Nations publication, Sales No. E.17.V.5.

<sup>77</sup> *Official Records of the General Assembly, Seventy-third session, Supplement No. 17 (A/73/17)*, para. 253 (c).

approach on contractual networks and whether it might lower barriers to the internationalization of micro, small and medium-sized enterprises. In that respect, the Commission also noted the view of Working Group I that the topic of contractual networks did not represent a matter of priority in the current work on creating an enabling legal environment for micro, small and medium-sized enterprises. The Commission endorsed that view and agreed not to include the topic of contractual networks in its work programme.

**(c) Civil asset tracing and recovery**

200. The Commission recalled that, at its fifty-first session, after discussion of a proposal for possible future work on civil asset tracing and recovery ([A/CN.9/WG.V/WP.154](#)), it had requested the Secretariat to examine the relevant issues of asset tracing in the area of insolvency, taking into account work undertaken by other organizations.<sup>78</sup> At its current session, the Commission was informed that the study was advancing and that it would cover the relevant work of international organizations and initiatives (e.g., the United Nations Office on Drugs and Crime (UNODC) in relation to the United Nations Convention against Corruption, the World Bank, the Stolen Asset Recovery (StAR) Initiative and the Lausanne process) as well as a review of national legal frameworks for national asset tracing and recovery in insolvency proceedings and solutions for the tracing and recovery of digital assets.

201. In that connection, at the current session, the Commission considered a proposal submitted by the United States calling for a colloquium to further explore the matter with a view to starting work on the development of model legislative provisions on civil asset tracing and recovery in both common law and civil law systems ([A/CN.9/996](#)). With respect to that proposal, it was suggested that it would be relevant not only to insolvency, but also to the treatment of commercial fraud and other topics. The proposal noted that many States lacked adequate legal tools for tracing and recovery and suggested the development of a toolbox of legislative provisions from which States could choose, as indicated in document [A/CN.9/WG.V/WP.154](#). It was emphasized that the work proposed was not intended to address criminal law issues and that coordination and cooperation with other relevant organizations would be a key element, to avoid potential overlap and duplication.

202. The Commission agreed on the importance of the topic and on the usefulness of providing further guidance for States to equip themselves with effective tools for asset recovery. It was said that, from the perspective of international initiatives such as the World Bank-UNODC StAR initiative, there was potential for using insolvency representatives' powers, avoidance actions and other insolvency tools for asset tracing and recovery. Furthermore, it was observed that international instruments existed that also applied in principle to insolvency, in particular the Convention on the Taking of Evidence abroad in Civil and Commercial Matters. The view was expressed that, in some jurisdictions, those instruments had generated hardly any practice or case law related to asset tracing in insolvency proceedings. At the same time, views were expressed that the topic was not limited to insolvency. Other delegations, however, expressed concerns that work by UNCITRAL on the topic would extend to issues beyond insolvency matters. It was noted that, in any event, it was essential to delineate carefully the scope and nature of the work that the Commission could undertake, and to avoid interference with existing instruments, for instance, those relating to criminal law.

203. For that purpose, the Commission requested the Secretariat to organize a colloquium, in conjunction with the fifty-sixth session of Working Group V, to be held in December 2019, in cooperation with other relevant international organizations, to further clarify and refine various aspects of the Commission's possible work in that area, for consideration by the Commission at its fifty-third session, in 2020. The colloquium should consider the elements of a possible toolkit on asset tracing and recovery and supplement the existing background study with information on the

<sup>78</sup> *Ibid.*, para. 253 (d).

practices of civil law jurisdictions. The colloquium should also: (a) examine both criminal and civil asset tracing and recovery, with a view to better delineating the topic while benefiting from the available tools; (b) consider tools developed for insolvency law and for other areas of law; and (c) discuss proposed asset tracing and recovery tools and other international instruments.

**(d) Applicable law in insolvency proceedings**

204. The Commission recalled that, at its fifty-first session, the European Union had presented a proposal to dedicate future work to applicable law related to insolvency as an alternative to work on asset tracing and recovery.<sup>79</sup> It was stressed that the issue of applicable law was an important matter that warranted consideration.

205. The European Union presented a proposal in support of future work by UNCITRAL on harmonizing applicable law in insolvency proceedings (A/CN.9/995). It was pointed out that the three UNCITRAL model laws relating to cross-border insolvency addressed important areas of cross-border insolvency law, including access, recognition and relief (including enforcement of judgments, coordination, centralization and cooperation in cases of enterprise group insolvency) but they did not address choice of law or issues of applicable law. The divergent approaches in national laws were said to lead to inconsistency and lack of predictability in cross-border insolvency cases. It was suggested that the harmonization of choice-of-law rules in cross-border insolvency cases could significantly improve the coordination of liquidation and rescue of enterprises; promote consistency, certainty and predictability in cross-border cases; and improve and rationalize the content of the relevant choice-of-law rules, with a positive effect on trade and commerce. The future instrument could take the form of a model law, a stand-alone text or a supplement to the current UNCITRAL Model Law on Cross-Border Insolvency. The instrument should complement the existing model laws by providing rules on the scope of the *lex fori concursus*, and the law applicable to avoidance actions, automatic termination of contracts, rights in rem, set-off rights and limitations. The view was expressed that the work could utilize the Principles on Choice of Law in International Commercial Contracts of 2015 as a potential model for a soft law instrument.

206. The Commission agreed on the importance of the topic, which complemented the significant work already done by the Commission in the area of insolvency law, in particular cross-border insolvency. The Commission agreed, however, that the subject matter was potentially complex and required a high level of expertise in various subjects of private international law, as well as on choice of law in areas such as contract law, property law, corporate law, securities and banking and other areas on which the Commission had not worked recently. The Commission also agreed that it was essential to delineate carefully the scope and nature of the work that it could undertake. For that purpose, the Commission requested the Secretariat to organize a colloquium, in cooperation with other relevant international organizations, possibly in conjunction with the fifty-seventh session of Working Group V, with a view to submitting more concrete proposals for consideration by the Commission at its fifty-third session, in 2020.

**(e) Legal issues relating to the digital economy**

207. The Commission recalled that, at its fifty-first session, it had heard a proposal by the Government of Czechia that the Secretariat should closely monitor developments relating to legal aspects of smart contracts and artificial intelligence (A/CN.9/960), and report back to the Commission on areas that might warrant uniform legal treatment, with a view to undertaking work in those fields when appropriate.<sup>80</sup> The Commission also recalled other related suggestions that had been made in the working groups, in the Commission, and at the Congress held in 2017 on the occasion of the Commission's fiftieth session, to celebrate the fiftieth anniversary

<sup>79</sup> Ibid., para. 251.

<sup>80</sup> Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), para. 247.

of UNCITRAL, for instance, in respect of the use of distributed ledger technology, supply chain management, payments and cross-border data flows. Lastly, the Commission recalled the mandate given to the Secretariat, at its fifty-first session, to compile information on legal issues related to the digital economy, including by organizing, within existing resources and in cooperation with other organizations, symposiums, colloquiums and other expert meetings, and to report that information for its consideration at a future session.<sup>81</sup>

208. The Commission took note of the summary of exploratory work undertaken by the Secretariat on the digital economy (see [A/CN.9/981](#), annex), in particular the following events: (a) the expert group meeting jointly organized with the Institute for Advanced Judicial Studies (Institut des Hautes Études sur la Justice) and the Ministry for Europe and Foreign Affairs of France to discuss legal issues relating to cross-border data flows and artificial intelligence (Paris, 15 March 2019); (b) the workshop on legal issues arising from the use of smart contracts, artificial intelligence and distributed ledger technology, jointly organized with Unidroit under the patronage of the Ministry of Foreign Affairs and International Cooperation of Italy (Rome, 6–7 May 2019); and (c) the regional conference on legal issues relating to the digital economy jointly organized with the Ministry of Information and Communication Technology of Colombia, in cooperation with the Organization for American States (OAS) and the Inter-American Development Bank (Bogotá, 5 June 2019). The Commission was also informed of the preparations for a law and technology forum to be held in Incheon, Republic of Korea, on 18 September 2019, which was being organized by the UNCITRAL Regional Centre for Asia and the Pacific in cooperation with the Ministry of Justice of the Republic of Korea.

209. The Commission heard that the Secretariat's exploratory work had identified several lines of enquiry that might crystallize into more concrete proposals to be submitted to the Commission for consideration. Legal issues that could be the object of those proposals included the rights of parties to data transactions for commercial purposes, supply chains and the tokenization of assets using distributed ledger technology, the disruptive effect of new technologies on commercial transactions, the legal validity of actions of artificial intelligence systems and associated liability, and an appraisal of existing instruments to determine how they apply to those issues, in particular with regard to automated transactions. The work had also identified the need for a taxonomy of emerging technologies and related transactions to facilitate a common understanding of legal issues.

210. Broad support was expressed for the view that, consistent with its mandate, UNCITRAL should play a central and coordinating role in addressing legal issues related to the digital economy and digital trade and that, accordingly, the Secretariat should continue its exploratory work in cooperation with States, other international organizations and the private sector. It was emphasized that the exploratory work should focus on legal issues, with a view to narrowing down the scope of work and proposing solutions that address legal obstacles and take into account public policy considerations. It was also noted that the legal issues identified so far cut across many areas of the current work programme, including insolvency and dispute resolution. The view was expressed that any future work should respect the principle of technology neutrality, be future-proof and focus on the disruptive impact of emerging technologies on commercial transactions.

211. Noting that UNCITRAL played a central and coordinating role within the United Nations system in addressing legal issues related to the digital economy and digital trade, the Commission commended the Secretariat for its various initiatives and activities and requested the Secretariat to: (a) continue its exploratory work, in particular in collaboration with the Unidroit secretariat and interested States, with a view to formulating a proposal for possible future work in that area; (b) prepare a workplan to address the specific legal issues identified in the course of that exploratory work, including recommendations both for dealing with them in existing

<sup>81</sup> Ibid, para. 253 (b).

instruments and for the development of specific new instruments, as appropriate; and (c) report back to the Commission at its fifty-third session, in 2020, on the progress of its exploratory work.

## **2. New proposals for future work**

### **(a) Arbitration in international high-tech-related disputes**

212. The Commission heard a proposal on high-tech-related dispute resolution by the Governments of Israel and Japan ([A/CN.9/997](#)), which suggested that the Secretariat could undertake a preliminary review of the current state of affairs, the current and expected needs of the high-tech industry in resolving such disputes, and the availability or lack of adequate legal frameworks to address those needs. It was explained that the growth of the digital economy in the last few decades had caused an increase in disputes involving questions unique to the field of high-tech, such as those relating to violation of software licences, misrepresentations of an acquired company's information technology, or liability due to faulty code. It was observed that disputes involving high-tech issues tended to be technically complex, mainly because high-tech products and services relied on applied sciences, engineering and the like. Also, special arrangements might become necessary with respect to access to digital evidence, for example, by providing the arbitrator, mediator or technical expert with remote access to a computer, wherever it may be located, containing relevant information, or by enabling him or her to take such measures as may be needed to preserve digital evidence.

213. In response to concerns about the possible development of sector-specific dispute settlement rules, it was clarified that the proposal did not foresee the development of a normative instrument, but rather that the Commission could provide guidance to address issues arising in the context of high-tech-related disputes. In that connection, it was pointed out that the current UNCITRAL Arbitration Rules provided sufficient flexibility to parties in the high-tech industry to adjust the rules to meet their needs and that the development of sector-specific rules might run the risk of becoming too prescriptive.

214. Questions were also raised concerning the definition of the term "high-tech" and, consequently, the scope of the possible work, as well as the specific needs of the high-tech industry, the problems that it faced and the uniqueness of the industry, which called for such work. In that connection, it was suggested that the exploratory work would need to provide justification as to why work on that specific sector was necessary, possibly through engagement with relevant experts and by taking into account the existing work carried out by other organizations.

215. After discussion, there was general agreement that the Secretariat should be requested to conduct exploratory work on issues relating to disputes that arise out of transactions in the digital economy. Such exploratory work should include a feasibility study on possible future work by the Commission on the topic. It was also agreed that the concerns and questions expressed during the current session should be taken into account in conducting exploratory work, which should be combined with the Secretariat's ongoing exploratory work on the legal issues arising in the digital economy (see paras. 207–211 above). The Secretariat was afforded flexibility in organizing such work, subject to the availability of resources and time.

### **(b) Railway consignment notes**

216. The Government of China presented a proposal on possible future work by UNCITRAL to develop a legal framework for railway consignment notes ([A/CN.9/998](#)). The proposal noted that railway transportation had many advantages, such as shorter transport distance, faster speed and less vulnerability to weather. As many countries were connected by land, railway transportation had a significant development potential as an important means for close economic and trade exchanges among different countries. However, in practice, international railway consignment notes only had an evidentiary function as proof of the receipt of goods and the terms

of the railway carriage contract. Unlike the ocean bill of lading, the consignment note did not serve as a document of title and could not be used for the settlement and financing of letters of credit. The limited function of the railway consignment note also limited the ability of banks and other institutions to provide financial services and increased the financial pressure on importers and the risks faced by exporters in collecting payments. Therefore, it was recommended that UNCITRAL incorporate railway transport documents into its work programme and start work on the drafting of relevant international rules and the establishment of relevant legal instruments. It was suggested, for instance, that the Commission could explore the possibility of creating a rule on a bill of lading for one or more modes of transport, including railway, road and air, to achieve the goals of using a single bill, controlling the cargo with the bill and taking delivery of goods with the bill, giving that new transport document the nature of a document of title in order to enable it to perform the financial settlement function. The future instrument should include new rules on issues such as the issuer's qualifications, the conditions for issuance and the object, format and validity of the issuance.

217. The Commission considered with interest the proposal, which was felt to have considerable practical significance for world trade, in particular for the economic growth of developing countries. However, given the wide range of issues involved and their complexity, the Commission agreed, as a first step, to request the Secretariat to conduct research on legal issues related to the use of railway or other consignment notes, and to coordinate with other relevant organizations such as the Intergovernmental Organization for International Carriage by Rail, the Organization for Cooperation between Railways, the International Rail Transport Committee, the relevant United Nations regional commissions, FIATA and the International Chamber of Commerce. In that connection, the Commission requested the Secretariat to report back to the Commission, at its fifty-third session, in 2020, on the progress made in that research.

218. Support was expressed for the proposal, in view of the importance of railway transport in facilitating trade and the increase in the volume of trade using railway transport. Questions were raised as to whether the exploratory work should be limited to railway consignment notes, as the work could be expanded to address other modes of transport, including air, road and multi-modal transport. Another question was how the work would be linked with work by other international organizations on export credit, in particular on the use of railway consignment notes for financing purposes. It was noted that the work may have some commonalities with the possible work on warehouse receipts and that the Secretariat would need to examine the relationship with existing UNCITRAL texts, mainly the Model Law on Secured Transactions and the Model Law on Electronic Transferable Records. It was also noted that any future work should involve not only the organizations referred to in the proposal (see para. 217 above), but also other organizations working on legal standards for international railway transport, such as ECE.

219. After discussion, the Commission requested the Secretariat to conduct exploratory work by researching legal issues related to the use of railway or other consignment notes in international trade, in coordination with other relevant and interested organizations, in the light of the comments made at the current session and subject to the availability of resources. The Secretariat was requested to report to the Commission at its next session, so that it could make a more informed decision on the way forward.

**(c) Other topics (including non-legislative work)**

220. The Commission considered a number of topics that had been proposed as subjects of possible future work at previous working group sessions, as well as other activities of a non-legislative nature to be included in the work programme, as set out in tables 2 and 3 of document [A/CN.9/981](#).



## C. Priorities and timetable for future legislative projects

221. The Commission concluded its deliberations on possible future projects as follows:

(a) As far as the allocation of working group time was concerned, priority should be given to organizing a colloquium in 2019 to discuss civil asset tracing and recovery, and a colloquium in 2020 to consider applicable law in insolvency proceedings, to enable the Commission to further consider those topics at its fifty-third session, in 2020;

(b) The Secretariat should continue its preparatory work on warehouse receipts, including by organizing consultation meetings with other interested organizations, with a view to advancing the preparation of initial draft materials;

(c) The Secretariat should conduct exploratory and preparatory work on legal issues related to the digital economy, including on dispute resolution in relation to high-tech disputes, for further consideration by the Commission;

(d) The Secretariat should conduct exploratory and preparatory work on railway consignment notes, for further consideration by the Commission;

(e) No work would be undertaken on contractual networks, intellectual property licensing and alternative dispute resolution in secured transactions.

