United Nations A/CN.9/1090

General Assembly

Distr.: General
31 May 2022

Original: English

United Nations Commission on International Trade Law
Fifty-fifth session
New York, 27 June–15 July 2022

Report of Working Group I (MSMEs) on the work of its thirty-seventh session (New York, 9–13 May 2022)

Contents

V.22-03538 (E) 060622 070622

I. Introduction

Consideration of issues on access to credit for micro, small and medium-sized enterprises (MSMEs)

1. At its forty-sixth session, in 2013, the Commission agreed that work on reducing the legal obstacles faced by MSMEs throughout their life cycle, in particular, in developing economies, should be added to the work programme of the Commission, and that such work should begin with a focus on the legal questions surrounding the simplification of incorporation. This resulted in two texts adopted by the Commission in 2018 and 2021 respectively: the *UNCITRAL Legislative Guide on Key Principles of a Business Registry* and the *UNCITRAL Legislative Guide on Limited Liability Enterprises*.

2. At its fifty-second session, in 2019, the Commission agreed to strengthen and complete the work on reducing the legal obstacles faced by MSMEs throughout their life cycles by requesting the Secretariat to start preparing draft materials on MSMEs' access to credit, 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.[1] The Working Group considered the topic for the first time at its thirty-sixth session and continued that work at its thirty-seventh session on the basis of revised documentation reflecting its previous deliberations.

II. Organization of the session

3. Working Group I, which was composed of all States members of the Commission, held its thirty-seventh session in New York from 9 to 13 May 2022. The session was held in line with the decision by the Commission during its fifty-fourth session to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex I) until its fifty-fifth session. Arrangements were made to allow delegations to participate in person and remotely.

4. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Burundi, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, France, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Malaysia, Mali, Mexico, Nigeria, Peru, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Turkey, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

5. The session was attended by observers from the following States: Angola, Armenia, Azerbaijan, Bahrain, Bolivia (Plurinational State of), Burkina Faso, Egypt, El Salvador, Eswatini, Kuwait, Morocco, Nepal, Panama, Paraguay, Qatar, Saudi Arabia, Togo and Turkmenistan.

6. The session was also attended by observers from the European Investment Bank (EIB).

7. The session was further attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: United Nations Industrial Development Organization (UNIDO) and World Bank Group (WB);

(b) *Intergovernmental organizations*: Asociación Latinoamericana de Integración (ALADI), Cooperation Council for the Arab States of the Gulf (GCC),

[1] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 192 (a).

International Institute for the Unification of Private Law (Unidroit), Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS); and

(c) *Invited international non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Association for Financial Inclusion (AFI), Barreau de Paris, China Council for the Promotion of International Trade (CCPIT), European Law Students' Association (ELSA), Fondation pour le droit continental (FDC), Forum for International Conciliation and Arbitration (FICA), International Chamber of Commerce (ICC), International Union of Notaries (UINL), Kozolchyk National Law Center (NatLaw), Latin American Group of Lawyers for International Trade Law (GRULACI), Law Association for Asia and the Pacific (LAWASIA), Mid-Atlantic Caribbean Alternative Dispute Resolution Institute (MACADRI), Shanghai Arbitration Commission, Tashkent International Arbitration Centre (TIAC), Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ) and World Union of Small and Medium Enterprises (WASME).

8. According to the decision made by the Commission (see para. 3 above), the following persons continued their offices:

Chair: Mr. Siniša Petrović (Croatia)

Rapporteur: Ms. Beulah Li (Singapore)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.125); and

(b) Note by the Secretariat on access to credit for micro, small and medium-sized enterprises (MSMEs) (A/CN.9/WG.I/WP.126).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Consideration of issues on access to credit for micro, small and medium-sized enterprises.

III. Deliberations and decisions

11. The Working Group engaged in discussions on access to credit for MSMEs based on a Note by the Secretariat (A/CN.9/WG.I/WP.126). The deliberations of the Working Group on this topic are reflected below.

IV. Access to credit for micro, small and medium-sized enterprises (MSMEs)

A. Presentation of A/CN.9/WG.I/WP.126

12. The secretariat introduced document A/CN.9/WG.I/WP.126 highlighting the main changes. In particular, the secretariat noted the revised structure of the paper which was more coherent compared to its previous iteration (A/CN.9/WG.I/WP.124) and provided a clearer distinction between legislative tools that facilitate MSME access to credit (chapters III–V) and other policy and regulatory measures that can complement those tools (chapter VI). The secretariat also noted that A/CN.9/WG.I/WP.126 had an improved gender dimension, and in some parts it introduced a differentiation between reforms applicable to MSMEs of all sizes and others only applicable to micro and small enterprises (MSEs). Lastly, the secretariat

made reference to the “Notes to the Working Group” contained in the document calling for concrete action by the Working Group.

B. General remarks

13. As at the thirty-sixth session of the Working Group (Vienna, 4–8 October 2021), a suggestion was made that the Future Text should be developed by the secretariat with assistance from a group of experts (see A/CN.9/1084, para. 14) and that it would not be necessary for the Working Group to continue to consider the Future Text after the current session. It was suggested that the Working Group could provide guidance at the current session on how the secretariat could revise the Future Text in a coherent manner addressing the challenges faced by MSMEs and providing possible solutions. It was added that the Future Text should not include any legislative recommendation but rather explain how existing instruments of UNCITRAL and other organizations could address such challenges. In support, it was suggested that the nature of the Future Text would not be suitable for negotiation in a Working Group setting (also as the Text was quite lengthy) and would not be an efficient use of the Working Group’s time and resources.

14. Questions were raised about that suggestion in light of the mandate given by the Commission as well as to why the Future Text should not contain recommendations. It was pointed out that work involving a group of experts and work by the Working Group could be carried out concurrently; however, an expert group might not be as representative of the different legal systems as the Working Group, the diversity of which could benefit the development of the Future Text. There was some support that the Future Text should aim to contain concrete recommendations and that it would be worthwhile for the Working Group to continue to undertake its review of the Future Text as had been the case for the preparation of previous instruments developed by Working Group I. In response, it was noted that a conclusion from the Working Group after the current session to recommend to the Commission that the Future Text could be developed by the secretariat would be in line with the existing mandate given to it by the Commission. It was added that even if prepared by the secretariat, the Future Text could include some recommendations, which would eventually be approved by the Commission.

15. It was mentioned that while parts of the Future Text were descriptive consisting of narratives on how existing international standards addressed the challenges faced by MSMEs in accessing credit, there were other parts which required policy decisions by the Working Group, including whether substantive recommendations should be made. It was noted that the Working Group should carefully consider such parts before making a decision on whether the work should be conducted by the Working Group or the secretariat. Divergent views were expressed as to whether the nature of the Future Text needed to be decided by the Working Group at the outset before engaging in substantive discussions. Some delegations expressed the view that substantive discussion on the Future Text could help the Working Group make an informed decision on the nature of the document at a later stage.

16. Other suggestions were made for example, that the Future Text could be separated into two documents – one high-level document outlining the policy issues and one legislative guide on specific topic(s). Yet another suggestion was that in light of the mandate of UNCITRAL, focus should be on legislative solutions to address issues which required legal harmonization and not those which were the subject of commercial considerations. On the other hand, the benefit of producing a document illustrating the challenges faced by MSMEs in accessing credit and providing possible solutions for reference by governments was highlighted.

17. After discussion, it was agreed that the nature of the Future Text and the suggestion for it to be developed by the secretariat with assistance from experts should be discussed after a substantive review by the Working Group of document A/CN.9/WG.I/WP.126.

C. Purpose of the Future Text

18. On the question of whether references should be made to micro and small enterprises (MSEs) instead of MSMEs in the Future Text, there was some hesitance as a number of the issues could equally apply to medium-sized enterprises and because enterprises were likely to change in size as they developed. Concerns were expressed that it would not be useful to exclude medium-sized enterprises entirely from the scope of the Future Text as medium-sized enterprises in developing countries should also benefit from the work of the Working Group. A suggestion was made that there might be a need to distinguish parts of the Future Text that would respectively be applicable to micro, small and medium-sized enterprises. On the other hand, it was mentioned that the issues or challenges of access to credit for medium-sized enterprises were quite different and that the Future Text should focus on MSEs ("think small first" paradigm). In support, it was suggested that parts addressing issues faced by medium-sized enterprises (e.g. public listing) could be removed from the Future Text.

19. After discussion, the Working Group agreed for the Future Text to focus on MSEs but not to exclude issues relating to medium-sized enterprises from its scope.

D. Chapter I – Introduction

20. With regard to the phrase "domestic legal framework" in paragraph 14, it was highlighted that the Commission had prepared legal instruments on secured transactions involving movable assets extensively while it had not touched upon the legal framework for personal guarantees. It was said that the issues of enforcement should also be taken account of, which would enhance creditor's confidence when extending credit to MSMEs and it was suggested that reference could be made to Unidroit's work on best practices for effective enforcement.

21. It was pointed out that the difference between legal and policy issues as well as between legislative and regulatory aspects was not clear and that it would be necessary to identify the respective issues in order to make progress on the scope of the Future Text. Reference was made to the definition of "law" in the *UNCITRAL Legislative Guide on Key Principles of a Business Registry*, which referred to both legislation and administrative regulations or guidelines. Doubts were expressed about listing certain topics, such as business registration, credit reporting, and restructuring support, as policy issues for which recommendations would not need to be developed, on the basis that some topics were products of this Working Group and Working Group V (Insolvency Law). In response, it was stated that such issues were intertwined and it was a question for the Working Group to determine whether legislative solutions were appropriate for tackling such policy issues. In that context, it was mentioned that issues of commercial considerations (for example, whether to provide State subsidies to MSEs) were not necessarily suitable for legislative solutions. With regard to public guarantee schemes, it was suggested that while the Future Text would not recommend that States develop such schemes, it would be useful to outline such schemes as a way to improve access to credit through debt tools as they would reduce the perceived risk of creditors.

E. Chapter II – MSMEs and their financing needs at various stages

22. With respect to paragraph 18, it was emphasized that the paragraph highlighted two aspects to enhance access to credit – first, that the framework should make creditors more willing to lend to MSMEs and second, that the framework would provide means to protect MSMEs. It was said that the latter could be tackled through a wide range of regulatory approaches and that it might be better to address them separately.