222. The Commission further decided to:

(a) Urge the Secretariat to finalize the guide on international commercial contracts (with a focus on sales) prepared in cooperation with the Hague Conference on Private International Law and Unidroit (see also para. 224 below),<sup>82</sup>

(b) Request the Secretariat to proceed with the preparation of a digest on the UNCITRAL Model Law on Cross-Border Insolvency (see also para. 250 below), as well as explanatory materials on the enactment of three UNCITRAL model laws in the area of insolvency law (see [A/CN.9/966](#), para. 109), and establish a mechanism for updating the publication entitled *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* on an ongoing basis;

(c) Confirm the request to the Secretariat to prepare explanatory materials on the enactment of UNCITRAL texts in the area of electronic commerce.<sup>83</sup>

## XVI. Coordination and cooperation

### A. General

223. The Commission had before it a note by the Secretariat ([A/CN.9/978](#)) providing information on the activities of international organizations active in the field of international trade law in which the Secretariat had participated since the last note to the Commission ([A/CN.9/948](#)). The Commission was informed that the increased volume of international and regional legal harmonization efforts over the years had made it increasingly difficult and resource intensive for the Secretariat to prepare either general surveys of the activities of other international organizations related to international trade law or in-depth reports on the activities of organizations on specific international trade law topics. For this reason, since 2006 the Secretariat had focused only on preparing a note on activities of international organizations in which the Secretariat had participated. Because of the rapid development of new areas of work of relevance for the Commission, however, it may be desirable to reconsider such an approach. The Secretariat thus informed the Commission that, resources permitting, it would examine the feasibility of preparing a periodic overview of

<sup>82</sup> For an earlier report on this project by the Secretariat to the Commission, see *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 176–177.

<sup>83</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 112–114.

international activities on international trade law with a view to assisting the Commission in ascertaining the state of harmonization of the law of international trade and planning its future work.

224. The Commission took note with satisfaction of the continuing coordination with the Hague Conference on Private International Law and Unidroit, and the progress on the preparation of the joint guidance document on commercial contract law (with a focus on sales) that would be submitted to the Commission at its fifty-third session, in 2020, (see para. 222 above). The Commission also noted with appreciation the coordination of the Secretariat with the World Bank, which was working in parallel with UNCITRAL on a standard that would address the insolvency of micro and small enterprises (see para. 178 above). The importance of achieving the alignment of future UNCITRAL and World Bank texts on that matter was highlighted. The Commission recalled that, earlier in the session, it had been reminded of the ICR Standard, which was designed as a broad-spectrum assessment tool to assist countries in their efforts to evaluate and improve insolvency and creditor/debtor regimes (see para. 183 above). The Commission considered it important to include the latest instruments of UNCITRAL in the area of insolvency law (on recognition and enforcement of insolvency-related judgments, enterprise group insolvency and obligations of directors of enterprise group companies) and any future instrument on the insolvency of micro and small enterprises in the ICR Standard. Furthermore, the Commission stressed the need for a closer coordination of its secretariat with ECE and EBRD in the area of public-private partnerships with a view to enhancing consistency among forthcoming texts (see para. 19 above).

225. The Commission expressed its satisfaction with the Secretariat's engagement with other organizations and entities both within and outside the United Nations system, including the International Centre for Settlement of Investment Disputes, the Organization for Economic Cooperation and Development, OIF, OAS, the United Nations Conference on Trade and Development and the World Trade Organization.

226. The Commission noted that, as in previous years, the coordination work of the Secretariat included the provision of comments on documents drafted by those organizations and participation in various meetings (e.g., working groups, expert groups and plenary meetings) and conferences and the preparation of joint papers with the purpose of sharing information and expertise and avoiding duplication of work in the resultant work products.

227. Finally, the Commission observed that the effectiveness of the Secretariat's coordination efforts was severely limited by the human and financial resources available to it and that the success of such efforts also depended on the willingness of the other organizations to ensure a coordinated outcome. Reiterating the importance of UNCITRAL coordination work, the Commission supported the Secretariat's appeal for closer coordination with those UNCITRAL member States that are also active in other international organizations, which would greatly enhance the Secretariat's coordination efforts.

## **B. Reports of other international organizations**

228. The Commission took note of the statements made on behalf of international and regional organizations invited to the session that focused on activities of relevance to UNCITRAL.



## 1. Unidroit

229. The Secretary-General of Unidroit reported on the developments concerning several Unidroit texts and activities. In particular, the Commission was informed about the following:

(a) The international registry under the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft continued to attract an increasing number of registered transactions (1 million);

(b) The Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock was expected to soon enter into force following ratification by Sweden, with four more States expected to accede in the near future;

(c) Unidroit was making progress on preparations for a diplomatic conference in Pretoria, to be held in November 2019, that would consider and possibly adopt the fourth protocol to the Convention on International Interests in Mobile Equipment, on matters specific to mining, agricultural and construction equipment;

(d) The working group that was preparing a draft Unidroit-FAO-IFAD legal guide on agricultural land investment contracts had agreed to make the zero draft of the guide available for open consultations as part of its elaboration process (see [www.unidroit.org/work-in-progress/agricultural-land-investment/online-consultation](http://www.unidroit.org/work-in-progress/agricultural-land-investment/online-consultation));

(e) Unidroit was continuing to work with the European Law Institute to adapt the American Law Institute/Unidroit Principles of Transnational Civil Procedure with a view to drafting Europe-specific regional rules;

(f) The project on the preparation of the principles of reinsurance contract law was making progress. The project, which was included in the Unidroit work programme for the period 2017–2019, was aimed at formulating a restatement of global reinsurance law, which is usually embedded in international custom and usage but seldom in legislation;

(g) Unidroit was assessing the feasibility of a new project focusing on developing standards and best practices for the effective enforcement of contracts and security rights. The project would address both in-court and out-of-court procedures, as well as the different institutions and professionals involved, and would examine the challenges that creditors and debtors face during the enforcement process and the tools for overcoming those obstacles.

## 2. Permanent Court of Arbitration

230. The representative of PCA made a statement providing a summary of the work of PCA in the period 2018–2019, including an update on the Court's provision of registry support in a number of different arbitration and conciliation proceedings, and in particular on its experience with the operation of the UNCITRAL Arbitration Rules. PCA had also provided technical contributions to the discussions in UNCITRAL Working Groups II, on expedited arbitration, and III, on investor-State dispute settlement reform. Such contributions included information on costs and appointment and the challenges faced by arbitrators.

## 3. World Bank

231. The representative of the World Bank emphasized the importance of cooperation between UNCITRAL and the World Bank on the insolvency of micro and small enterprises in the light of the ICR Standard (see para. 224 above). The representative of the World Bank also emphasized the importance of the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency in the context of World Bank technical assistance activities. The representative of the World Bank also informed the Commission that both texts were used by States as the basis for law reform in the area of insolvency law. In that regard,

the Commission took note with appreciation of likely upcoming enactments of the Model Law in various States.

232. The representative of the World Bank also recalled the ongoing cooperation between the UNCITRAL secretariat and the World Bank in respect to the Multinational Judicial Colloquium on Insolvency. A proposal to deliver judicial training not only to insolvency judges was noted.

#### 4. Hong Kong Mediation Centre

233. The representative of the Hong Kong Mediation Centre informed UNCITRAL about the activities of the Centre, highlighting in particular those relating to the promotion of the Singapore Convention on Mediation and the organization of conferences on alternative dispute resolution. The coordinating role of the Centre in relation to the digital economy was also highlighted. Finally, the representative emphasized the importance of coordination and cooperation among international organizations.

#### 5. Organization of American States

234. The delegate of Paraguay expressed appreciation for the significant contribution by the UNCITRAL secretariat to the OAS project on drafting a guide on the law applicable to the international sale of goods, and explained that the OAS General Assembly would soon consider the draft text. A suggestion that UNCITRAL could endorse the guide, as it had done with texts emanating from the work of Unidroit and the Hague Conference on Private International Law, was made.

235. The delegate of Paraguay also informed the Commission about developments in Paraguay, noting that draft laws on securities and insolvency that drew on the work of UNCITRAL had been prepared.

### C. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups

236. The Commission recalled that, at its forty-fourth to fiftieth sessions, it had heard oral reports by the Secretariat about intergovernmental and non-governmental organizations invited to sessions of UNCITRAL.<sup>84</sup> At its forty-eighth session, in 2015, it had requested the Secretariat, when presenting its oral report on the topic of organizations invited to sessions of UNCITRAL, to provide comments on the manner in which invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite such organizations.<sup>85</sup> At its forty-ninth session, in 2016, the Commission welcomed the detailed and informative report presented by the Secretariat pursuant to that request.<sup>86</sup> At its fiftieth session, in 2017, the Commission requested the Secretariat to provide information about intergovernmental and non-governmental organizations invited to sessions of UNCITRAL in writing for future sessions.<sup>87</sup>

237. The Commission had before it a note submitted pursuant to that request (A/CN.9/984). The note presented information about the newly invited intergovernmental and non-governmental organizations, and the non-governmental organizations whose applications had been declined in the period since the start of the

<sup>84</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 288–298; *ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 174–178; *ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 257–261; *ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, paras. 205–207; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 279–281; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 286–290; and *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 360–364.

<sup>85</sup> *Ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, para. 280.

<sup>86</sup> *Ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, para. 290.

<sup>87</sup> *Ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 364.

fifty-first session of UNCITRAL until 24 May 2019. The Commission took note of a separate list of additional non-governmental organizations invited only to sessions of Working Group III while it was working on issues of investor-State dispute settlement reform.

238. As regards the request by the China Council for the Promotion of International Trade to be moved to the general list of non-governmental organizations invited to sessions of UNCITRAL and its working groups, the Commission granted that request.

## **XVII. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts**

239. The Commission considered the note by the Secretariat on promotion of awareness, understanding and use of UNCITRAL texts ([A/CN.9/976](#)). The Commission also heard a report on the meeting of national correspondents of the Case Law on UNCITRAL Texts (CLOUT) system, held in Vienna on 15 July 2019.

240. The Commission expressed its appreciation for the value of CLOUT, including the digests, in promoting the uniform interpretation of UNCITRAL texts. The Commission welcomed the Secretariat's proposals for enhancing CLOUT and creating a CLOUT community and noted that an enhanced and more effective CLOUT could significantly contribute to the delivery of continued and sustained capacity-building efforts, which were in high demand, as recently highlighted by an evaluation of the Office of Legal Affairs carried out by the Office of Internal Oversight Services ([E/AC.51/2019/9](#), para. 39).

241. It was also noted that CLOUT was an important tool for collecting information on the use and implementation of UNCITRAL texts and that such information was also useful for identifying needs for future legislative work.

242. The Commission took note of the gap between the number of case abstracts originating from jurisdictions located in the Western European and other States regional group and those originating from other regions. Similarly, the Commission noted that most CLOUT cases related to the application and interpretation of UNCITRAL texts on arbitration and the international sale of goods, while other areas of the work of UNCITRAL were underrepresented. The Commission also noted that, in the period under review, national correspondents had provided approximately half of the abstracts published in CLOUT and that the remainder had been prepared by voluntary contributors or by the Secretariat. It was suggested that the appointment of academics as national correspondents could significantly assist in the timely preparation of CLOUT abstracts.

243. It was noted that rejuvenating and expanding the CLOUT network was desirable, as that would give new impulse to the compilation of case law and the preparation of abstracts, as well as to the dissemination of related information. In particular, it was added, such expansion could assist in collecting information from all regions and relating to all UNCITRAL areas of work. It was indicated that the proposed establishment of a steering committee and a CLOUT network of partners ([A/CN.9/976](#), paras. 35–47) would constitute an important element of the revived CLOUT community. Such a committee, it was said, could contribute to managing CLOUT by providing advice on specific matters and establishing a closer connection between States and CLOUT. It was suggested that electronic exchanges among members of the CLOUT community should be encouraged.

244. It was indicated that the functions of the proposed steering committee could include the following: suggesting improvements for the dissemination of CLOUT information, such as editorial and technical solutions, including those based on user feedback; reporting on other case law databases and sources of information relevant to CLOUT and facilitating access to those sources; coordinating CLOUT-related activities, including by facilitating contact with local partners and donors; and suggesting, planning and carrying out activities at the national and regional levels. It

was further indicated that the steering committee could be useful in promoting the establishment of a network of CLOUT partners. With respect to financial implications, it was explained that the members of the steering committee could meet remotely or in person on the occasion of the meetings of national correspondents and therefore at no additional cost. After discussion, the Commission agreed to establish a CLOUT steering committee comprising one representative appointed by each State and encouraged States to appoint representatives.

245. With regard to the proposal to establish CLOUT partnerships, it was indicated that entities such as universities and research institutes, judicial bodies and other organizations with a special interest in one or more areas of the work of UNCITRAL should be eligible to become CLOUT partners and that the establishment of a partnership would take into account the ability of the entity to contribute to CLOUT, as well as the different needs of each work area.

246. It was suggested that CLOUT partners would monitor and report on case law and undertake promotional activities such as organizing conferences, workshops and similar events on UNCITRAL texts; making materials such as explanatory reports and travaux préparatoires available, especially in local languages; contributing to the bibliography of writings related to the work of UNCITRAL; reporting on legislation and administrative decisions relevant to the application and interpretation of UNCITRAL texts; creating and maintaining databases complementary to CLOUT; publishing books and articles in journals; and maintaining a presence on the Internet and on social media.

247. After discussion, the Commission requested the Secretariat to establish CLOUT partnerships to pursue the activities indicated above (para. 246), within available resources, in line with relevant rules and regulations and taking into account the ability of the entity to contribute to CLOUT, as well as the different needs of each work area.

248. With respect to dissemination of information, it was noted that the current electronic database supporting CLOUT had several limitations with respect to the search and retrievability of cases. It was also noted that multilingualism and free access were fundamental CLOUT features to be preserved.

249. It was recalled that a lack of human and financial resources had prevented improvements to the database, including its migration to the new UNCITRAL website, and that some technical issues were shared with the transparency repository (see paras. 290–292 below). The Commission requested the Secretariat to renew its efforts to find a sustainable solution for the electronic dissemination of CLOUT, including in cooperation with partners.

250. It was indicated that the draft digest on the UNCITRAL Model Law on Cross-Border Insolvency would be finalized in cooperation with interested organizations and academic institutions. Organizations and institutions invited to attend the sessions of UNCITRAL and its Working Group V (Insolvency Law) were invited to express their interest in contributing to the review of the draft digest to the Commission or the Secretariat. In response, the International Federation of Insolvency Professionals had expressed to the Secretariat its interest in contributing to the review of the draft digest. The Commission noted with appreciation that expression of interest.

251. It was noted that activities aimed at judicial capacity-building were instrumental in facilitating the harmonious interpretation and application of UNCITRAL texts. The Commission invited the Secretariat to intensify its capacity-building activities in support of the judiciary, including by making use of the CLOUT tools, and to report to future sessions on those activities.

252. The Commission took note with satisfaction of the performance of the website [www.newyorkconvention1958.org](http://www.newyorkconvention1958.org), and the successful coordination between that website and CLOUT.

## XVIII. Technical assistance to law reform

### A. General

253. The Commission had before it a note by the Secretariat ([A/CN.9/980/Rev.1](#)) on technical cooperation and assistance activities undertaken in the period since the last report to the Commission in 2018 ([A/CN.9/958/Rev.1](#)).

254. The Commission recalled that the technical assistance and cooperation activities of the Secretariat included: (a) raising awareness and promoting the effective understanding of UNCITRAL texts to allow States to enact them effectively; (b) providing advice and assistance in drafting laws and regulations enacting UNCITRAL texts, including through gap analyses and other diagnostic tools; and (c) building capacity in the adoption, use and interpretation of UNCITRAL texts. The Commission recognized that the effective adoption, use and interpretation of UNCITRAL texts were integral elements of harmonizing international trade law in practice.

#### 1. Strategic approach to enhancing the technical assistance activities of UNCITRAL

255. The Commission welcomed the Secretariat's renewed emphasis on effectiveness in the planning, budgeting, authorization and delivery of UNCITRAL technical cooperation and assistance activities, and the strategically-based prioritization and evaluation of those activities. It also expressed its appreciation to the Secretariat for its prompt implementation of the recommendations regarding technical assistance activities made in the recent evaluation of the Office of Legal Affairs.<sup>88</sup>

256. The Commission encouraged the Secretariat to continue the development of methods to support the enhanced organization, coordination and delivery of technical cooperation and assistance activities.

257. The Commission noted that the continuing ability to respond to requests from States and regional organizations for these activities was dependent upon the availability of funds to meet associated costs. The Commission also noted that the Secretariat had sought to maximize its available resources for technical cooperation and assistance activities through: (a) a strategic approach to the delivery of such activities, reflecting the priorities assigned to subject areas and activities; (b) strategically-directed cooperation and partnerships with international organizations, regional offices and bilateral assistance providers, in line with the Commission's suggestions made in previous years; (c) seeking to secure additional voluntary contributions to UNCITRAL trust funds (see also paras. 259–262 below); and (d) delivery on a cost-share or no-cost basis where appropriate. The Commission also took note of the relevant activities set out in the note by the Secretariat ([A/CN.9/980/Rev.1](#)), and recalled the need for the Secretariat to remain neutral and independent in partnering in the delivery of technical assistance and related activities.<sup>89</sup>

258. The Commission further noted that very limited funds remained in the UNCITRAL trust funds. The Commission reiterated its earlier requests to the Secretariat to explore sources of extrabudgetary funding.<sup>90</sup>

<sup>88</sup> Report of the Office of Internal Oversight Services on evaluation of the Office of Legal Affairs (E/AC.51/2019/9).