23. With regard to paragraph 19, it was suggested that reference should be made to "state-owned institutions" as providers of credit and that a similar reference could be included in chapter III.

24. With regard to paragraph 21, in line with the principle of "think small first", it was reiterated that the Future Text should not address public listings and corporate bonds as they were more applicable to medium-sized enterprises (see para. 18 above). Accordingly, it was suggested that this paragraph and relevant subsubsection on "public listing on stock exchanges" could be deleted.

F. Chapter III – Debt tools for MSMEs to access credit

25. With regard to the respective sections in chapter III, a suggestion was made that each section should be concluded with possible solution(s) after listing identified problems and issues. It was recalled that the purpose of chapter III was to list existing ways of accessing credit.

26. As a general point, a question was raised whether the debt tools might be better categorized by referring to the providers of credit and the tools of accessing credit. However, it was mentioned that it was not as easy to separate the two and that chapter III intended to outline the possible tools more generally.

27. As regards family and friends support, it was mentioned that high interests charged by banks in some jurisdictions was one of the main reasons for MSMEs to seek financial support from family and friends. Lack of regulation on how MSMEs could be supported by family and friends, as well as lack of financial education were cited as issues to be mentioned. In addition, it was noted that issues may also arise as regards the nature of the support (loan vs. gift, partnership), which may not fall within the mandate of UNCITRAL. Similarly, some doubts were expressed about providing solutions on issues of commercial nature, for example, on unsecured lending and best practices thereto in the context of credit cards.

28. With regard to the use of the term "bank credit" in subsection E, it was suggested that the term may be replaced with "commercial credit" as it dealt with credit provided by financial institutions and banks.

1. General remarks

29. A proposal was made to reorganize the Future Text along the following lines: (i) to combine chapters III and IV under the heading "sources and types of credit available to MSMEs" considering that chapter IV would likely be shortened after deleting subsection D on "public listing on stock exchanges" (see para. 24 above); (ii) to have three sections within the new chapter – the first section on personal wealth (including for example, issues concerning restrictions under inheritance law as discussed in para. 77 of the Future Text), with the second and third sections respectively dealing with "debt tools" and "equity tools"; (iii) to move section H of chapter III and section E of chapter IV to chapter VI, with the heading "measures to facilitate access to credit". That proposal was generally supported.

30. As to a proposal to make a distinction between sources of credit (i.e. credit providers) and credit products, views were expressed that there was not much merit in making such distinction, even though they may be subject to different regulatory frameworks. It was considered that the emphasis should be on the tools to access credit, which would in any case touch upon the sources of funding.

31. Considering that personal wealth of individuals was an important source of funding for MSMEs and that it could be considered as a credit to the enterprise that the individual would be operating, it was noted that the issues relating to personal wealth deserved to be discussed in the Future Text. Yet another view was expressed that personal wealth could be used as either debt or equity and that it should not form a separate section and could be discussed within the context of debt or equity. It was

mentioned that the Future Text could explain the need to distinguish the funds of individuals and the funds of the enterprises so that they do not become commingled.

32. In response to the proposal to move section H of chapter III and section E of chapter IV to chapter VI, it was noted that chapter VI would need to be restructured so as to first highlight the legislative frameworks for debt and equity tools and then list the other ways to facilitate access to credit as currently contained in chapter VI. It was agreed to consider the structure of that chapter after discussing the substance and possible recommendations to be made.

33. After discussion, the Working Group decided to: (i) combine chapters III and IV into a single chapter, addressing generally the sources of financing including personal wealth followed by separate sections on debt and equity tools, (ii) move section H of chapter III and section E of chapter IV to chapter VI, and (iii) keep the division between debt and equity tools and not to categorize such tools based on sources of credit and types of credit products.

2. Family and friends support

34. Divergent views were expressed as to whether the subsection on family and friends support should be further expanded. Delegations in favour noted that issues arising from family and friends support, such as the informal nature of such support, lack of regulation and lack of financial literacy, could be further highlighted in the Future Text. It was also suggested that means to capture repayment records of informal loans from family and friends could be developed as a way to build credit history. It was further noted that criminal law issues concerning fraud may also be relevant in that context.

35. On the other hand, it was questioned whether family and friends as the source of funding needed to be highlighted in the Future Text as they should be subject to the same rules as any other creditor and as it would be difficult to come up with concrete recommendations. It was explained that family and friends support would generally be governed by laws concerning contract formation and execution, and questions concerning how to structure debts from family and friends in an enterprise were more relevant to issues discussed in the *UNCITRAL Legislative Guide on the Limited Liability Enterprises*. Another view was that family and friends support would often depend on the societal structure of the place where the MSME operated, which would not be a subject for commercial law.

36. Given that family and friends were often providers of personal guarantees and collateral, it was questioned whether all those issues could be dealt with in one single section or throughout the Future Text, where relevant. It was also noted that the access to credit framework would need to not only protect MSMEs but also the family and friends who provided the support. Another suggestion was to compile some best practices regarding such family and friends support.

37. After discussion, the Working Group agreed to give special attention to family and friends support in the Future Text, noting that it was a significant source of financing, particularly in developing economies. In that context, it was agreed that a number of challenges faced by MSMEs in accessing credit and the environment in which they operated would be further elaborated in chapter II of the Future Text. These included a general lack of a legal or regulatory framework, financial illiteracy or low literacy, informality both with regard to the form of the MSEs and the transactions that they engage in, high interest rates, the need to protect both MSEs as well as creditors and so forth. Noting that some of those challenges were already addressed in that chapter, the secretariat was requested to reflect the above-mentioned challenges in that chapter possibly making reference to other parts of the Future Text that dealt with ways to address or mitigate such challenges.

3. Microcredit

38. Concerns were expressed about how microfinance institutions operated in certain countries to the detriment of the MSMEs (e.g. high interest rates), which appeared to be inconsistent with the assumption that microfinance institutions could provide credit at lower costs given that they were subject to less stringent prudential regulations than other regulated financial institutions. Accordingly, suggestions were made to further investigate the reasons for such inconsistency as well as to further elaborate in the Future Texts requirements on the operation of microfinance institutions, including possibly limiting the interest rates that they could impose. However, it was also noted that there were different types of microfinance institutions with different objectives, which might not make it possible to develop a single regulatory framework for all such types.

39. Having recalled that the Commission had previously decided to focus its work on reducing the legal obstacles faced by MSMEs throughout their life cycle rather than on microfinance (A/68/17, paras. 321–322), the Working Group requested the secretariat to reflect the fact that microcredit providers were often subject to less stringent prudential regulations.

4. Bank credit

40. It was suggested that the problems in accessing bank credit could be discussed in a single paragraph, instead of throughout the whole subsection. While suggestions were made that banks should be required to share the burden of micro enterprises in financial difficulties (e.g. mandatory moratorium for MSEs under certain circumstances) and provide preferential treatment to such enterprises (e.g. lower interest rates), doubts were expressed on the extent to which such recommendation could be made to private banks which were profit-driven. Instead, the role of States in incentivizing banks to provide funding to MSMEs through various measures was emphasized.

5. Trade finance

41. A suggestion to delete this subsection as it was mainly for medium-sized enterprises did not receive support. In response, it was explained that MSMEs were indirect beneficiaries from trade finance provided to larger companies. It was also mentioned that the examples of trade finance listed (i.e. factoring and supply chain finance) were often considered as useful means for small businesses to obtain working capital. In this respect, it was suggested that the heading of this subsection could refer to “working capital finance”.

42. Several proposals to revise and expand this subsection were taken up by the Working Group: (i) include the use of letters of credit in trade finance; (ii) remove references to “importers and exporters”; (iii) explain the different practices concerning payment schedules which may affect the use of trade finance tools in the context of supply chain finance or elsewhere in the Future Text; and (iv) discuss the credit system utilized in the agricultural sector in some countries, so-called “warrantage”, which provided a form of guarantee so that farmers would not be forced to sell products below market price.

43. Different views were expressed on whether to address financial leases under this subsection. It was generally felt that this topic could be better addressed under the subsection on “bank credit” or as a separate section.

6. Corporate bonds

44. Recalling previous discussions on this topic (see para. 24 above), the Working Group decided to delete this subsection as corporate bonds were mainly relevant for medium-sized enterprises.

7. A legislative framework supportive of debt tools for MSME to access credit

(a) Existing international standards

45. With respect to movable assets, the Working Group decided to recommend the use of existing international standards concerning the use of movable assets as collateral, including those standards on efficient security rights registry systems. It was suggested that the Future Text should include a reference to the status of jurisdictions that have adopted such international standards, if available.

46. A question was raised about a situation where the collateral would be transferred without the secured creditor being informed about the transfer and whether such transactions should be made illegal or subject to criminal action. In response, it was pointed out that the *UNCITRAL Model Law on Secured Transactions* provided the rules to respond to such situation, while not limiting the possibility for the grantor to transfer assets which were the subject of a security right. It was mentioned that the security rights registry had the aim of making information about security interests available to the public so as to protect not only the grantor and the secured creditor but also third parties.

47. It was suggested that best lending practices including responsible lending standards, which only applied to the consumer context in many jurisdictions, could be discussed in section H of the current chapter VI concerning capacity-building.

48. As regards immovable assets, doubts were raised as to whether the *EBRD Core Principles for a Mortgage Law* could be regarded as existing international standards on the topic. A suggestion was also made to not make any legislative recommendations on immovable assets as collateral. It was recalled that the area was not necessarily subject to or feasible for legal harmonization in light of the divergence in domestic property law principles. As many States had separate registry systems for movable and immovable assets, it was suggested that such a system should not be characterized as being "antiquated" in paragraph 68.

49. After discussion, the Working Group agreed that the paragraphs on the use of immovable assets as collateral could be revised as follows:

- To indicate that there are no existing international standards on the use of immovable property as collateral;
- To delete the word "antiquated" in paragraph 68;
- To revise paragraph 69 to reflect that many countries required notarization for taking security over immovable assets;
- To retain references to existing regional standards, such as the *EBRD Core Principles for a Mortgage Law*; and
- To make reference to the objectives of the *UNCITRAL Model Law on Secured Transactions* in facilitating the use of movables as collateral, which could equally apply to immovable assets, also acknowledging that the rules governing immovable assets had their specificities.