<sup>89</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 188.

<sup>90</sup> *Ibid.*, paras. 188–189.

## 2. Voluntary contributions to UNCITRAL trust funds

259. The Commission expressed its gratitude to the States and the organization that had contributed to the Trust Fund for UNCITRAL Symposia since the Commission's fifty-first session, which were the following:

- (a) The Government of the Republic of Korea (to support participation in the Asia-Pacific Economic Cooperation Ease of Doing Business project, as noted in [A/CN.9/980/Rev.1](#), paras. 49 and 78);
- (b) The Government of Indonesia;
- (c) The Commercial Finance Association Education Foundation.

260. The Commission reiterated its call upon all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL Symposia, if possible in the form of multi-year contributions or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests for technical cooperation and assistance activities.

261. With respect to the Trust Fund for Granting Travel Assistance to Developing States Members of UNCITRAL, the Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make contributions to the Trust Fund. The Commission also expressed its appreciation to the Government of Austria for its contribution.

262. The Commission recalled that, earlier in the current session it had noted that the European Union, SDC and GIZ had made resources available to provide financial support for the participation of developing countries in Working Group III (Investor-State Dispute Settlement Reform) (see para. 165 above). While that funding was directed to UNCITRAL legislative activities, participation in the working group sessions supported the development of capacity among the participating developing countries to participate more effectively in UNCITRAL legislative development work. The funds were used to facilitate participation at the thirty-fifth session of Working Group III (New York, 23–27 April 2018) for delegates from El Salvador and Sri Lanka, at the thirty-sixth session (Vienna, 29 October–2 November 2018) for delegates from Burkina Faso, the Democratic Republic of the Congo, Gabon, Madagascar, Mali, Mauritania, Myanmar, Namibia, Senegal and Togo, and at the thirty-seventh session (New York, 1–5 April 2019) for delegates from Argentina, Bolivia (Plurinational State of), Burkina Faso, Colombia, Costa Rica, the Democratic Republic of the Congo, Ecuador, Gabon, Guinea, Kenya, Mali and Senegal.<sup>91</sup>

## 3. Round table on technical assistance activities

263. The Commission commended the Secretariat for having organized a round table on technical assistance at the Commission's 1107th meeting, on Friday, 19 July. The round table brought together States and international and regional organizations and experts active in international commercial law reform and in development assistance, to discuss the following topics:

- (a) Use of the UNCITRAL Model Law on Cross-Border Insolvency in India, and in the current activities of the World Bank;
- (b) Relevance of UNCITRAL instruments for the inclusive development of electronic commerce in francophone areas, from the perspectives of OIF and an expert from the region covered by OHADA, on the current legal framework for businesses in the digital economy and on the needs in the field in terms of modernization of legislation and technical assistance;

<sup>91</sup> The Commission may wish to note that the agreement between the United Nations and the European Union provides for funds to travel to the sessions of Working Group III regardless of whether the developing countries concerned are members of UNCITRAL.



(c) Use of the UNCITRAL Model Law on Public Procurement in Uzbekistan, in cooperation with EBRD, and the use of supporting digital tools in Ukraine;

(d) Use of the UNCITRAL Model Law on Secured Transactions in Thailand, focusing on lessons learned in coordination with domestic stakeholders and cooperation with international organizations, such as the World Bank.

264. The participants shared their experience in the use and implementation of UNCITRAL texts at the national level and the benefits, challenges and lessons learned in the process. A common theme running through the presentations made was that efficient and effective reform required flexibility and agility in implementation, political commitment and identification of potential benefits to underpin reforms, a clear understanding of markets and economic circumstances in the countries concerned, and the use of stakeholder consultations and pilots, so as to place the reforms in the appropriate country context.

265. The Commission welcomed the presentations made at the round table and the discussion that took place thereafter, which, it was said, offered valuable insights on tools and methods for enhancing the effective use and implementation of its texts. The Commission heard views on the importance of communications from stakeholders on the ground and governments in serving as a bridge between those that would benefit from reform and those directing reform. The Commission was also informed of various ways in which the Secretariat, in collaboration with relevant partners as appropriate, could support States seeking technical assistance in the use of UNCITRAL texts, and of how funding to support such activities might be found. (Examples of relevant partnerships in addition to those presented at the round table may be found in [A/CN.9/980/Rev.1](#), paras. 12–21 and 24–27.)

266. Clear lessons emerging from the round table, it was agreed, were that country ownership, together with international, regional and national cooperation, in implementing sound commercial law reform provided a key indicator of success and that those implementing reforms needed to take into account the situation on the ground in the different countries and regions. The Commission expressed its appreciation to the participants in the round table and requested the Secretariat to continue to present examples of practical experience in the use and implementation of its texts for its consideration at future sessions.

#### 4. Dissemination of information on the work and texts of UNCITRAL

267. The Commission noted the important role played by the UNCITRAL website (<https://uncitral.un.org/>) and the UNCITRAL Law Library (see also paras. 293 and 294 below). The Commission noted the migration of the UNCITRAL website to a Drupal platform. The Commission welcomed the revision and continued inclusion of a feature on the new website highlighting the role of UNCITRAL in supporting the Sustainable Development Goals.<sup>92</sup> The Commission recalled its request that the Secretariat continue to explore the development of new social media features on the UNCITRAL website as appropriate,<sup>93</sup> noting that the development of such features in accordance with the applicable guidelines was also welcomed by the General Assembly.<sup>94</sup> In that regard, the Commission noted with approval the continued use and development of the UNCITRAL LinkedIn page and the addition of the UNCITRAL Facebook page.<sup>95</sup> Finally, recalling the General Assembly resolutions in which the website's six-language interface was commended,<sup>96</sup> the Commission requested the Secretariat to continue to provide, on the website, UNCITRAL texts,

<sup>92</sup> Available at <https://uncitral.un.org/en/about/sdg>.

<sup>93</sup> *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 247.

<sup>94</sup> General Assembly resolutions 69/115, para. 21; 70/115, para. 21; 71/135, para. 23; 72/113, para. 29; and 73/197, para. 26.

<sup>95</sup> Available at [www.linkedin.com/company/uncitral](http://www.linkedin.com/company/uncitral).

<sup>96</sup> General Assembly resolutions 61/32, para. 17; 62/64, para. 16; 63/120, para. 20; 69/115, para. 21; 70/115, para. 21; 71/135, para. 23; 72/113, para. 29; and 73/197, para. 26.

publications and related information, in a timely manner and in the six official languages of the United Nations.

#### 5. Moot competitions

268. The Commission noted that, in addition to other moot competitions held in 2019, including the Willem C. Vis International Commercial Arbitration Moot, the Madrid Commercial Arbitration Moot, the Frankfurt Investment Moot and the Ian Fletcher International Insolvency Law Moot, the fifth mediation and negotiation competition, organized jointly by IBA and VIAC with the support of the Commission, was held in Vienna from 6 to 10 July 2019. The legal issues addressed by the teams had been those addressed at the Twenty-sixth Willem C. Vis International Commercial Arbitration Moot. A total of 33 teams from 13 jurisdictions had registered to participate.

#### 6. Internship programme

269. The Commission welcomed the continuation of the internship programme. Noting that the majority of applicants came from the regional group of Western Europe and Other States, and the Secretariat's difficulties in attracting candidates from African and Latin American countries, as well as candidates with fluent Arabic language skills, as reported, the Commission requested States and observer organizations to bring the possibility of an internship at UNCITRAL to the attention of interested persons and to consider granting scholarships for the purpose of attracting those most qualified for an internship at UNCITRAL. The Commission also requested the Secretariat to review whether internships of short duration might encourage more candidates from underrepresented regions to apply.

#### 7. General comments

270. The Commission noted that: (a) developing States, in particular, encountered challenges in securing sufficient human and other resources for commercial law reform, underscoring the importance of partnerships between them and various members of the donor community to enhance the delivery of technical assistance and capacity-building activities; and (b) the Secretariat reviewed national enactments of UNCITRAL texts and reported enactments that reflected or were based on those texts on its website.

271. The Commission expressed its appreciation for the work undertaken by the Secretariat in its technical cooperation and capacity-building activities. The Commission also expressed its appreciation for the efforts of the Secretariat to enhance the delivery and effectiveness of those activities.

### B. UNCITRAL presence in the Asia and Pacific region

272. The Commission had before it a note by the Secretariat on the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific ([A/CN.9/988](#)) in the period since the last such report to the Commission, in 2018 ([A/CN.9/947](#)).

273. The Commission commended the tangible progress made as a result of the regional activities of the Secretariat, through its Regional Centre, in the levels of awareness, adoption and implementation of harmonized and modern international trade law standards elaborated by UNCITRAL. Examples of that progress included the accession by Papua New Guinea to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention);<sup>97</sup> the accession by the Democratic People's Republic of Korea to the United Nations Convention on Contracts for the International Sale of Goods (the United Nations Sales Convention)<sup>98</sup>; and reforms based on the advice given to Thailand on the UNCITRAL

<sup>97</sup> United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

<sup>98</sup> *Ibid.*, vol. 1489, No. 25567, p. 3.



Model Law on Secured Transactions. (For other treaty-related actions and enactments, see chapter XIX below.) The Commission also highlighted the impact of the Regional Centre in mobilizing contributions to the work of UNCITRAL from the Asia-Pacific region.

274. The Commission noted that the Regional Centre was staffed with one professional, one programme assistant, one team assistant and two legal experts, and that its core project budget allowed for the occasional employment of experts and consultants. During the reporting period, the Regional Centre had received 14 interns. The Commission also noted that the Regional Centre relied fully on the annual financial contribution from the Incheon Metropolitan City to the Trust Fund for UNCITRAL Symposia to meet the cost of its operations and programmes (\$500,000 annually from 2011 to 2016 and \$450,000 annually from 2017) and expressed its gratitude to the city of Incheon. The Commission further expressed its gratitude to the Ministry of Justice of the Republic of Korea and to the Government of the Hong Kong Special Administrative Region of China for the extension of their contribution of two legal experts on non-reimbursable loans.

275. The Commission commended the Regional Centre for having continued to deliver flagship activities during the reporting period, namely the fourth edition of the UNCITRAL Trade Law Forum (Incheon, 10–12 September 2018), which had included the first intersessional regional meeting on investor-State dispute settlement reform, the seventh edition of the Asia-Pacific Alternative Dispute Resolution (ADR) Conference (Seoul, 5–6 November 2018) and the fifth edition of the UNCITRAL Asia-Pacific Day. Regarding the latter, the Commission welcomed the events held by various universities in the region during the last quarter of 2018 which, as in previous years, had proved highly successful in supporting the activities and objectives of the Regional Centre,<sup>99</sup> and heard that Chulalongkorn University of Thailand would be among those collaborating in the delivery of the 2019 edition of the Asia-Pacific Day.

276. The Commission noted with appreciation the additional events and public, private and civil society initiatives that the Regional Centre had organized or supported through Secretariat participation, and the technical assistance and capacity-building services provided to States, international and regional organizations and development banks in the region.

277. It also expressed strong support for the Regional Centre's continued coordination and cooperation efforts with regional stakeholders, development banks and other institutions active in trade law reform, and with United Nations funds, programmes and specialized agencies active in the region.

278. The Commission welcomed a statement from the Republic of Korea explaining that it was engaged in a process to continue and expand its financial support to the Regional Centre, and encouraged the Secretariat to continue to seek cooperation, including through formal agreements, to ensure coordination and funding for the technical assistance and capacity-building activities of the Regional Centre. It reiterated its call upon all States, international organizations and other interested entities to consider cooperating with the Republic of Korea in supporting the Regional Centre, and to consider making contributions to the UNCITRAL trust funds to enable the continued delivery of its activities.

### C. UNCITRAL presence in other regions

279. The Commission heard an oral report on the development of two proposals to establish a regional presence in other parts of the world. In view of the successful activities of the Regional Centre for Asia and the Pacific since 2012 and the Commission's reiterated statements on the importance of a regional presence for the

<sup>99</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 197.

promotion of UNCITRAL texts, the Secretariat had explored various options to establish a presence in other regions.

280. The Commission recalled a proposal by the Government of Cameroon to establish a regional centre for Africa<sup>100</sup> and a proposal by the Bahrain Chamber of Dispute Resolution in cooperation with the Government of Bahrain to establish a regional centre for the Middle East and North Africa. It was also recalled that the Commission had requested the Secretariat to keep it informed of developments, including the funding and budget situations.<sup>101</sup>

281. The Commission recalled that it had been informed by the delegate of Cameroon at its fifty-first session that the Government of Cameroon had continued to examine the financial implications and the feasibility of establishing a UNCITRAL regional centre in the country.<sup>102</sup>

282. The Commission was further informed that the Secretariat had conducted a mission to assess the desirability, feasibility and sustainability of establishing a regional centre for the Middle East and North Africa. It was mentioned that the assessment had been conducted to evaluate the resources needed by the Secretariat to establish and supervise the activities of such a regional presence, bearing in mind the impact that such a project could have on the Secretariat's ability to discharge its core responsibility of servicing the Commission and its working groups. The Commission recalled that, in 2018, it had encouraged the Secretariat to continue its consultations, and to consider carefully the level of Secretariat resources needed for the efficient management of any new regional centre and for ensuring adequate supervision by, and coordination with, Vienna-based staff.<sup>103</sup>

283. The Commission further recalled that its approval of the establishment of the Regional Centre had been based on the key understanding that the activities concerned should not displace Secretariat support for its legislative activities. Therefore, the establishment of a regional presence would have to rely entirely on extrabudgetary resources and not entail a burden on the already limited resources of the Secretariat,<sup>104</sup> and the benefits arising from the establishment of a regional centre should outweigh any related costs associated with the time spent by the Secretariat staff on such activities.

284. The Commission was informed that the establishment of additional regional centres and the monitoring of their operation, including the recruitment and training of project personnel, the coordination of activities and various administrative aspects, required the substantial involvement of the Secretariat staff in Vienna, the number of which had not increased in recent years. It was also mentioned that the number of projects that the Commission had requested to be handled by the Secretariat had increased recently. It was further noted that another element to be considered was the possible overlap with the activities of the existing Regional Centre, which covered part of the Middle East region. The Commission was informed that, in the light of all such considerations, the conclusions reached by the Secretariat, in consultation with the Office of Legal Affairs, were that: (a) the resources required for the Secretariat to establish and monitor a regional centre in the Middle East would be likely to outweigh the benefit derived from it, in particular in a period of budgetary constraints; and (b) relevant capacity-building activities for States in that region could effectively be handled by the Secretariat from Vienna, with the support of the Regional Centre for Asia and the Pacific.

<sup>100</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 292–293.

<sup>101</sup> *Ibid.*, paras. 295–296.

<sup>102</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 200.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 265.

285. The Commission took note of and concurred with the assessment by the Secretariat. It further encouraged the Secretariat, in its consultations with governments and other partners, to increase or enhance technical assistance and capacity-building, and to carefully consider the level of Secretariat resources and other costs needed to maintain a regional balance.

## **XIX. Status and promotion of UNCITRAL legal texts**

### **A. General discussion**

286. The Commission considered the status of the conventions and model laws emanating from its work and the status of the 1958 New York Convention, on the basis of a note by the Secretariat (A/CN.9/979). The Commission noted with appreciation the information on treaty actions and legislative enactments received since its fifty-first session.

287. The Commission also noted that following the submission of the Secretariat's note, Liechtenstein acceded to the United Nations Sales Convention (91 States parties).

288. The Commission was informed that the Secretariat, in the framework of its technical assistance activities, was planning a series of initiatives and events to celebrate the fortieth anniversary of the adoption of the United Nations Sales Convention, in 2020. It was explained that those activities and events pursued two main objectives: to encourage broader State participation, including by aiming at reaching 100 States parties to that Convention; and to support capacity-building on the use and uniform interpretation of the Convention and of related UNCITRAL texts, including by using the tools prepared in the framework of the renewed CLOUT system (see chapter XVII above). It was added that those activities and events would also enable the assessment of the operation of the United Nations Sales Convention and of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005)<sup>105</sup> vis-à-vis certain legal issues relating to the digital economy such as the use of smart contracts and artificial intelligence. It was indicated that two major events were planned to be held in Vienna and Hong Kong before the annual Willem C. Vis International Commercial Arbitration Moot and the Willem C. Vis (East) International Commercial Arbitration Moot competitions, respectively. States and organizations were invited to express to the Secretariat their interest in contributing to the celebrations.

289. The Commission expressed appreciation to the General Assembly for the support it provided to UNCITRAL in its activities and in particular for its distinct role in furthering the dissemination of international commercial law. In particular, the Commission referred to the long-established practice of the General Assembly, upon acting on UNCITRAL texts, of recommending to States to give favourable consideration to UNCITRAL texts and requesting the Secretary-General to publish UNCITRAL texts, including electronically, in the six official languages of the United Nations, and to take other measures to disseminate UNCITRAL texts as broadly as possible to Governments and all other relevant stakeholders.

### **B. Functioning of the transparency repository**

290. The Commission recalled that the repository of published information under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, adopted at its forty-sixth session in 2013, had been established under article 8 of the

<sup>105</sup> General Assembly resolution 60/21, annex.