50. The Working Group also agreed that no legislative recommendation would be prepared with respect to the use of immovable assets as collateral, considering the diversity in approaches in property law and as it would not be desirable nor feasible to harmonize the relevant laws.

(b) Possible areas for future improvement

(i) Use of collateral

Lack of collateral

51. The Working Group moved to discuss the obstacles faced by MSMEs in the use of collateral and a wide range of comments were made with regard to the subsection on the "Lack of collateral". It was said that lack of collateral was one of the major

challenges for MSMEs and it might be caused by legal constraints on the use of certain assets as collateral as well as procedural difficulties associated with providing assets as collateral. It was also noted that in many instances, lack of collateral was a factual matter (e.g. the MSME had no assets) that legislative solutions could not resolve. Accordingly, some delegations were of the view that no legislative recommendations could be formulated in this regard. In response, comments were made that several issues could be relevant for a legislative recommendation.

52. It was said that one recommendation would be for States to ensure that all types of assets (regardless of whether tangible or intangible, present or future) could be used as collateral, which would expand the pool of assets that could be provided as collateral by MSMEs. Yet another recommendation could be to lift the collateral requirements for MSMEs, for example, by requiring financial institutions to not require collateral for such loans. In response, it was noted that such a regulatory approach might be putting too much burden on the financial institutions that would need to be responsible for any non-payment of loans. It was also mentioned that improving the valuation methodology could enhance the credit to be provided by financial institutions.

53. It was said that the lack of collateral could be tackled through recommending the use of various tools which did not involve collateral, such as guarantee schemes, peer-to-peer lending, microcredit, family and friend support, as well as tools to assess the creditworthiness of the borrower. It was added that the establishment of digital banks may also help address the issue as it streamlined the loan application process and reduced transaction costs.

54. It was suggested that references to existing international standards concerning using movable assets as collateral should be emphasized. In particular, it was pointed out that the *UNCITRAL Model Law on Secured Transactions* allowed taking security over all types of movable assets and securing all types of obligations. The importance of building the capacity of secured creditors (concerning, for example, asset valuation and assets that could be encumbered) was also highlighted.

Overcollateralization

55. Views were expressed that the issue of overcollateralization was not an issue often faced by micro and small-sized enterprises, which did not have the assets to provide as collateral. While it was suggested that overcollateralization related more to secured transactions involving movable assets, it was pointed out that the same would arise with respect to secured transactions involving immovable assets. It was also noted that the *UNCITRAL Model Law on Secured Transaction* aimed to address the problem that could arise from overcollateralization by providing an option to States to require that the security agreement include the maximum amount for which enforcement could be sought. It was further stated that the description on the issues should be nuanced to not give the impression that overcollateralization was a problem to be resolved.

Enforcement

56. A suggestion was made to expand the subsection on enforcement as credit was likely to be extended when supported by a strong legal framework for enforcement. In response, it was noted that any potential overlap with Unidroit's ongoing project on "Best Practices for Effective Enforcement" should be avoided and a reference to that project could be included in the Future Text as an emerging international standard. It was added that the subsection should clarify that determination of the types of assets that would be exempt from enforcement (e.g. essential personal assets, household goods) was a policy issue to be left to individual States.

57. After discussion, the Working Group decided that the section regarding the "use of collateral", which would form part of the new chapter VI on "Measures to facilitate access credit", would be reorganized to identify the problems arising therein and

outline the possible solutions (focusing on legislative solutions), with regard to which the Working Group would later decide whether to make any recommendations.

(ii) Personal guarantees

A general introduction

58. A concern was expressed that the current section on personal guarantees was drafted in an unbalanced manner, placing too much emphasis on the high risks for the guarantor and the need for its protection. The Working Group supported a suggestion that the introductory part of this section of the Future Text could better highlight how personal guarantees can facilitate access to credit (they could be the only way to obtain credit if the MSME lacked collateral) without undermining the importance of the guarantor's protection. In this regard, it was proposed that issues arising from personal guarantees provided by family members and friends and the protection to be provided to them could be mentioned. It was noted that in certain States there were strong concerns on the use of personal guarantees and laws have been reformed to introduce more protection for guarantors. The importance of taking into consideration that personal guarantees can be provided by a partner or the owner of the small business or a third party (e.g. a family member), when crafting laws for guarantor's protection was also highlighted. A suggestion was made that the Future Text could illustrate the different approaches of States to ensure protection of personal guarantors. There was support for that suggestion.

59. With regard to paragraph 91, a suggestion was made that the secretariat could clarify the distinction between secured and unsecured guarantees, because it may correspond to different mechanisms in different legal systems or even within the same system.

The relevance of dependent personal guarantees for MSEs

60. In noting that the secretariat would further elaborate on the issue of surety bonds in the next iteration of the Future Text, it was said that surety bonds were not tools appropriate for MSMEs in certain States due to their high costs (e.g. expensive premiums for issuance of surety bonds by private companies). However, as the practice may be different in other States, the secretariat was requested to clarify whether surety bonds may represent an advantageous option for MSMEs.