Rules on Transparency. The Commission also recalled reports on the transparency repository that had been provided at its previous sessions.<sup>106</sup>

291. The Commission also recalled the note from the current session which provided an update on the Rules on Transparency and the transparency repository ([A/CN.9/979](#)).

292. The Commission welcomed the report on the transparency repository and expressed its support for continued operation of the repository as a key mechanism for promoting transparency in investor-State arbitration.

### C. Bibliography of recent writings related to the work of UNCITRAL

293. The Commission recalled that the UNCITRAL Law Library specialized in international commercial law and its collection featured important titles and online resources in that field in the six United Nations official languages. The Commission took note that, in 2018, library staff had responded to approximately 460 reference requests, originating from over 40 countries, and hosted researchers from over 30 countries.

294. Considering the broader impact of UNCITRAL's texts, the Commission took note of the bibliography of recent writings related to the work of UNCITRAL ([A/CN.9/977](#)) and the influence of UNCITRAL legislative guides, practice guides and contractual texts as described in academic and professional literature. The Commission noted the importance of facilitating a comprehensive approach to the creation of the bibliography and the need to remain informed of activities of non-governmental organizations active in the field of international trade law. In that regard, the Commission recalled and repeated its request that non-governmental organizations invited to the Commission's annual session donate copies of their journals, reports and other publications to the UNCITRAL Law Library for review.<sup>107</sup> The Commission expressed appreciation to all non-governmental organizations that donated materials.

## XX. Current role of UNCITRAL in promoting the rule of law

### A. Introduction

295. The Commission recalled that the item had been on the agenda of the Commission since its forty-first session, in 2008,<sup>108</sup> in response to the General Assembly's invitation to the Commission to comment, in its report to the General Assembly, on the Commission's current role in promoting the rule of law.<sup>109</sup> The Commission further recalled that, at its forty-first to fifty-first sessions, in 2008 to 2018, respectively, the Commission, in its annual reports to the General Assembly,<sup>110</sup>

<sup>106</sup> *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)*, paras. 107–110; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 152–161; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 166–173; *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 308–321; and *ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 204–208.

<sup>107</sup> *Ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, para. 264.

<sup>108</sup> For the decision of the Commission to include the item on its agenda, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part two, paras. 111–113.

<sup>109</sup> General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; 68/116, para. 14; 69/123, para. 17; 70/118, para. 20; 71/148, para. 22; 72/119, para. 25; and 73/207, para. 20.

<sup>110</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum ([A/63/17](#) and Corr.1), para. 386; *ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 413–419; *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 313–336; *ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 299–321; *ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 195–227; *ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 267–291; *ibid.*, *Sixty-ninth Session, Supplement No. 17*

transmitted comments on its role in promoting the rule of law at the national and international levels, including in the post-conflict reconstruction context.

296. The Commission also recalled that it had considered it essential to maintain a regular dialogue with the Rule of Law Coordination and Resource Group through the Rule of Law Unit and to keep abreast of progress made in the integration of the work of UNCITRAL into the United Nations joint rule-of-law-activities. The Commission recalled that, to that end, it requested the Secretariat to organize briefings by the Rule of Law Unit biennially, when sessions of the Commission were held in New York.<sup>111</sup> The Commission recalled that the briefings had consequently been held at the Commission's forty-fifth, forty-seventh, forty-ninth and fifty-first sessions, in 2012, 2014, 2016 and 2018,<sup>112</sup> respectively.

297. The Commission also recalled that, at its fifty-first session, it had considered the proposal to generate discussion within the Commission on the agenda item "Role of UNCITRAL in promoting the rule of law at the national and international levels" and to improve the way the Commission handled that agenda item. The Commission considered the possibility of broadening the discussion of its role in promoting the rule of law at the national and international levels to a discussion of the way the work of UNCITRAL relates to the 2030 Agenda for Sustainable Development and the Sustainable Development Goals, both with regard to the instruments developed by UNCITRAL and with regard to assistance to States in their achievement of the Goals. It was suggested that, in order for the Commission to achieve a more meaningful consideration of that agenda item, the Secretariat could prepare a paper outlining the way that the UNCITRAL instruments and texts relate to the Sustainable Development Goals and identifying concrete issues to be discussed by the Commission. It was further suggested that that paper could also take stock of the evolution of the agenda item relating to the rule of law over several Commission sessions and how the Commission could ensure that its work reflected the broader development agenda of the United Nations as a whole. It was further decided that a discussion would take place at the fifty-second session of the Commission, in 2019, on the basis of the report to be prepared by the Secretariat.<sup>113</sup>

298. At the current session, the Commission took note of the issues raised in the note by the Secretariat on the role of UNCITRAL in promoting the rule of law at the national and international levels (A/CN.9/985), which summarized the most recent resolutions of the General Assembly relevant to the consideration of the role of UNCITRAL in the promotion of the rule of law (chapter II), took stock of the evolution of the consideration of the agenda item in the Commission (chapter III and annex), outlined the relevance of the texts that were before the Commission for finalization and adoption at the current session to the promotion of the rule of law and the implementation of the Sustainable Development Goals (chapter IV) and suggested actions by the Commission under that agenda item at the current session (chapter V). The Commission heard a statement underscoring the role of UNCITRAL in assisting States through its instruments to promote the rule of law and implement the Sustainable Development Goals.

299. Taking note of General Assembly resolution 73/207 and responding to the invitation contained therein to continue to comment, in its report to the General

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(A/69/17), paras. 215–240; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 318–324; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 317–342; *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 435–441; and *ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 232–233.

<sup>111</sup> *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 335.

<sup>112</sup> *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 199–210; *ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, paras. 229–233; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 313–317; and *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 230–231.

<sup>113</sup> *Ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 264–267.

Assembly, on its current role in promoting the rule of law,<sup>114</sup> the Commission took into account that the upcoming debates of the Sixth Committee under the agenda item on the rule of law would focus on the subtopic “Sharing best practices and ideas to promote the respect of States for international law”. The Commission recalled its consideration of issues relevant to that subtopic at its sessions in 2009, 2010 and 2015–2018 (see [A/CN.9/985](#), annex).

300. The Commission requested States, the Secretariat, organizations and institutions to continue their efforts towards increasing awareness of the role of UNCITRAL standards and activities for the promotion of the rule of law at the national and international levels and the implementation of the Sustainable Development Goals. The Commission noted that such opportunities had in particular arisen in conjunction with the following:

(a) The High-Level Political Forum on Sustainable Development “Empowering people and ensuring inclusiveness and equality” (New York, 9–15 July 2019), which was held in parallel with the current session of the Commission and in which an in-depth review was conducted of the implementation of several Sustainable Development Goals of relevance to UNCITRAL, such as Goals 8, 10, 16 and 17;

(b) A special session of the General Assembly on challenges and measures to prevent and combat corruption and strengthen international cooperation, which would be held in the first half of 2021, with the preparatory process undertaken under the auspices of the Conference of States Parties to the United Nations Convention against Corruption.

301. The Commission reiterated its view that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General.

302. The Commission noted that the newly introduced programme budget planning and performance framework required a close alignment of the programme of each United Nations entity with the Sustainable Development Goals as the contemporary embodiment of the long-term purposes of the United Nations enshrined in the United Nations Charter. The internal oversight bodies of the United Nations system periodically evaluate United Nations entities against the implementation of the Sustainable Development Goals (the Office of Legal Affairs, including the International Trade Law Division, was the subject of such an evaluation in 2018<sup>115</sup>, as noted in paras. 240 and 255 above).

## **B. UNCITRAL comments to the General Assembly**

303. The Commission highlighted the relevance of its current work to the promotion of the rule of law and the implementation of the Sustainable Development Goals, with reference to the texts finalized and adopted at the current session. The Commission noted that the decisions adopting those texts (see paras. 71, 101, 110 and 116 above) demonstrated the interrelationship between the promotion of the rule of law in commercial relations and sustained economic development.

304. The Commission notably expressed its conviction that public-private partnerships could play an important role in improving the provision and sound management of infrastructure and public services, and support government efforts to achieve the Sustainable Development Goals, in particular goals 1, 8, 9, 10, 12, 16 and 17.

305. The Commission further recognized that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment,

<sup>114</sup> General Assembly resolution 73/207, para. 20.

<sup>115</sup> [E/AC.51/2019/9](#).



as well as fostering entrepreneurial activity and preserving employment, and that texts on enterprise group insolvency were expected to contribute to the implementation of Sustainable Development Goals 8, 10 and 17.

306. It also recognized that an efficient secured transactions regime with a publicly accessible security rights registry was likely to increase access to affordable secured credit and thus promote economic growth, sustainable development, the rule of law and financial inclusion, as well as assist in combating poverty. It was noted that the UNCITRAL Model Law on Secured Transactions enabled and facilitated the use of movable assets (e.g., inventory and receivables financing) as collateral in secured transactions. Such assets might be the main or only type of asset that some businesses, such as micro, small and medium-sized enterprises, had. The Model Law and its Practice Guide thus promoted the access of businesses, in particular micro, small and medium-sized enterprises, to financial services, including affordable credit and were expected to contribute to the implementation of Sustainable Development Goals 8, 9 and 17.

307. The Commission then considered that the notes on the main issues of cloud computing contracts were relevant to Sustainable Development Goals 8 and 9, as they might be useful for parties negotiating a cloud computing contract, as well as for customers reviewing standard terms offered by providers to determine whether those terms sufficiently addressed the customer's needs. As an online tool, the notes might reach intended users in a more effective way and were thus expected to contribute to the implementation of the aforementioned Sustainable Development Goals.

308. The Commission noted the expected contribution to sustainable development of its ongoing work on simplified incorporation for micro, small and medium-sized enterprises, expedited arbitration proceedings, investor-State dispute settlement reform, electronic commerce (identity management and trust services), the insolvency of micro and small enterprises and the judicial sale of ships.

## **XXI. Relevant General Assembly resolutions**

309. The Commission recalled that, at its fiftieth session, in 2017, it had requested the Secretariat to replace an oral report to the Commission on relevant General Assembly resolutions with a written report to be issued before the session.<sup>116</sup> Pursuant to that request, the Commission had before it at its fifty-second session a note by the Secretariat (A/CN.9/983) summarizing the content of operative paragraphs of General Assembly resolutions 73/197, on the report of UNCITRAL on the work of its fifty-first session, 73/198, on the United Nations Convention on International Settlement Agreements Resulting from Mediation, 73/199, on the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, and 73/200, on the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

310. The Commission took note of those General Assembly resolutions and noted that no resolution had been adopted on the *UNCITRAL Legislative Guide on Key Principles of a Business Registry*.

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<sup>116</sup> Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), para. 480.

## XXII. Other business

### A. Enlargement of UNCITRAL membership

311. The Commission had before it the following proposal by the Governments of Israel and Japan:

“1. On 17 December 2018, the General Assembly elected 30 members to the United Nations Commission on International Trade Law. Of the 30 members elected, 7 members from the Group of Asia-Pacific States (China, Indonesia, Japan, Malaysia, Republic of Korea, Singapore and Viet Nam) and 7 members from the Group of Western Europe and Other States (Belgium, Canada, Finland, France, Germany, Switzerland and United Kingdom) were elected by secret ballot. While it had been customary, with regard to elections for the Commission’s members, that the number of candidates nominated by regional groups corresponded to the number of seats to be filled by each group, 9 candidates were nominated by the Group of Asia-Pacific States and 8 candidates were nominated by the Group of Western Europe and Other States for the elections in 2018. As for the Group of Asia-Pacific States, 11 States initially presented their candidature for the same elections and 2 States withdrew their candidature before the elections.

“2. Corresponding to the increasing interdependence of the global economy, the role played by the Commission has become increasingly important. The most recent activities of the Commission include those aimed at establishing or improving legal frameworks designed for, inter alia, further enhancing the digital economy, reforming the investor-State dispute settlement system, which is an essential mechanism to secure foreign investments, reducing obstacles faced by micro, small and medium-sized enterprises, and assisting in the recovery of value from troubled businesses through international insolvency processes. It should be underlined that the Commission’s work is important not only to facilitating international trade and investment but also to achieving peace, security and good governance.

“3. While we highly value the Commission’s practice of inviting non-member States to participate in the meetings and reaching decisions by consensus without a formal vote, we think this practice should not diminish the significance for States of obtaining membership as they commit to the work of the Commission. On the basis of the understanding that a member State will be better placed than a non-member State to mobilize resources for the purpose of preparing for and engaging in the Commission’s discussions, it is broadly acknowledged that a member State will be more likely than a non-member State to be represented at meetings of the Commission and its working groups. Given that active participation in the Commission’s meetings, where best practices and experience are shared, serves to develop the capacity of States to address those novel issues arising from a rapidly changing economy, it is essential to achieve broader participation in meetings of the Commission and its working groups to further the effectiveness of the Commission.

“4. It would be a fair assessment to state that the 2018 elections clearly demonstrated the increased willingness of Member States to contribute to the work of the Commission as members. Thus, it is our view that, for the reasons outlined above, the Commission has legitimate grounds to recommend to the General Assembly to consider increasing the membership of the Commission.

“5. On 19 November 2002, the General Assembly adopted resolution [57/20](#), in which it increased the membership of the Commission from 36 to 60 States. Prior to the adoption of that resolution, the Commission, at its thirty-fourth session, held June and July 2001, recommended that the General Assembly approve an increase in the membership of the Commission from 36 to 72 States. The General Assembly, however, fell short of increasing the membership to



72 States, taking into account concerns expressed, such as that doubling the number might be excessive. We nevertheless think that, at present, such concerns basically do not apply. In the light of the above-mentioned necessity to increase the Commission's membership, and on the basis of the Commission's recommendation at its thirty-fourth session, we suggest that the Commission reiterate its recommendation to the General Assembly to increase the membership of the Commission to 72 States.

"6. The Commission was informed in advance of the adoption of the recommendation at its thirty-fourth session that the increase in membership of the Commission from 36 to 72 States would not entail financial implications. As such, we are convinced that the current proposal to increase the membership of the Commission to 72 States, when adopted by the General Assembly, will have no financial implications and ask the Secretariat for confirmation.

"7. We submit the following draft recommendation for consideration by the Commission:

*'The United Nations Commission on International Trade Law,*

*'Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Assembly established the Commission and its mandate of furthering the progressive harmonization and unification of the law of international trade and pursuant to which the Commission is to bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade,

*'Recalling also* General Assembly resolution 57/20 of 19 November 2002, by which it increased the membership of the Commission from 36 to 60 States,

*'Being satisfied* with the practice of inviting States not members of the Commission and relevant intergovernmental and international non-governmental organizations to participate as observers in sessions of the Commission and its working groups and to take part in the formulation of texts by the Commission, as well as with the practice of reaching decisions by consensus without a formal vote,

*'Observing* that the considerable number of States that have participated as observers and made valuable contributions to the work of the Commission indicates that there exists an interest in active participation in the Commission beyond the current 60 States that are members of the Commission,

*'Convinced* that wider participation of States in the work of the Commission would further the progress of its work and that an increase in the membership of the Commission would further stimulate interest in its work,

*'Being informed* that the impact of an increase in membership of the Commission on the secretariat services required to facilitate the work of the Commission would not be material enough to quantify and that therefore the increase would have no financial implications,

*'Recalling* its recommendation adopted at the meeting on 11 July 2001 during the thirty-fourth session of the Commission, aimed at increasing the membership of the Commission from 36 to 72 States,

*'Recommends* that the General Assembly approve an increase in the membership of the Commission from the current 60 States to 72.'"

312. Broad support was expressed for the idea of enlarging the membership of UNCITRAL. The importance of the principle of equitable geographical distribution of seats in UNCITRAL was underscored. Membership enlargement, it was said, could be a means of increasing the visibility of UNCITRAL, awareness about its work, acceptance of its texts and mobilization of commercial law expertise. Membership enlargement was also seen as an opportunity to address geographical distribution

issues, the underrepresentation of certain regions and the lack of active participation by developing countries in UNCITRAL.

313. Some delegations questioned the need for enlargement and expressed concerns that enlargement might produce a negative impact on the effectiveness and efficiency of the Commission and therefore suggested to hold further discussions on those issues. Other delegations were of the view that enlargement of membership would not necessarily lead to active participation by regions or groups of countries underrepresented in the Commission. Yet other delegations supported the idea in principle but were not ready to discuss it or take a decision on it at the current session of the Commission, as there were still several questions to be considered.

314. The Commission noted many issues that remained open in relation to the proposal. For that reason, some delegations considered it premature to submit a proposal for enlargement of UNCITRAL membership to the United Nations General Assembly. Suggestions were made to hold informal consultations, including among regional groups in Vienna, with a view to developing the proposal, focusing on such issues as the reasons for the enlargement, its timing and the geographical distribution of seats. While not opposing informal consultations, some delegations were of the view that it would be more effective to discuss those issues during Commission sessions. The view was expressed that discussions at the fifty-third session of UNCITRAL could be combined with informal consultations among regional groups in New York. Another view was that informal consultations should not run indefinitely but should be time-bound and aimed at recommending a specific course of action to the Commission already in 2020, even if that course of action meant deferral to the General Assembly of decisions on the issues that the Commission would not be able to resolve in 2020.