Legal nature and scope of the liability

61. The need to clarify the rights and obligations of the parties involved in personal guarantees (particularly the guarantor) was emphasized, noting that certain concepts (such as special defences that were not available to the principal debtor) might not exist in all jurisdictions. It was explained that uncertainty might reduce the availability of credit or increase the costs for obtaining credit. A suggestion was made that this subsection should focus on recommending that the rights and obligations should be clear for the parties, without an attempt to harmonize rules in this context.

62. The Working Group agreed to formulate a recommendation that States should provide clear rules on the rights and obligations of the parties (including the scope of guarantor's liability) in their respective laws. Doubts were expressed about achieving harmonization of such rules and it was agreed that the recommendation should not imply the need for harmonization.

Personal guarantees of MSE's owners, directors or family members

63. A suggestion for this subsection to follow a more balanced approach was taken up by the Working Group. While explaining the potential risks of issuing personal guarantees and special protection for the guarantor, the subsection should highlight the benefits of having personal guarantees provided by the owners of the business or their family members. However, it was pointed out that personal guarantees should

not be issued simply because the lender lacked capacity to conduct proper credit risk analysis.

64. A view was expressed in favour of ensuring sufficient disclosure of information to the guarantor, especially in the context of insolvency. It was clarified that some domestic insolvency laws treated guarantees issued by family members of the debtor as subordinated debt as the guarantor was related to the debtor.

(iii) Other initiatives

65. The legislation entitled "Magna Carta for MSMEs", which mandated all financial institutions to allot 10 per cent of their respective loan portfolios for MSMEs, was cited as an example of a legislative framework supportive of debt tools for MSME access to credit. Another example was the creation of a public revolving fund to assist MSME access to credit, especially in the absence of collateral and guarantee. The establishment of national guarantee schemes for MSMEs was also proposed in this context. In response, it was pointed out that chapter VI, section B specially dealt with the issues concerning credit guarantee schemes.

G. Chapter IV – Equity tools for MSMEs to access credit

66. As a general remark, it was noted that the heading of the chapter could be clarified as equity tools were not necessarily means to access "credit" in the narrow sense but rather to obtain "financing". In this respect, it was suggested that since the Working Group had agreed to combine chapters III and IV into one (see para. 33 above), the latter parts of the heading ("for MSMES to access credit") could be deleted.

1. Family and friends support

67. Recalling the previous deliberations of the Working Group on family and friends support as a debt tool (see paras. 34–37 above), it was noted that the section on family and friends support as an equity tool would also need to be revised to ensure consistency between the two sections.

2. "Business angel" investment and venture capital

68. A suggestion was made that both sections B ("Business angel" investment) and C (Venture Capital) could be expanded to touch upon the possibility that both equity tools could be used in combination with or also as a debt tool. It was mentioned that in Europe, venture capital was often combined with a debt tool whereby a debt is converted into equity after a certain period or when certain conditions are met. However, questions were raised whether small businesses would be the main users of such convertible tools. After discussion, it was agreed that short reference to the use of the convertible tools could be included in the text, without too detailed a discussion.

69. The experience of a State in operating a programme linking MSMEs with venture capitalists was shared during the session. Among others, it was noted that (i) for many MSMEs the process of creating and maintaining a corporate structure was daunting and that MSMEs needed to overcome this challenge; (ii) MSMEs that successfully incorporated were largely open to venture capital investments; and (iii) the financial assessment by the State and a strong legal stance in all venture capital investments were key in ensuring a relative success of the programme.

3. Public listing on stock exchanges

70. In recalling previous discussions on the scope of the Future Text (see paras. 18 and 24 above), it was agreed that section D on Public listings on stock exchanges would be removed from the Future Text.

H. Chapter V – FinTech tools for MSMEs to access credit

71. It was agreed that there was merit in the Future Text discussing FinTech tools for MSMEs to access to credit. A question was raised about the placement of chapter V, noting that it addressed distinctive issues associated with modern technology. It was suggested that the contents of that chapter could be placed in the new chapter III of the Future Text, as a new part with an introductory section addressing digital financial services as a source of financing, which would be followed by a section with the examples provided in section B of the current chapter V. The suggestion received support.

72. The Working Group also agreed that: (i) the paragraphs on crowdfunding could be further clarified to distinguish the different types of crowdfunding, one type being loan-based crowdfunding (peer-to-peer lending) and another type being investment-based crowdfunding (including debt and equity with the possibility to issue securities); (ii) the paragraphs on distributed ledger technology could be shortened and mentioned in the introductory section on FinTech; (iii) digital mobile credit (credit provided by mobile money providers or telecommunication service providers) could be mentioned as another example of FinTech tools.

73. The Working Group was cautioned against making concrete recommendations with regard to FinTech tools considering the complexities inherent in the relevant transactions as well as technology and also in light of the work to be conducted by Working Group IV (Electronic Commerce). While different views were expressed as to whether section C of chapter V should be deleted entirely, it was agreed that the part on FinTech tools should be descriptive in nature and that the current section C of chapter V should be simplified and moved to the introductory section (see para. 71 above), making references to existing UNCITRAL standards on e-commerce and ongoing work of other working groups, as relevant.