315. The Commission encouraged its member States to consult with each other and other interested States on the proposal during the intersessional period and requested the Secretariat to facilitate those intersessional consultations.

## **B. Methods of work**

316. Appreciation was expressed to the Secretariat for having taken into account in the organization of the session-related improvements suggested by States at the fifty-first session of the Commission.<sup>117</sup> The view was expressed that the fifty-second session should serve as a model for future UNCITRAL sessions.

317. The Commission recalled the request made at its fifty-first session that email contacts for the delegations attending the Commission and the working groups be made available with a view to facilitating intersessional contacts and discussions among delegates.<sup>118</sup> The Secretariat confirmed that a list of delegates' contact information had been prepared and published on the web page of the UNCITRAL website reserved for States, which was accessible through the link "UNCITRAL: Information for Member States" at <https://uncitral.un.org/en/about>. In response, it was suggested that such information should be made more visible on and easily available from the home page of the UNCITRAL website.

318. Several delegations expressed their satisfaction with the outcome of the session, which occasionally involved decisions on issues in respect of which contrasting views had been expressed. Those delegations recalled the practice by Vienna-based organizations of taking decisions by seeking compromise through a constructive dialogue. It was considered that that spirit should continue to prevail in UNCITRAL.

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<sup>117</sup> *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 258–267.

<sup>118</sup> *Ibid.*, para. 268.

### C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

319. The Commission was informed that, as a result of changes introduced in the budgetary framework, among the expected accomplishments of the UNCITRAL secretariat, “facilitating the work of UNCITRAL” was no longer listed. The Commission recalled that the performance metric for that expected accomplishment had been the level of satisfaction of UNCITRAL with the services provided by its secretariat, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).<sup>119</sup> The Commission also recalled that the Secretariat had in the past circulated an evaluation questionnaire to elicit responses from States regarding the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat.

320. The Commission was informed that, although continuing that practice was no longer necessary in the context of the new budgetary framework, the UNCITRAL secretariat intended to continue circulating a questionnaire during the sessions of UNCITRAL for self-evaluation. At the current session, 66 responses had been received and the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat, as indicated in those responses, remained high (53 respondents gave 5 out of 5, 12 respondents gave 4 out of 5 and 1 respondent gave 3 out of 5).

321. The Commission expressed appreciation to the Secretariat for its work in servicing UNCITRAL. It was also noted that States, in their statements to the Sixth Committee of the General Assembly on the report of the Commission, often included their views on the work of the UNCITRAL secretariat in servicing the Commission. It was noted that such statements should also be considered the essential source of States’ feedback about the UNCITRAL secretariat’s performance.

### XXIII. Date and place of future meetings

322. The Commission recalled that, at its thirty-sixth session, in 2003, it had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group, provided that such arrangement would not result in an increase in the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in an increase in the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.<sup>120</sup>

323. At the current session, the Commission reached the understanding that extra time for conference services, if required, could also be allocated to working groups from the unused time of the Commission session. The Commission noted that, as a result of the shortening of the fifty-second session of the Commission by one week, five days of unused conference services had become available for use by working groups or other needs of the Commission.

324. The Commission recalled that it had before it a request from Working Group III (Investor-State Dispute Settlement Reform) that the Commission consider allocating an additional week of conference time available in 2019 to the Working Group in the light of the anticipated workload (see para. 163 above). The Commission also recalled that Working Group III had further requested that, if and when additional conference time were to become available in the future, the Commission at that point would consider allocating that time to the Working Group (A/CN.9/970, para. 86).

<sup>119</sup> A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

<sup>120</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.

325. The Commission confirmed its understanding that requests by working groups for additional time for conference services would be considered by the Commission on a case-by-case basis, taking into account the needs of the requesting working group, the needs of other working groups and the other needs of the Commission at the given time, and taking into account the views of all member States of UNCITRAL. The Commission was also of the understanding that the request from a working group should not by itself be treated as a sufficient ground for granting the request; in each case, the request had to be properly substantiated.

326. Different views were expressed on the desirability of allocating an additional week to Working Group III before the fifty-third session of the Commission. Different views were also expressed on the question of, if the time were to be allocated, whether it should be allocated in 2019 or in 2020 and whether a two-week session or two one-week sessions with some time in between should be held.

327. The Commission reiterated its practice of taking decisions by consensus. After discussion, agreement emerged that Working Group III would hold three sessions before the fifty-third session of UNCITRAL: one session in October 2019 in Vienna, one session in January or February 2020 in Vienna and one session in April 2020 in New York, on the understanding that that would not set a precedent for the meeting pattern of Working Group III (Investor-State Dispute Settlement Reform) or any other UNCITRAL working group.

328. One delegation declared that would support that agreement on the condition that (in addition to the understanding that had been reflected in para. 325 and the first sentence of para. 327 above): (a) States and all UNCITRAL working groups should be informed about the availability of extra time well in advance; and that (b) only three sessions of Working Group III should be held in 2020.

329. After discussion, the Commission agreed that all working groups would meet for two one-week sessions before its fifty-third session, in 2020, except for Working Group III (Investor-State Dispute Settlement Reform), which would meet for an additional session in January or February 2020 in Vienna (see the table in section B.1 below). The Commission requested the Secretariat to organize the additional session of Working Group III in January or February 2020 within the existing resources, with the understanding that that could be achieved if the timelines for the submission and processing of documentation, as well as the dates of the meeting, were determined in consultation between the UNCITRAL secretariat and the Department for General Assembly and Conference Management. The Commission requested the Secretariat, in identifying appropriate dates for the additional session of the Working Group, to ensure that those dates did not coincide with the dates of the session of Working Group II in February 2020.

330. The Commission further recalled that, at its fiftieth session, in 2017, it had taken note of General Assembly resolutions on the pattern of conferences promulgating policies regarding significant holidays on which United Nations Headquarters and the Vienna International Centre remained open but United Nations bodies were invited to avoid holding meetings. The Commission had agreed to take into account those policies as far as possible when considering the dates of its future meetings.<sup>121</sup> The Commission noted that the dates approved for future sessions presented below did not include significant holidays. However, it noted that Working Group IV (Electronic Commerce) would hold a four-day session in April 2020, as 10 April 2020 was a United Nations official holiday, thus on that date the United Nations would be closed.

## **A. Fifty-third session of the Commission**

331. The Commission approved the holding of its fifty-third session in New York for two weeks, from 6 to 17 July 2020, subject to the possible extension of that session for an additional week if the workload of the session so warranted such an extension.

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<sup>121</sup> Ibid., *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 485.

The Commission confirmed its understanding that two-week sessions would generally be sufficient and that the duration of each annual session was to be determined on a case-by-case basis depending on the expected workload.

## B. Sessions of working groups

### 1. Sessions of working groups between the fifty-second and fifty-third sessions of the Commission

	<b>Second half of 2019 (Vienna)</b>	<b>First half of 2020 (New York, unless otherwise noted)</b>
<b>Working Group I (Micro, Small and Medium-sized Enterprises)</b>	Thirty-third session, 7–11 October 2019	Thirty-fourth session, 23–27 March 2020
<b>Working Group II (Dispute Settlement)</b>	Seventieth session, 23–27 September 2019	Seventy-first session, 3–7 February 2020
<b>Working Group III (Investor-State Dispute Settlement Reform)</b>	Thirty-eighth session, 14–18 October 2019	Thirty-ninth session, January or February 2020 (in Vienna); Fortieth session, 30 March–3 April 2020
<b>Working Group IV (Electronic Commerce)</b>	Fifty-ninth session, 25–29 November 2019	Sixtieth session 6–9 April 2020 (a four-day session; the United Nations will be closed on 10 April 2020, that day being a United Nations official holiday)
<b>Working Group V (Insolvency Law)</b>	Fifty-sixth session, 2–5 December 2019;  Colloquium on civil asset tracing and recovery: 6 December 2019	Fifty-seventh session, 11–14 May 2020;  Colloquium on applicable law in insolvency proceedings: 15 May 2020
<b>Working Group VI (Judicial Sale of Ships)</b>	Thirty-sixth session, 18–22 November 2019	Thirty-seventh session, 20–24 April 2020

### 2. Tentative arrangements for sessions of working groups in 2020 after the fifty-third session of the Commission, subject to the approval by the Commission at that session

	<b>Second half of 2020 (Vienna)</b> (to be confirmed by the Commission at its fifty-third session, in 2020)
<b>Working Group I (Micro, Small and Medium-sized Enterprises)</b>	Thirty-fifth session, 28 September–2 October 2020
<b>Working Group II (Dispute Settlement)</b>	Seventy-second session, 21–25 September 2020
<b>Working Group III (Investor-State Dispute Settlement Reform)</b>	Forty-first session, 5–9 October 2020

<b>Working Group IV (Electronic Commerce)</b>	Sixty-first session, 19–23 October 2020
<b>Working Group V (Insolvency Law)</b>	Fifty-eighth session, 7–11 December 2020
<b>Working Group VI (Judicial Sale of Ships)</b>	Thirty-eighth session, 14–18 December 2020

## Annex I

# UNCITRAL Model Legislative Provisions on Public-Private Partnerships

## General provisions

### Model provision 1. PPP Guiding Principles

#### *Option 1*

WHEREAS the [Government] [Parliament] of [...] wishes to enable the use of public-private partnerships in infrastructure development and the provision of associated services to the public;

WHEREAS, for those purposes, the [Government] [Parliament] considers it desirable to regulate public-private partnerships so as to enhance transparency, fairness, stability and predictability; promote proper management, integrity, competition and economy; and ensure long-term sustainability;

[Other objectives that the enacting State might wish to state];

Be it therefore enacted as follows:

#### *Option 2*

This law establishes the procedures for the approval, award and implementation of public-private partnership projects, in accordance with the principles of transparency, fairness, stability, proper management, integrity, completion, economy, and long-term sustainability.

### Model provision 2. Definitions

For the purposes of this law:

(a) Public-private partnership (PPP) means an agreement between a contracting authority and a private entity for the implementation of a project, against payments by the contracting authority or the users of the facility, including both those projects that entail a transfer of the demand risk to the private partner (“concession PPPs”) and those other types of PPPs that do not entail such risk transfer (“non-concession PPPs”);

(b) “Infrastructure facility” means physical facilities and systems that directly or indirectly provide services to the general public;

(c) “Infrastructure project” means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(d) “Contracting authority” means the public authority that has the power to enter into a PPP contract [under the provisions of this law];<sup>1</sup>

(e) “Private Partner” means the private entity retained by the contracting authority to carry out a project under a PPP contract;

(f) “PPP contract” means the mutually binding agreement or agreements between the contracting authority and the private partner that set forth the terms and conditions for the implementation of a PPP;

<sup>1</sup> It should be noted that this definition relates only to the power to enter into PPP contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as “regulatory agency” in subpara. (i), may have responsibility for issuing rules and regulations governing the provision of the relevant service.

(g) “Bidder” or “bidders” means persons, including groups thereof, that participate in selection proceedings for the award of the PPP contract;<sup>2</sup>

(h) “Unsolicited proposal” means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(i) “Regulatory agency” means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.<sup>3</sup>

### **Model provision 3. Authority to enter into PPP contracts**

The following public authorities have the power to enter into PPP contracts<sup>4</sup> for the implementation of infrastructure projects falling within their respective spheres of competence: [*the enacting State lists the relevant public authorities of the host country that may enter into PPP contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof*].<sup>5</sup>

### **Model provision 4. Eligible infrastructure sectors**

PPP contracts may be entered into by the relevant authorities in the following sectors: [*the enacting State indicates the relevant sectors by way of an exhaustive or indicative list*].<sup>6</sup>

<sup>2</sup> The term “bidder” or “bidders” encompasses, according to the context, both persons that have sought an invitation to take part in preselection proceedings or persons that have submitted a proposal in response to a contracting authority’s request for proposals.

<sup>3</sup> The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see paras. ...).

<sup>4</sup> It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing the approvals, licences, permits or authorizations required for the implementation of PPP in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see chap. II, “Project planning and preparation”, paras. ...). In addition, for countries that contemplate providing specific forms of government support to PPP projects, it may be useful for the relevant law, such as legislation or a regulation governing the activities of entities authorized to offer government support, to identify clearly which entities have the power to provide such support and what kind of support may be provided (see chap. II, “Project planning and preparation”, paras. ...).

<sup>5</sup> Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into PPP contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming relevant public authorities. In a federal State, for example, such an enabling clause might refer to “the Union, the states [or provinces] and the municipalities”. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

<sup>6</sup> It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.



## II. Project planning and preparation

### Model provision 5. PPP project proposals

1. A contracting authority envisaging to develop infrastructure or services through a PPP shall carry out or procure a feasibility study to assess whether the project meets the conditions for approval set for in [*these provisions*].
2. The feasibility study shall:
  - (a) Identify the public infrastructure or service needs to be met by the proposed PPP project and how the project meets relevant national or local priorities for the development of public infrastructure and services;
  - (b) Assess the various options available to the contracting authority to satisfy those needs and conclusively demonstrate the comparative advantage, strategic and operational benefits of implementation as PPP, in particular that the project:
    - (i) Offers a more economic and efficient solution as a PPP than if it were to be procured and carried out by the contracting authority or another public body (“value for money”); and
    - (ii) Will not lead to unexpected financial liabilities for the public sector (“fiscal risk”).
3. In addition to the feasibility study, the request for approval of a PPP project shall:
  - (a) Assess the project’s social, economic and environmental impact;
  - (b) Identify the technical requirements and expected inputs and deliverables;
  - (c) Consider the extent to which the project activities can be performed by a private partner under a contract with the contracting authority;
  - (d) Identify the licences, permits or authorizations that the contracting authority or any other public authority may be required to issue in connection with the approval or implementation of the project;
  - (e) Identify and assess the main project risks and describe the proposed risk allocation under the contract;
  - (f) Identify any proposed form of Government support for the implementation of the project;
  - (g) Determine the capacity of the contracting authority to effectively enforce the contract, including the ability to monitor and regulate project implementation and the performance of the private partner;
  - (h) Identify the appropriate procedure for contract award.

### Model provision 6. Approval of PPP project proposals

1. The [the enacting State indicates the competent body] shall be responsible for [approving proposed PPP projects submitted to it by contracting authorities] [advising the [the enacting State indicates the competent body] as to whether a proposed PPP project meets the approval conditions set forth in [*these provisions*]].
2. The [the enacting State indicates the competent body] shall be responsible, in particular for:
  - (a) Reviewing PPP project proposals and feasibility studies submitted by contracting authorities for purposes of ascertaining whether a proposed project is worthwhile being carried out as a PPP and meets the requirements set forth in [*these provisions*];

- (b) Reviewing the contracting authority's capability for carrying out the project and making appropriate recommendations;
- (c) Reviewing the draft requests for proposal prepared by contract authorities to ensure conformity with the approved proposal and feasibility study;
- (d) Advising the Government on administrative procedures relating to PPPs;
- (e) Developing guidelines relating to PPPs;
- (f) Advising contracting authorities on the methodology for conducting feasibility and other studies;
- (g) Preparing standard bidding and contract documents for use by contracting authorities;
- (h) Issuing advice in connection with the implementation of PPP projects;
- (i) Assisting contracting authorities as required to ensure that PPPs are carried out in accordance with [these provisions]; and
- (j) Performing any other functions in connection with PPPs that the [the enacting States indicates the competent body to issue regulations implementing the model provisions] may assign to it.

### **Model provision 7. Administrative coordination**

The [*the enacting State indicates the competent body*] shall [establish] [propose to the [*the enacting State indicates the competent body*] the establishment of] institutional mechanisms to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of PPP projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned.

## **III. Contract award**

### **Model provision 8. General rules**

The contract authority shall select the private partner in accordance with model provisions 9–22 (or exceptionally model provisions 23–28) and model provisions 29–32, and, for matters not provided herein, in accordance with [*the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive public procurement procedures equivalent to those set forth in the UNCITRAL Model Law on Public Procurement*].<sup>7</sup>

<sup>7</sup> The reader's attention is drawn to the relationship between the procedures for the selection of the private partner and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of PPP projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the request for proposals, two-stage tendering, competitive negotiations and single-source procurement methods under the UNCITRAL Model Law on Public Procurement, which was adopted by UNCITRAL at its forty-fourth session, held in Vienna from 27 June to 8 July 2011. The model provisions on the selection of the private partner are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators in developing special rules for the selection of the private partner. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of

## 1. Pre-selection of bidders

### Model provision 9. Purpose and procedure of pre-selection

1. For the purpose of limiting the number of suppliers or contractors from which to request proposals, the contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged project.
2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [*the enacting State indicates the provisions of its laws governing publication of invitation to participate in proceedings for the pre-qualification of suppliers and contractors*].
3. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors*],<sup>8</sup> the invitation to participate in the pre-selection proceedings shall include at least the following:
  - (a) A description of the infrastructure, facility or service systems, as appropriate;
  - (b) An indication of other essential elements of the project, such as the services to be delivered by the private partner, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the private partner);
  - (c) Where already known, a summary of the main required terms of the PPP contract to be entered into;
  - (d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and
  - (e) The manner and place for solicitation of the pre-selection documents.
4. To the extent not already required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors*],<sup>9</sup> the pre-selection documents shall include at least the following information:
  - (a) The pre-selection criteria in accordance with model provision 10;
  - (b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in model provision 11;
  - (c) Whether the contracting authority intends to request only a limited number<sup>10</sup> of pre-selected bidders that best meet the pre-selection criteria specified in the pre-selection documents to submit proposals upon completion of the pre-selection proceedings in accordance with model provision 12, paragraph 2; if so, the maximum

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notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public and challenge procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, *mutatis mutandis*, supplement the practical elements of the selection procedure described herein.