74. Another suggestion was that it might be useful for the Future Text to provide information about national initiatives in developing regulatory frameworks for FinTech, for example, using a so-called sandbox approach to allow for innovations. In that context, it was suggested that reference could be made to how FinTech tools could fit within the existing legal and/or regulatory frameworks. In response, the need for the Future Text to focus on FinTech tools relevant for MSMEs' access to credit was emphasized. In addition, it was noted that the key issue was whether MSMEs faced any legal impediments when utilizing FinTech tools.

75. With regard to the subsection on electronic commerce platforms, it was widely felt that the use of such platforms was not specific to FinTech tools and could be used in the context of supply chain finance as well as other debt and equity tools. The Working Group agreed that the introductory part of the new chapter III could mention the use of technology and such platforms as means to facilitate the use of the tools.

I. Chapter VI – Additional measures to facilitate access to credit

1. Credit guarantee schemes

Public Credit Guarantee Schemes

76. As a general comment, it was noted that the paragraphs in section B on Credit Guarantee Schemes (CGS) should not be prescriptive (for example, first sentence of para. 168) but rather be explanatory. It was suggested that transparency should be highlighted as an element of an effective public credit guarantee scheme at the outset.

77. The following suggestions were made:

- Paragraph 166: to clarify that CGS and public support mechanisms were not an alternative to market-based private lending mechanisms, as they should coexist to address a wide range of different circumstances that MSMEs faced. It was stressed that the public CGS should generally supplement private lending

mechanisms and that the Future Text should highlight their complementary nature;

- Paragraph 168: to revise the last sentence to clarify that it was making a contrast to a situation where the public CGS would be provided by a separate entity established for that purpose;
- Paragraph 170: to avoid using the term "government oversight" and explain that the day-to-day operation of the CGS should not be subject of political influence;
- Paragraph 177: to reflect that coverage ratios may affect lenders' incentives to monitor the performance of the borrower; and
- Paragraph 180: to delete the phrase which stated that CGS should be able to adjust fees based on credit loss history and market developments given that such fees were fixed in some countries.

78. It was further suggested that guarantee schemes provided by national export developments banks to help MSMEs and facilitate trade could be mentioned in this section.

2. Credit reporting

79. It was noted that section C on Credit reporting could address more broadly measures to facilitate the assessment of MSMEs' creditworthiness, with credit reporting forming one of the subsections and with the heading revised accordingly. It was further observed that if more information about the creditworthiness of MSMEs were to be available, it would facilitate lending and the section should focus on ways to remove obstacles in obtaining relevant information. It was said that the section could make reference to information that might be readily available to financers through public registries, including the business registry. It was, however, cautioned that the section should not take a prescriptive approach but illustrate the different approaches on credit reporting.

Reporting obligations

80. It was pointed out that while micro and small enterprises might provide financial statements voluntarily, they might not be required to keep such records. Reference was made to the UNCITRAL Legislative Guide on Limited Liability Enterprises, which did not impose such obligation, but encouraged MSMEs to opt for voluntary disclosure. It was suggested that section C could take the same approach.

Integrating available information with public agencies' records

81. With regard to the first sentence of paragraph 199, it was suggested that the word "regulated" should be deleted and replaced with "non-bank" as not all of the examples of commercial entities provided in the penultimate sentence (such as factoring and leasing companies) were subject to such regulation.

Alternative data

82. With regard to alternative data, it was suggested that reference could be made to the work to be conducted by Working Group IV on data transactions as well as that by UNCTAD on data for e-commerce.

83. The Working Group considered all suggestions mentioned in the paragraphs above (paras. 79 to 82) and requested the secretariat to revise the section on credit reporting accordingly.

3. Procedures and mechanisms for resolving disputes on access to credit

84. The Working Group generally recognized the importance of procedures and mechanisms for resolving disputes arising in accessing credit. It was reiterated that financers' decisions to lend were often based on the availability of an efficient judicial

system and the existence of external redress mechanisms. In this respect, it was suggested that the examples of external redress mechanisms in paragraph 217 could be further elaborated by illustrating the advantages and disadvantages of each mechanism. It was said that emphasis could be put on “mediation” and that special procedures available to consumers of financial services could be mentioned. It was further suggested that reference could be made to existing UNCITRAL texts on dispute settlement as well as the APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-business Disputes.

85. Further, it was said that the overall cost of the redress mechanism should be taken into account, particularly as it was an obstacle that MSMEs faced in utilizing the redress mechanisms. It was mentioned that means to reduce the overall cost, to enhance cost-efficiency of the proceeding and to possibly shift the burden of cost could be elaborated in the Future Text. In addition to cost, the importance of legal education for small businesses was also highlighted, noting that many of them were not aware of the available redress mechanisms.

86. After discussion, the Working Group agreed with the suggested changes of the section and requested the secretariat to revise it accordingly.