<sup>8</sup> A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 18, paragraph 3, of the Model Procurement Law.

<sup>9</sup> A list of elements typically contained in pre-qualification documents can be found in article 18, paragraph 5, of the Model Procurement Law.

<sup>10</sup> In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four).

number of pre-selected bidders from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing the maximum number, the contracting authority shall bear in mind the need to ensure effective competition;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [*the enacting State*] in accordance with model provision ....

5. For matters not provided for in this model provision, the pre-selection proceedings shall be conducted in accordance with [*the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification or pre-selection of suppliers and contractors*].<sup>11</sup>

### **Model provision 10. Pre-selection criteria**

Interested bidders must meet such of the following criteria as the contracting authority considers appropriate<sup>12</sup> and relevant for the particular contract:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) That they have sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) That they meet ethical and other standards applicable in [*this State*];

(d) That they have the legal capacity to enter into the PPP contract;

(e) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended and they are not the subject of legal proceedings for any of the foregoing;

(f) That they have fulfilled their obligations to pay taxes and social security contributions in [*this State*];

(g) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years [*the enacting State specifies the period of time*] preceding the commencement of the contract award proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

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<sup>11</sup> Procedural steps on pre-qualification and pre-selection proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in article 18 and 49, para. 3, of the Model Procurement Law.

<sup>12</sup> The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the *Guide* (see chapter III, "Contract award", paras. 44–45). The *Guide* suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they must be announced at the outset of the selection proceedings (i.e. in the invitation to the pre-selection proceedings).

### **Model provision 11. Participation of consortia**

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with model provision 10 shall relate to the consortium as a whole as well as to its individual participants.
2. Unless otherwise [authorized by ... [*the enacting State indicates the relevant authority*] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium<sup>13</sup> at a time. A violation of this rule shall cause the disqualification of the consortium and of the individual members.
3. When considering the qualifications of bidding consortia, the contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

### **Model provision 12. Decision on pre-selection**

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria, requirements and procedures that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with model provisions 13–22.
2. Notwithstanding paragraph 1, where the contracting authority has indicated through an appropriate statement in the pre-selection documents that it reserved the right to request proposals only from a limited number of bidders that best meet the pre-selection criteria, the contracting authority shall rate the bidders on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings up to the maximum number specified in the pre-selection documents but at least three, if possible. In drawing up the list, the contracting authority shall apply only criteria and the manner of rating that are set forth in the pre-selection documents.

## **2. Procedures for requesting proposals**

### **Model provision 13. Choice of selection procedure**

1. A contracting authority may select the private partner for a PPP project by means of a two-stage request for proposals in accordance with [*the enacting State indicates the provisions of its laws that provide for a procurement method equivalent to the two-stage tendering provided for in article 48 of the UNCITRAL Model Law on Public Procurement*] where the contracting authority assesses that discussions with bidders are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under [*the enacting State indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement*], and in order to allow

<sup>13</sup> The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

the contracting authority to obtain the most satisfactory solution to its procurement needs.

2. A contracting authority may select the private partner for a PPP project by means of a request for proposals with dialogue in accordance with [*the enacting State indicates the provisions of its laws that provide for a procurement method equivalent to the request for proposals with dialogue provided for in article 49 of the UNCITRAL Model Law on Public Procurement*] where it is not feasible for the contracting authority to formulate a detailed description of the subject matter of the procurement in accordance with [*the enacting State indicates the provisions of its laws that govern the content of requests for proposals as in article 10 of the UNCITRAL Model Law on Public Procurement*], and the contracting authority assesses that dialogue with bidders is needed to obtain the most satisfactory solution to its procurement needs.

#### **Model provision 14. Content of the request for proposals**

1. The contracting authority shall provide a set of the request for proposals and related documents to each bidder invited to submit proposals that pays the price, if any, charged for those documents.

2. In addition to any other information required by [*the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals*],<sup>14</sup> the request for proposals shall include the following information:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;

(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion or the descending order of importance of all evaluation criteria; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

#### **Model provision 15. Bid securities**

1. When the contracting authority requires bidders to provide a bid security, the request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:<sup>15</sup>

(a) If so stipulated in the request for proposals, withdrawal or modification of a proposal or a best and final offer before or after the stipulated deadline;

(b) Failure to enter into final negotiations with the contracting authority pursuant to model provision 22, paragraph 1;

<sup>14</sup> A list of elements typically contained in a request for proposals can be found in articles 47 and 49 of the Model Procurement Law.

<sup>15</sup> General provisions on bid securities can be found in article 17 of the *UNCITRAL Model Law on Public Procurement*.

(c) Failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to model provision 18, subparagraph (e);

(d) Failure to sign the PPP contract, if required by the contracting authority to do so, after the proposal has been accepted;

(e) Failure to provide required security for the fulfilment of the PPP contract after the proposal or offer has been accepted or to comply with any other condition prior to signing the PPP contract specified in the request for proposals.

### **Model provision 16. Clarifications and modifications**

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in model provision 14. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

### **Model provision 17. Two-stage request for proposals**

(a) Prior to issuing the request for proposals in accordance with [model provision 14], the contracting authority issues an initial request for proposals calling upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;

(b) The contracting authority may convene meetings and hold discussions or dialogue with bidders whose initial proposals have not been rejected as non-responsive or for other grounds specified in law.<sup>16</sup> Discussions may concern any aspect of the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders;<sup>17</sup>

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 31 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with model provision 14.

<sup>16</sup> For example, corruption, collusion and conflict of interest.

<sup>17</sup> General provisions on clarification of request for proposals and the conduct of meetings with bidders can be found in article 15 of the *UNCITRAL Model Law on Public Procurement*.



## Model provision 18. Request for proposals with dialogue

Where a request for proposals with dialogue is used in accordance with [model provision 13(2)]:

(a) The contracting authority shall invite each bidder that presented a responsive proposal, within any applicable maximum, to participate in the dialogue. The contracting authority shall ensure that the number of bidders invited to participate in the dialogue, which shall be at least three, if possible, is sufficient to ensure effective competition;

(b) The dialogue shall be conducted by the same representatives of the contracting authority on a concurrent basis;

(c) During the course of the dialogue, the contracting authority shall not modify the subject matter of the project, any qualification or evaluation criterion, any minimum requirements, any element of the description of the project or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals;

(d) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that is communicated by the contracting authority to a bidder shall be communicated at the same time and on an equal basis to all other participating bidders, unless such information is specific or exclusive to that supplier or contractor or such communication would be in breach of the confidentiality provisions of [*the enacting State indicates the provisions of its laws equivalent to article 24 of the UNCITRAL Model Procurement Law*];

(e) Following the dialogue, the contracting authority shall request all bidders remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing and shall specify the manner, place and deadline for presenting best and final offers.

## Model provision 19. Evaluation criteria

1. The criteria for the evaluation and comparison of the technical elements of the proposals shall include at least the following:

- (a) Technical soundness;
- (b) Compliance with environmental standards;
- (c) Operational feasibility;
- (d) Quality of services and measures to ensure their continuity.

2. The criteria for the evaluation and comparison of the financial and commercial elements of the proposals shall include, as appropriate:

(a) The present value of the proposed tolls, unit prices and other charges over the contract period;

(b) The present value of the proposed direct payments by the contracting authority, if any;

(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

(d) The extent of financial support, if any, expected from a public authority of [*the enacting State*];

(e) The soundness of the proposed financial arrangements;

(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;

(g) The social and economic development potential offered by the proposals.

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### **Model provision 20. Comparison and evaluation of proposals or offers**

1. The contracting authority shall compare and evaluate each proposal or offer in accordance with the evaluation criteria, the relative weight accorded to each such criterion or the descending order of importance of evaluation criteria and the evaluation process set forth in the request for proposals.
2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals or offers that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the procedure.

### **Model provision 21. Further demonstration of fulfilment of qualification criteria**

The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.<sup>18</sup>

### **Model provision 22. Contract award**

1. Where a two-stage procedure is used in accordance with model provision 13(1):
  - (a) The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the PPP contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals;
  - (b) If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a contract, the contracting authority shall inform the bidder of termination of the negotiations and give the bidder reasonable time to formulate its best and final offer;
  - (c) If the contracting authority does not find that offer acceptable, it shall reject that offer and invite for negotiations the other bidders in the order of their ranking until it arrives at a PPP contract or rejects all remaining proposals;
  - (d) The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.
2. Where a request for proposals with dialogue is used in accordance with model provision 13(2):
  - (a) No negotiations shall take place between the contracting authority and bidders with respect to their best and final offers;
  - (b) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

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<sup>18</sup> See *UNCITRAL Model Law on Public Procurement*, art. 9, para. 8.

### 3. Direct negotiation of PPP contracts with one or more bidders

#### Model provision 23. Circumstances authorizing direct negotiation

Subject to approval by [*the enacting State indicates the relevant authority*],<sup>19</sup> the contracting authority is authorized to negotiate a PPP contract without using the procedure set forth in model provisions 9 to 22 in the following cases:

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in model provisions 9 to 22 would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of [*the enacting State specifies a monetary ceiling*]] [set forth in [*the enacting State indicates the provisions of its laws that specify the monetary threshold below which a project may be awarded through direct negotiations*]];<sup>20</sup>

(c) Where the use of the procedures set forth in model provisions 9–22 is not appropriate for the protection of essential security interests of the State;

(d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for compelling reasons of public interest.<sup>21</sup>

#### Model provision 24. Procedures for negotiation of a PPP contract

Where a PPP contract is negotiated without using the procedures set forth in model provisions 9–22 the contracting authority shall:

(a) Cause a notice of its intention to commence negotiations in respect of a PPP contract to be published in accordance with [*the enacting State indicates the*

<sup>19</sup> The rationale for subjecting the direct negotiation of a PPP contract to the approval of a higher authority is to ensure that the contracting authority makes use of this exception only in the appropriate circumstances. The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

<sup>20</sup> As an alternative to the exclusion provided for in subparas. (b) and (c), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by allowing direct solicitation in the procedures described in model provisions 9 to 22, as envisaged in art. 35, para. 2, of the *UNCITRAL Model Law on Public Procurement*.

<sup>21</sup> Enacting States that deem it desirable to authorize the use of direct negotiation procedures on an ad hoc basis may wish to retain subpara. (g) when implementing the model provision. Enacting States wishing to limit exceptions to the selection procedures envisaged in model provisions 9–22 may prefer not to include the subparagraph. In any event, for purposes of transparency, the enacting State may wish to indicate here or elsewhere in the model provision other exceptions, if any, authorizing the use of direct negotiation procedures that may be provided for under specific legislation.

*provisions of any relevant laws on procurement proceedings that govern the publication of notices*<sup>22</sup>];

(b) Engage in negotiations with as many persons as the contracting authority judges capable of carrying out the project as circumstances permit;

(c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

#### **4. Unsolicited proposals**<sup>23</sup>

##### **Model provision 25. Admissibility of unsolicited proposals**

As an exception to model provisions 9 to 22, the contracting authority<sup>24</sup> is authorized to consider unsolicited proposals pursuant to the procedures set forth in model provisions 26 to 28, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

##### **Model provision 26. Procedures for determining the admissibility of unsolicited proposals**

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall inform the proponent as soon as practicable whether or not the project is considered to be potentially in the public interest.<sup>25</sup>

2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications<sup>26</sup> and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make

<sup>22</sup> See *UNCITRAL Model Law on Public Procurement*, art. 7.

<sup>23</sup> Enacting States wishing to enhance transparency in the use of direct negotiation procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to model provisions 23 and 24. An indication of possible qualification criteria is contained in model provision 10.

<sup>24</sup> The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the institutional and administrative arrangements of the enacting State, a body separate from the contracting authority may have the responsibility for handling unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 19 and the references cited therein).

<sup>25</sup> The determination that a proposed project is in the public interest entails a considered judgment regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.

<sup>26</sup> The enacting State may wish to provide in its regulations the qualification criteria that need to be met by the proponent. Elements to be taken into account for that purpose are indicated in model provision 10.

use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

### **Model provision 27. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights**

1. Except in the circumstances set forth in model provision 23, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with model provisions 9 to 22 if the contracting authority considers that:
  - (a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and
  - (b) The proposed concept or technology is not truly unique or new.
2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

### **Model provision 28. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights**

1. If the contracting authority determines that the conditions of model provision 27, paragraph 1 (a) and (b), are not met, it shall not be required to carry out a selection procedure pursuant to model provisions 9 to 22. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4 of this model provision.
2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [*the enacting State indicates a certain amount of time*].
3. If no proposals in response to an invitation issued pursuant to paragraph 2 of this model provision are received within [a reasonable period] [the amount of time specified in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.
4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in model provision 24. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its needs, the contracting authority shall request the submission of proposals pursuant to model provisions 9 to 22, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with model provision 27, paragraph 2.

## 5. Miscellaneous provisions

### Model provision 29. Confidentiality

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders or to any other person not authorized to have access to this type of information. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to model provisions 17, 18, 21, 23, 24 or 28, paragraphs 3 and 4, shall be confidential. Unless required by law or by a court order, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

### Model provision 30. Notice of contract award

The contracting authority shall cause a notice of the contract award to be published in accordance with [the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices].<sup>27</sup> The notice shall identify the private partner and include a summary of the essential terms of the PPP contract.

### Model provision 31. Record of selection and award proceedings

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [*the enacting State indicates the provisions of its laws on public procurement that govern the record of procurement proceedings*].<sup>28</sup>

### Model provision 32. Review procedures

A bidder that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the contracting authority with the law may challenge the decision or action concerned in accordance with [*the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings*].

## III. Contents and implementation of the PPP contract

### Model provision 33. Contents and implementation of the PPP contract

The PPP contract shall provide for such matters as the parties deem appropriate,<sup>29</sup> such as:

- (a) The nature and scope of works to be performed and services to be provided by the private partner (see chap. IV, para. 1);

<sup>27</sup> See *UNCITRAL Model Law on Public Procurement*, art. 23.

<sup>28</sup> The content of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, is set out in art. 25 of the Model Procurement Law. If the laws of the enacting State do not adequately address these matters, the enacting State should adopt legislation or regulations to that effect.

<sup>29</sup> Enacting States may wish to note that the inclusion in the PPP contract of provisions dealing with some of the matters listed in this model provision is mandatory pursuant to other model provisions.

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the private partner's rights under the PPP contract;

(c) The assistance that the contracting authority has undertaken to provide to the private partner in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 35 (see model provision 30);

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with model provisions 36 to 39 (see model provisions 36–39);

(f) Where the remuneration of the private partner consists of operational revenue such as tariffs and fees for the use of the facility or the provision of services: the amount and method of payment, their breakdown, the modalities of their variation and any public subsidies when applicable;

(g) Where the remuneration of the private partner consists of payments made by the contracting authority: the overall cost of the service rendered to the public authority and its breakdown; the methods and formulas for the establishment or adjustment of such payments; the payment procedure, in particular the conditions under which, each year, the gross sums due by the contracting authority to the private partner are set off against any sums that the private partner may be liable to pay due to fines, contract penalties or liquidated damages if any;

(h) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility;

(i) The extent of the private partner's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users (see model provision 43);

(j) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the private partner and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements;

(k) The extent of the private partner's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations;

(l) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (i) and (j) above, including any compensation to which the private partner might be entitled;

(m) Any rights of the contracting authority to review and approve major contracts to be entered into by the private partner, in particular with the private partner's own shareholders or other affiliated persons;

(n) Guarantees of performance to be provided and insurance policies to be maintained by the private partner in connection with the implementation of the infrastructure project;

(o) Remedies available in the event of default of either party;



(p) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the PPP contract owing to circumstances beyond its reasonable control;

(q) The duration of the PPP contract and the rights and obligations of the parties upon its expiry or termination;

(r) The manner for calculating compensation pursuant to model provision 53;

(s) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the private partner (model provisions 34 and 54);

(t) The rights and obligations of the parties with respect to confidential information (see model provision 29).

### **Model provision 34. Governing law**

The PPP contract is governed by the law of [*the enacting State*] unless otherwise provided in the PPP contract.<sup>30</sup>

### **Model provision 35. Corporate structure of the private partner**

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*the enacting State*], provided that a statement to that effect was made in the preselection documents or in the request for proposals, as appropriate. Any requirement relating to the time frame for establishing such legal entity, its minimum capital and the procedures for obtaining the approval of the contracting authority to its statute and by-laws and significant changes therein shall be set forth in the PPP contract consistent with the terms of the request for proposals.

### **Model provision 36. Ownership of assets<sup>31</sup>**

The PPP contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private partner's own property. The PPP contract shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the private partner is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the PPP contract;

<sup>30</sup> Legal systems provide varying answers to the question as to whether the parties to a PPP contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the *Legislative Guide* (see chap. IV, "PPP implementation: legal framework and PPP contract", paras. 5–8), in some countries the PPP contract may be subject to administrative law, while in others the PPP contract may be governed by private law (see also chap. VII, "Other relevant areas of law", paras. 25–28). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the implementation of a PPP project (see generally chap. VII, "Other relevant areas of law", sect. B).

<sup>31</sup> Private sector participation in infrastructure and public service projects may be devised in a variety of different forms (see "Introduction and background information on PPPs", paras. 48–55). The general policy typically determines the legislative approach for ownership of project-related assets. Irrespective of the host country's general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the private partner's ability to create security interests in project assets for the purpose of raising financing for the project. Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the

(b) Assets, if any, that the contracting authority, at its option, may purchase from the private partner; and

(c) Assets, if any, that the private partner may retain or dispose of upon expiry or termination of the PPP contract.

### **Model provision 37. Acquisition of rights related to the project site**

1. The contracting authority or other public authority under the terms of the law and the PPP contract shall make available to the private partner or, as appropriate, shall assist the private partner in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with [*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*].<sup>32</sup>

### **Model provision 38. Easements<sup>33</sup>**

#### **Variant A**

1. The contracting authority or other public authority under the terms of the law and the PPP contract shall make available to the private partner or, as appropriate, shall assist the private partner to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

#### **Variant B**

1. The private partner shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

2. Any easements that may be required for the implementation of the project shall be created in accordance with [*the enacting State indicates the provisions of its laws that govern the creation of easements for reasons of public interest*].

### **Model provision 39. Financial arrangements**

1. Where the private partner operates a facility used by the public or provides a service to the public under the PPP contract, the private partner shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the PPP contract. The PPP contract shall provide for methods and

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private property of the private partner, upon expiry or termination of the PPP contract or at any other time.

<sup>32</sup> If the enacting State does not have such legislation, the specific law on PPP should so provide.

<sup>33</sup> The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the private partner directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative, which is reflected in variant B, might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure.

formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].<sup>34</sup>

2. The contracting authority shall have the power to agree to make direct payments to the private partner as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services under the preceding paragraph.

3. Where the private partner operates a facility used by the public or provides a service to the contracting authority or other public body, the private partner shall have the right to the rental, usage fees or other payments set forth in the contract for the actual use or availability of the facility or its services in accordance with the PPP contract. The PPP contract shall provide for methods and formulas for the establishment and adjustment of those payments.

### **Model provision 40. Security interests**

1. Subject to any restriction that may be contained in the PPP contract,<sup>35</sup> the private partner has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the private partner or its interests in project assets;

(b) A pledge of the proceeds of, and receivables owed to the private partner for, the use of the facility or the services it provides.

2. The shareholders of the private partner shall have the right to pledge or create any other security interest in their shares in the private partner.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*the enacting State*].

### **Model provision 41. Assignment of the PPP contract**

Except as otherwise provided in model provision 40, the rights and obligations of the private partner under the PPP contract may not be assigned to third parties without the consent of the contracting authority. The PPP contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the private partner under the PPP contract, including the acceptance by the new private partner of all obligations thereunder and evidence of the new private partner's technical and financial capability as necessary for providing the service.

<sup>34</sup> Tolls, fees, prices or other charges accruing to the private partner, which are referred to in the *Legislative Guide* as “tariffs”, may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, “Project planning and preparation, paras. 56–86). The cost at which public services are provided is typically an element of the Government's infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of “reasonableness”, “fairness” or “equity”.

<sup>35</sup> These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

### **Model provision 42. Transfer of controlling interest<sup>36</sup> in the private partner**

Except as otherwise provided in the PPP contract, a controlling interest in the private partner or the interest of a shareholder whose participation in the project company is deemed as essential for the successful maintenance and operation of the project may not be transferred to third parties without the consent of the contracting authority. The PPP contract shall set forth the conditions under which consent of the contracting authority may be given.

### **Model provision 43. Operation of infrastructure**

1. The PPP contract shall set forth, as appropriate, the extent of the private partner's obligations to ensure:
  - (a) The modification of the service so as to meet the demand for the service;
  - (b) The continuity of the service;
  - (c) The provision of the service under essentially the same conditions for all users;
  - (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the private partner.
2. The private partner shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

### **Model provision 44. Compensation for specific changes in legislation**

The PPP contract shall set forth the extent to which the private partner is entitled to compensation in the event that the cost of the private partner's performance of the PPP contract has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

### **Model provision 45. Amendment of the PPP contract**

1. Without prejudice to model provision 44, the PPP contract shall further set forth the whether and to what extent the private partner is entitled to request the amendment of the PPP contract in the event that the cost of the private partner's performance of the PPP contract has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:
  - (a) Changes in economic or financial conditions; or

<sup>36</sup> The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

(b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

- Occur after the conclusion of the contract;
- Are beyond the control of the private partner; and
- Are of such a nature that the private partner could not reasonably be expected to have taken them into account at the time the PPP contract was negotiated or to have avoided or overcome their consequences.

2. Subject to the provisions of paragraph 5, the contracting authority and the private partner may agree to expand the scope of the PPP contract to include additional works or services to be provided by the private partner that were not included in the initial contract but have since become necessary and for the performance of which it would not be in the public interest to select another private partner:

(i) Because of economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial contract; and

(ii) Because the selection of another private partner would cause significant inconvenience or substantial duplication of costs for the contracting authority.

3. The PPP contract shall establish procedures for amending the terms of the PPP contract pursuant to paragraphs 1 and 2.

4. The contracting authority shall require the approval of [*the enacting State indicates the public body or entity*] for any amendments to the PPP contract:

(a) That exceed [*the enacting State indicates the percentage*] of the value of the original contract; or

(b) That provide for additional works or services to be provided by the private partner that were not included in the initial contract pursuant to paragraph 2.

5. The contracting authority may not accept any amendment or modification to the PPP contract of the type referred to in paragraph 2 that would render the contract substantially different in character from the one initially concluded. A modification shall be considered to be substantial where one or more of the following conditions is met:

(a) The total value of the remuneration of the private partner resulting from the amendment would exceed [*the enacting State indicates the percentage*] of the combined sum of the present value of the proposed tolls, fees, unit prices and other charges over the contract period and the present value of the proposed direct payments by the contracting authority, if any, as considered by the contracting authority to evaluate proposals in accordance with Model Provision 19, paragraph 2 (a) and (b). Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications, in a period of [*the enacting State indicates the desired time frame*];

(b) The modification introduces conditions which, had they been part of the initial contract award procedure, would have allowed for the admission of bidders other than those initially selected or for the acceptance of a proposal other than that originally accepted or would have attracted additional participants in the contract award procedure;

(c) The modification extends the scope of the contract considerably;

(d) Where a new private partner replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under model provision 47.

### **Model provision 46. Takeover of an infrastructure project by the contracting authority**

Under the circumstances set forth in the PPP contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the private partner to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

### **Model provision 47. Substitution of the private partner**

The contracting authority may agree with the entities extending financing for an infrastructure project and the private partner to provide for the substitution of the private partner by a new entity or person appointed to perform under the existing PPP contract upon serious breach by the private partner or other events that could otherwise justify the termination of the PPP contract or other similar circumstances.<sup>37</sup>

## **IV. Duration, extension and termination of the PPP contract**

### **1. Duration and extension of the PPP contract**

#### **Model provision 48. Duration of the PPP contract**

The PPP contract shall set forth its duration, which shall take into account the following factors:

- (a) The nature and amount of investment required to be made by the private partner;
- (b) The normal amortization period for the particular facilities and installations to be built, expanded, refurbished or renovated under the contract;
- (c) The contracting authority's needs and requirements in relation to the facilities or services concerned;
- (d) Any relevant policies concerning the competition and market structure for the infrastructure or service sector concerns, as laid down in applicable laws and regulations.

#### **Model Provision 49. Extension of the PPP contract**

The contracting authority may not agree to extend the duration of the PPP contract except as a result of the following circumstances:

- (a) Delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;

<sup>37</sup> The substitution of the private partner by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the PPP contract (see, chap. IV, "PPP implementation: legal framework and PPP contract", paras. 162–165). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the private partner company by selling those shares to a third party acceptable to the contracting authority.

- (b) Project suspension brought about by acts of the contracting authority or other public authorities;
- (c) Increase in costs arising from requirements of the contracting authority not originally foreseen in the PPP contract, if the private partner would not be able to recover such costs without such extension; or
- (d) *[Other circumstances, as specified by the enacting State]*.<sup>38</sup>

## **2. Termination of the PPP contract**

### **Model provision 50. Termination of the PPP contract by the contracting authority**

The contracting authority may terminate the PPP contract:

- (a) In the event that it can no longer be reasonably expected that the private partner will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;
- (b) For compelling<sup>39</sup> reasons of public interest, subject to payment of compensation to the private partner, the terms of the compensation to be as agreed in the PPP contract;
- (c) *[Other circumstances that the enacting State might wish to add]*.

### **Model provision 51. Termination of the PPP contract by the private partner**

The private partner may not terminate the PPP contract except under the following circumstances:

- (a) In the event of serious breach by the contracting authority or other public authority of its obligations in connection with the PPP contract and subject to a final finding by the dispute settlement body agreed by the parties in accordance with model provision ... or in the contract;
- (b) If the conditions for a revision of the PPP contract under model provision 45, paragraph 1, are met, but the parties have failed to agree on a revision of the PPP contract; or
- (c) If it would be manifestly unreasonable to expect the private partner to continue performing under the contract as a result of:
  - (i) Failure by a public authority to provide support or perform other acts which under the term of the PPP contract or the law are required for the implementation of the project; or
  - (ii) A substantial increase in the cost of the private partner's performance of the PPP contract or a substantial decrease of the value that the private partner receives for such performance as a result of acts or omissions of the contracting authority or other public authorities, for instance, pursuant to model provision 33, subparagraphs (h) and (i), and the parties have failed to agree on a revision of the PPP contract pursuant to model provision 33, subparagraph (l).

<sup>38</sup> The enacting State may wish to consider the possibility of having the law authorize a consensual extension of the PPP contract pursuant to its terms, for reasons of public interest, as justified in the record to be kept by the contracting authority pursuant to model provision 31.

<sup>39</sup> Possible situations constituting a compelling reason of public interest are discussed in the Legislative Guide, chap. V, "Duration, extension and termination of the PPP contract", paras. 29–30.

### **Model provision 52. Termination of the PPP contract by either party**

The PPP contract shall provide for either party to terminate the PPP contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The PPP contract shall also set forth the procedure for such termination, in particular the prior notice to be given to the other contracting party. The parties shall also have the right to terminate the PPP contract by mutual consent.

### **3. Arrangements upon termination or expiry of the PPP contract**

#### **Model provision 53. Compensation upon termination of the PPP contract**

The PPP contract shall stipulate how compensation due to either party is calculated in the event of termination of the PPP contract, providing, where appropriate, for compensation for the fair value of works performed under the PPP contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

#### **Model provision 54. Wind-up and transfer measures**

The PPP contract shall provide, as appropriate, for:

- (a) Mechanisms and procedures for the transfer of assets to the contracting authority;
- (b) The compensation to which the private partner may be entitled in respect of assets transferred to the contracting authority or to a new private partner or purchased by the contracting authority;
- (c) The transfer of technology required for the operation of the facility;
- (d) The training of the contracting authority's personnel or of a successor private partner in the operation and maintenance of the facility;
- (e) The provision, by the private partner, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor private partner;
- (f) Mechanisms and procedures for the decommissioning of the infrastructure, including the preparation of a decommissioning plan and the parties' respective obligations for carrying it out and their financial obligations in that respect.

## **V. Settlement of disputes**

### **Model provision 55. Disputes between the contracting authority and the private partner**

Any disputes between the contracting authority and the private partner shall be settled through the dispute settlement mechanisms agreed by the parties in the PPP contract.<sup>40</sup>

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<sup>40</sup> The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of PPPs.



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### **Model provision 56. Disputes involving customers or users of the infrastructure facility, or other parties**

Where the private partner provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the private partner to establish simplified and efficient mechanisms for handling claims submitted by customers or users of the infrastructure facility, as well as by other parties affected by the project.

### **Model provision 57. Other disputes**

1. The private partner and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.
2. The private partner shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

## Annex II

# UNCITRAL Model Law on Enterprise Group Insolvency

## Part A. Core provisions

### Chapter 1. General provisions

#### Preamble

The purpose of this Law is to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group, in order to promote the objectives of:

- (a) Cooperation between courts and other competent authorities of this State and foreign States involved in those cases;
- (b) Cooperation between insolvency representatives appointed in this State and foreign States in those cases;
- (c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;
- (d) Fair and efficient administration of insolvencies concerning enterprise group members that protects the interests of all creditors of those enterprise group members and other interested persons, including the debtors;
- (e) Protection and maximization of the overall combined value of the assets and operations of enterprise group members affected by insolvency and of the enterprise group as a whole;
- (f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and
- (g) Adequate protection of the interests of the creditors of each enterprise group member participating in a group insolvency solution and of other interested persons.

#### Article 1. Scope

1. This Law applies to enterprise groups where insolvency proceedings have commenced for one or more of its members, and addresses the conduct and administration of those insolvency proceedings and cooperation between those insolvency proceedings.
2. This Law does not apply to a proceeding concerning [*designate any types of entity, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

#### Article 2. Definitions

For the purposes of this Law:

- (a) “Enterprise” means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;
- (b) “Enterprise group” means two or more enterprises that are interconnected by control or significant ownership;
- (c) “Control” means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;
- (d) “Enterprise group member” means an enterprise that forms part of an enterprise group;

(e) “Group representative” means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;

(f) “Group insolvency solution” means a proposal or set of proposals developed in a planning proceeding for the reorganization, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realizing or enhancing the overall combined value of those enterprise group members;

(g) “Planning proceeding” means a main proceeding commenced in respect of an enterprise group member provided:

(i) One or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution;

(ii) The enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution; and

(iii) A group representative has been appointed;

Subject to the requirements of subparagraphs (g)(i) to (iii), the court may recognize as a planning proceeding a proceeding that has been approved by a court with jurisdiction over a main proceeding of an enterprise group member for the purpose of developing a group insolvency solution within the meaning of this Law;

(h) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of an enterprise group member debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(i) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the enterprise group member debtor’s assets or affairs or to act as a representative of the insolvency proceeding;

(j) “Main proceeding” means an insolvency proceeding taking place in the State where the enterprise group member debtor has the centre of its main interests;

(k) “Non-main proceeding” means an insolvency proceeding, other than a main proceeding, taking place in a State where the enterprise group member debtor has an establishment within the meaning of subparagraph (l) of this article; and

(l) “Establishment” means any place of operations where the enterprise group member debtor carries out a non-transitory economic activity with human means and goods or services.

### **Article 3. International obligations of this State**

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

### **Article 4. Jurisdiction of the enacting State**

Where an enterprise group member has the centre of its main interests in this State, nothing in this Law is intended to:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member’s participation in a group insolvency solution being developed in another State;

(c) Limit the commencement of insolvency proceedings in this State, if required or requested; or

(d) Create an obligation to commence an insolvency proceeding in this State in respect of that enterprise group member when no such obligation exists.

#### **Article 5. Competent court or authority**

The functions referred to in this Law relating to the recognition of a foreign planning proceeding and cooperation with courts, insolvency representatives and any group representative appointed shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

#### **Article 6. Public policy exception**

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

#### **Article 7. Interpretation**

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

#### **Article 8. Additional assistance under other laws**

Nothing in this Law limits the power of a court or an insolvency representative to provide additional assistance to a group representative under other laws of this State.

### **Chapter 2. Cooperation and coordination**

#### **Article 9. Cooperation and direct communication between a court of this State and other courts, insolvency representatives and any group representative appointed**

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with other courts, insolvency representatives and any group representative appointed, either directly or through an insolvency representative appointed in this State or a person appointed to act at the direction of the court.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, other courts, insolvency representatives or any group representative appointed.

#### **Article 10. Cooperation to the maximum extent possible under article 9**

For the purposes of article 9, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with other courts, an insolvency representative or any group representative appointed;

(c) Coordination of the administration and supervision of the affairs of enterprise group members;

(d) Coordination of concurrent insolvency proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval and implementation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;

(g) Cooperation among courts as to how to allocate and provide for the costs associated with cooperation and communication;

(h) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between enterprise group members concerning claims;

(i) Approval of the treatment and filing of claims between enterprise group members;

(j) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

(k) [*The enacting State may wish to list additional forms or examples of cooperation*].

#### **Article 11. Limitation of the effect of communication under article 9**

1. With respect to communication under article 9, a court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

2. Participation by a court in communication pursuant to article 9, paragraph 2, does not imply:

(a) A waiver or compromise by the court of any powers, responsibilities or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts.

#### **Article 12. Coordination of hearings**

1. A court may conduct a hearing in coordination with another court.

2. The substantive and procedural rights of the parties and the jurisdiction of the court may be safeguarded by the parties reaching agreement on the conditions to govern the coordinated hearing and the court approving that agreement.

3. Notwithstanding the coordination of the hearing, the court remains responsible for reaching its own decision on the matters before it.

#### **Article 13. Cooperation and direct communication between a group representative, insolvency representatives and courts**

1. A group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts and insolvency representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts and insolvency representatives of other enterprise group members.

**Article 14. Cooperation and direct communication between an insolvency representative appointed in this State, other courts, insolvency representatives of other group members and any group representative appointed**

1. An insolvency representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with other courts, insolvency representatives of other enterprise group members and any group representative appointed.
2. An insolvency representative appointed in this State is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from other courts, insolvency representatives of other enterprise group members and any group representative appointed.

**Article 15. Cooperation to the maximum extent possible under articles 13 and 14**

For the purposes of article 13 and article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

- (a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;
- (b) Negotiation of agreements concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed;
- (c) Allocation of responsibilities between an insolvency representative appointed in this State, insolvency representatives of other group members and any group representative appointed;
- (d) Coordination of the administration and supervision of the affairs of the enterprise group members; and
- (e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

**Article 16. Authority to enter into agreements concerning the coordination of insolvency proceedings**

An insolvency representative and any group representative appointed may enter into an agreement concerning the coordination of insolvency proceedings relating to two or more enterprise group members, including where a group insolvency solution is being developed.

**Article 17. Appointment of a single or the same insolvency representative**

A court may coordinate with other courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group.

**Article 18. Participation by enterprise group members in an insolvency proceeding commenced in this State**

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State with respect to an enterprise group member that has the centre of its main interests in this State, any other enterprise group member may participate in that insolvency proceeding for the purpose of facilitating cooperation and coordination under this Law, including developing and implementing a group insolvency solution.
2. An enterprise group member that has the centre of its main interests in another State may participate in an insolvency proceeding referred to in paragraph 1 unless a court in that other State prohibits it from so doing.

3. Participation by any other enterprise group member in an insolvency proceeding referred to in paragraph 1 is voluntary. An enterprise group member may commence its participation or opt out of participation at any stage of such a proceeding.
4. An enterprise group member participating in an insolvency proceeding referred to in paragraph 1 has the right to appear, make written submissions and be heard in that proceeding on matters affecting that enterprise group member's interests and to take part in the development and implementation of a group insolvency solution. The sole fact that an enterprise group member is participating in such a proceeding does not subject the enterprise group member to the jurisdiction of the courts of this State for any purpose unrelated to that participation.
5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.

### **Chapter 3. Appointment of a group representative and relief available in a planning proceeding in this State**

#### **Article 19. Appointment of a group representative and authority to seek relief**

1. When the requirements of article 2, subparagraph (g)(i) and (ii), are met, the court may appoint a group representative. Upon that appointment, a group representative shall seek to develop and implement a group insolvency solution.
2. To support the development and implementation of a group insolvency solution, a group representative is authorized to seek relief pursuant to this article and article 20 in this State.
3. A group representative is authorized to act in a foreign State on behalf of the planning proceeding and, in particular, to:
  - (a) Seek recognition of the planning proceeding and relief to support the development and implementation of a group insolvency solution;
  - (b) Seek to participate in a foreign proceeding relating to an enterprise group member participating in the planning proceeding; and
  - (c) Seek to participate in a foreign proceeding relating to an enterprise group member not participating in the planning proceeding.

#### **Article 20. Relief available to a planning proceeding**

1. To the extent needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:
  - (a) Staying execution against the assets of the enterprise group member;
  - (b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
  - (c) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;
  - (d) Entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, in order to protect, preserve, realize or enhance the value of assets;

(e) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;

(f) Staying any insolvency proceeding concerning a participating enterprise group member;

(g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and

(h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

3. With respect to the assets and operations located in this State of an enterprise group member that has the centre of its main interests in another State, relief under this article may only be granted if that relief does not interfere with the administration of insolvency proceedings taking place in that other State.

## **Chapter 4. Recognition of a foreign planning proceeding and relief**

### **Article 21. Application for recognition of a foreign planning proceeding**

1. A group representative may apply in this State for recognition of the foreign planning proceeding to which the group representative was appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision appointing the group representative; or

(b) A certificate from the foreign court affirming the appointment of the group representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence concerning the appointment of the group representative that is acceptable to the court.

3. An application for recognition shall also be accompanied by:

(a) A statement identifying each enterprise group member participating in the foreign planning proceeding;

(b) A statement identifying all members of the enterprise group and all insolvency proceedings that are known to the group representative that have been commenced in respect of enterprise group members participating in the foreign planning proceeding; and

(c) A statement to the effect that the enterprise group member subject to the foreign planning proceeding has the centre of its main interests in the State in which that planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members subject to or participating in that proceeding.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

5. The sole fact that an application pursuant to this Law is made to a court in this State by a group representative does not subject the group representative to the jurisdiction of the courts of this State for any purpose other than the application.



6. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

**Article 22. Provisional relief that may be granted upon application for recognition of a foreign planning proceeding**

1. From the time of filing an application for recognition of a foreign planning proceeding until the application is decided upon, where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member, the court may, at the request of the group representative, grant relief of a provisional nature, including:

- (a) Staying execution against the assets of the enterprise group member;
- (b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
- (c) Staying any insolvency proceeding concerning the enterprise group member;
- (d) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;
- (e) In order to protect, preserve, realize or enhance the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;
- (f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;
- (g) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and
- (h) Granting any additional relief that may be available to an insolvency representative under the laws of this State.

2. *[Insert provisions of the enacting State relating to notice.]*

3. Unless extended under article 24, paragraph 1 (a), the relief granted under this article terminates when the application for recognition is decided upon.

4. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

**Article 23. Recognition of a foreign planning proceeding**

1. A foreign planning proceeding shall be recognized if:
  - (a) The application meets the requirements of article 21, paragraphs 2 and 3;
  - (b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and
  - (c) The application has been submitted to the court referred to in article 5.
2. An application for recognition of a foreign planning proceeding shall be decided upon at the earliest possible time.
3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.
4. For the purposes of paragraph 3, the group representative shall inform the court of material changes in the status of the foreign planning proceeding or in the status of its own appointment occurring after the application for recognition is made, as well as changes that might bear upon the relief granted on the basis of recognition.

**Article 24. Relief that may be granted upon recognition of a foreign planning proceeding**

1. Upon recognition of a foreign planning proceeding, where necessary to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize or enhance the value of assets of an enterprise group member subject to or participating in the foreign planning proceeding or the interests of the creditors of such an enterprise group member, the court, at the request of the group representative, may grant any appropriate relief, including:
  - (a) Extending any relief granted under article 22, paragraph 1;
  - (b) Staying execution against the assets of the enterprise group member;
  - (c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;
  - (d) Staying any insolvency proceeding concerning the enterprise group member;
  - (e) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations, or liabilities of the enterprise group member;
  - (f) In order to protect, preserve, realize or enhance the value of assets for the purpose of developing or implementing a group insolvency solution, entrusting the administration or realization of all or part of the assets of the enterprise group member located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task;
  - (g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member;
  - (h) Approving arrangements concerning the funding of the enterprise group member and authorizing the provision of finance under those funding arrangements; and
  - (i) Granting any additional relief that may be available to an insolvency representative under the laws of this State.
2. In order to protect, preserve, realize or enhance the value of assets for the purposes of developing or implementing a group insolvency solution, the distribution of all or part of the enterprise group member's assets located in this State may be

entrusted to an insolvency representative appointed in this State. Where that insolvency representative is not able to distribute all or part of the assets of the enterprise group member located in this State, the group representative or another person designated by the court may be entrusted with that task.

3. Relief under this article may not be granted with respect to the assets and operations located in this State of any enterprise group member participating in a foreign planning proceeding if that enterprise group member is not subject to an insolvency proceeding, unless an insolvency proceeding was not commenced for the purpose of minimizing the commencement of insolvency proceedings in accordance with this Law.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of an insolvency proceeding taking place where an enterprise group member participating in the foreign planning proceeding has the centre of its main interests.

#### **Article 25. Participation of a group representative in proceedings in this State**

1. Upon recognition of a foreign planning proceeding, the group representative may participate in any proceeding concerning an enterprise group member that is participating in the foreign planning proceeding.

2. The court may approve participation by a group representative in any insolvency proceeding in this State concerning an enterprise group member that is not participating in the foreign planning proceeding.

#### **Article 26. Approval of a group insolvency solution**

1. Where a group insolvency solution affects an enterprise group member that has the centre of its main interests or an establishment in this State, the portion of the group insolvency solution affecting that enterprise group member shall have effect in this State once it has received any approvals and confirmations required in accordance with the law of this State.

2. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of a group insolvency solution.

### **Chapter 5. Protection of creditors and other interested persons**

#### **Article 27. Protection of creditors and other interested persons**

1. In granting, denying, modifying or terminating relief under this Law, the court must be satisfied that the interests of the creditors of each enterprise group member subject to or participating in a planning proceeding and other interested persons, including the enterprise group member subject to the relief to be granted, are adequately protected.

2. The court may subject relief granted under this Law to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under this Law, or at its own motion, modify or terminate such relief.

### **Chapter 6. Treatment of foreign claims**

#### **Article 28. Undertaking on the treatment of foreign claims: non-main proceedings**

1. To minimize the commencement of non-main proceedings or facilitate the treatment of claims in an enterprise group insolvency, a claim that could be brought by a creditor of an enterprise group member in a non-main proceeding in another State

may be treated in a main proceeding commenced in this State in accordance with the treatment it would be accorded in the non-main proceeding, provided:

(a) An undertaking to accord such treatment is given by the insolvency representative appointed in the main proceeding in this State. Where a group representative is appointed, the undertaking should be given jointly by the insolvency representative and the group representative;

(b) The undertaking meets the formal requirements, if any, of this State; and

(c) The court approves the treatment to be accorded in the main proceeding.

2. An undertaking given under paragraph 1 shall be enforceable and binding on the insolvency estate of the main proceeding.

#### **Article 29. Powers of the court of this State with respect to an undertaking under article 28**

If an insolvency representative or a group representative from another State in which a main proceeding is pending has given an undertaking in accordance with article 28, a court in this State, may:

(a) Approve the treatment to be provided in the foreign main proceeding to the claims that might otherwise be brought in a non-main proceeding in this State; and

(b) Stay or decline to commence a non-main proceeding.

### **Part B. Supplemental provisions**

#### **Article 30. Undertaking on the treatment of foreign claims: main proceedings**

To minimize the commencement of main proceedings or to facilitate the treatment of claims that could otherwise be brought by a creditor in an insolvency proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may undertake to accord to those claims the treatment in this State that they would have received in an insolvency proceeding in that other State and the court in this State may approve that treatment. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.

#### **Article 31. Powers of a court of this State with respect to an undertaking under article 30**

If an insolvency representative or a group representative from another State in which an insolvency proceeding is pending has given an undertaking under article 30, a court in this State may:

(a) Approve the treatment in the foreign insolvency proceeding of the claims that might otherwise be brought in a proceeding in this State; and

(b) Stay or decline to commence a main proceeding.

#### **Article 32. Additional relief**

1. If, upon recognition of a foreign planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in that proceeding, particularly where an undertaking under article 28 or 30 has been given, the court, in addition to granting any relief described in article 24, may stay or decline to commence an insolvency proceeding in this State with respect to any enterprise group member participating in the foreign planning proceeding.

2. Notwithstanding article 26, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of the

creditors of the affected enterprise group member are or will be adequately protected, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 24 that is necessary for implementation of the group insolvency solution.

## Annex III

### List of documents before the Commission at its fifty-second session

<i>Symbol</i>	<i>Title or description</i>
<a href="#">A/CN.9/962</a>	Provisional agenda, annotations thereto and scheduling of meetings of the fifty-second session
<a href="#">A/CN.9/963</a>	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its thirty-first session
<a href="#">A/CN.9/964</a>	Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session
<a href="#">A/CN.9/965</a>	Report of Working Group IV (Electronic Commerce) on the work of its fifty-seventh session
<a href="#">A/CN.9/966</a>	Report of Working Group V (Insolvency Law) on the work of its fifty-fourth session
<a href="#">A/CN.9/967</a>	Report of Working Group VI (Security Interests) on the work of its thirty-fourth session
<a href="#">A/CN.9/968</a>	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its thirty-second session
<a href="#">A/CN.9/969</a>	Report of Working Group II (Dispute Settlement) on the work of its sixty-ninth session
<a href="#">A/CN.9/970</a>	Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session
<a href="#">A/CN.9/971</a>	Report of Working Group IV (Electronic Commerce) on the work of its fifty-eighth session
<a href="#">A/CN.9/972</a>	Report of Working Group V (Insolvency Law) on the work of its fifty-fifth session
<a href="#">A/CN.9/973</a>	Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session
<a href="#">A/CN.9/974</a>	Draft notes on the main issues of cloud computing contracts
<a href="#">A/CN.9/975</a>	Review of draft UNCITRAL secretariat notes on the main issues of cloud computing contracts: considerations relating to the preparation of an online tool containing a legal text
<a href="#">A/CN.9/976</a>	Promotion of awareness, understanding and use of UNCITRAL texts
<a href="#">A/CN.9/977</a>	Bibliography of recent writings related to the work of UNCITRAL
<a href="#">A/CN.9/978</a>	Coordination activities
<a href="#">A/CN.9/979</a>	Status of conventions and model laws
<a href="#">A/CN.9/980/Rev.1</a>	Technical cooperation and assistance
<a href="#">A/CN.9/981</a>	Work programme of the Commission

<i>Symbol</i>	<i>Title or description</i>
<a href="#">A/CN.9/982/Rev.1</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects
<a href="#">A/CN.9/982/Add.1</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised Introduction)
<a href="#">A/CN.9/982/Add.2</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapters I and II)
<a href="#">A/CN.9/982/Add.3</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapter III)
<a href="#">A/CN.9/982/Add.4/Rev.1</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised Chapter IV)
<a href="#">A/CN.9/982/Add.5/Rev.1</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapter V)
<a href="#">A/CN.9/982/Add.6/Rev.1</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapter VI)
<a href="#">A/CN.9/982/Add.7/Rev.1</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (revised chapter VII)
<a href="#">A/CN.9/983</a>	Relevant General Assembly resolutions
<a href="#">A/CN.9/984</a>	Coordination and cooperation: international governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups
<a href="#">A/CN.9/985</a>	Role of UNCITRAL in promoting the rule of law at the national and international levels
<a href="#">A/CN.9/986</a>	International commercial mediation: draft UNCITRAL mediation rules
<a href="#">A/CN.9/987</a>	International commercial mediation: draft UNCITRAL notes on mediation
<a href="#">A/CN.9/988</a>	Activities of the UNCITRAL Regional Centre for Asia and the Pacific
<a href="#">A/CN.9/989</a>	Compilation of comments on the draft model law on enterprise group insolvency as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-fourth session ( <a href="#">A/CN.9/966</a> )
<a href="#">A/CN.9/989/Add.1</a>	Compilation of comments on the draft model law on enterprise group insolvency as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-fourth session ( <a href="#">A/CN.9/966</a> )
<a href="#">A/CN.9/WG.V/WP.165</a>	Enterprise group insolvency: draft guide to enactment
<a href="#">A/CN.9/990</a>	Finalization and adoption of texts in the area of insolvency law: draft text on obligations of directors of enterprise group companies in the period approaching insolvency

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<i>Symbol</i>	<i>Title or description</i>
<a href="#">A/CN.9/991</a>	Report of the Colloquium on contractual networks and other forms of inter-firm cooperation
<a href="#">A/CN.9/992</a>	Possible future work on warehouse receipts
<a href="#">A/CN.9/993</a>	Draft Practice Guide to the UNCITRAL Model Law on Secured Transactions
<a href="#">A/CN.9/994</a>	Consideration of issues in the area of security interests: finalization and adoption of a practice guide to the UNCITRAL Model Law on Secured Transactions
<a href="#">A/CN.9/995</a>	Work programme: proposal of the European Union
<a href="#">A/CN.9/996</a>	Work programme: proposal by the United States of America
<a href="#">A/CN.9/997</a>	Possible future work in the field of dispute resolution in international high-tech related transactions: proposal by the Governments of Israel and Japan
<a href="#">A/CN.9/998</a>	Work programme: possible future work regarding railway consignment notes: proposal by the Government of the People's Republic of China
<a href="#">A/CN.9/999</a>	Finalization and adoption of model legislative provisions on public-private partnerships with an accompanying legislative guide
<a href="#">A/CN.9/1000</a>	Public-private partnerships (PPPs): Proposed updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects – comments by the Government of Algeria

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