4. Transparency

87. The general importance of “transparency” in access to credit was shared by the Working Group. It was noted that transparency had various dimensions, one being transparency of information for lenders to assess the creditworthiness of MSMEs and another being transparency of contractual terms for obtaining credit. It was explained that the former dimension related directly to access to credit as a requirement for the lender to grant credit, especially in the absence of collateral. It was added that the latter dimension contributed to informed consent of the MSMEs, as lenders would need to meet certain disclosure requirements and was an important element of financial consumer protection in general and of small businesses accessing credit with great clarity, which might result in improved reputation of lenders and, eventually, to less amount of bad loans. It was further mentioned that that dimension could be linked with responsible lending practices and aspects discussed in section G on Safeguards against unfair practices. In addition, it was noted that another dimension of transparency would be that MSMEs should be able to access information about different means of accessing credit, including borrowing rates and conditions.

88. While a suggestion was mentioned that these dimensions could be elaborated in the respective sections of chapter VI (for example, sections C – Credit reporting – and G – Safeguards against unfair practices), it was generally felt that there was merit in retaining the current structure with a section on Transparency outlining the three different dimensions highlighted in the above paragraph as this would remind the States of the need for transparency at various levels. It was agreed that cross references to the other parts of the Future Text addressing transparency (e.g. credit reporting) would be useful.

5. Safeguards against unfair practices

89. It was agreed that section G on Safeguards against unfair practices could be combined with the section on transparency, while illustrating that measures to safeguard against unfair practice were not limited to ensuring transparency and transparency could be discussed in a subsection. It was stated that the various measures to protect MSMEs against unfair lending practices, including measures to address abusive contract clauses, should be outlined therein.

90. A view was expressed that this section should also mention the need for commercial certainty, noting that some jurisdictions imposed high thresholds for unfairness of terms with respect to contracts not involving consumers. In response, it was noted that requiring supervisors to clarify the scope of unfair terms in a transparent manner could help ensure commercial certainty. It was also suggested that

some examples of unfair practices (for example, by second-level financial institutions) could be provided.

91. While a suggestion was made that the section could be restructured to mention the different elements of financial consumer protection, it was recalled that the focus of the Future Text was on access to credit for MSMEs and due caution should be taken in making reference to "consumers".

6. Measures to tackle low financial literacy of MSMEs

92. With regard to capacity-building for financiers, it was said that the Future Text should also discuss developing their capacity to monitor their loans to MSMEs and to provide advice to the MSMEs.

93. With regard to capacity-building for regulators, a suggestion was made that the last two sentences of paragraph 249 should be deleted as they touched upon the functions and role to be provided by the regulators which could be different depending on the jurisdiction. There was agreement in the Working Group to delete the two sentences. Another suggestion was that reference could be made to the use of sandboxes as a way for developing the capacity of the regulators, noting that such sandboxes could enable regulators to learn from new types of products and credit providers.

V. Next steps

94. It was generally shared that the Future Text should include a comprehensive review of issues associated with the access to credit for MSMEs as well as general guidance and options for addressing some of the issues based on existing instruments as well as other practices when appropriate. It was said that the Future Text could support commercial law reform consistent with UNCITRAL's mandate. A suggestion was made that the Text could take the form of a guide.

95. As to the way forward, a suggestion was reiterated that the secretariat could be tasked with the preparation of the Future Text by engaging with experts with an aim to present the final draft of the text to the Commission in 2023 (see paras. 13–17). It was stated that the Working Group would not need to meet further to discuss this topic. Reference was made to texts adopted by the Commission without involving the Working Group (2009 *Practice Guide on Cross-Border Insolvency Cooperation* and the recently adopted 2019 *UNCITRAL Legislative Guide on Public-Private Partnerships*).

96. However, it was argued that there was merit in continuing to discuss the Future Text during the formal meetings of the Working Group, particularly as it would allow the Future Text to reflect a wide range of different perspectives including those of developing countries. It was suggested that experts could, in any case, be engaged by the secretariat in the preparation of draft working papers. Furthermore, concerns were expressed about the fact that the Working Group had yet to determine the nature of the Future Text or the specific topic(s) where recommendations would be developed. Accordingly, it was stated that it would not be appropriate for the secretariat or the group of experts to make such determinations or to make specific recommendations to be included in the Future Text. Another suggestion was for the Working Group to finalize the Future Text during the session in the second half of 2022 (tentatively scheduled from 19–23 September – dates to be approved by the Commission at its fifty-fifth session, New York, 27 June–15 July). It was mentioned that to facilitate the participation of a number of delegates, it would be preferable to hold that session in hybrid format. However, it was noted that the form of working group meetings to take place in the second half of 2022 were to be determined by the Commission at its upcoming annual session.

97. Considering the concerns expressed about the work being conducted by the secretariat without the involvement of the Working Group, it was suggested that as an

alternative, the Working Group could meet in the first half of 2023 (and not in the second half of 2022) to finalize the text prior to submitting to the Commission for its adoption. It was stated that that approach would allow the secretariat to further develop the text following the guidance given to it by the Working Group at this session so that it is ready for review by the Working Group in the first half of 2023.

98. However, concerns were expressed about the fact that this might result in the waste of valuable working group resources which had been allocated to Working Group I as until the present the Commission had not assigned other topics to the Working Group. Moreover, it was noted that there would not be sufficient time to prepare working papers for another topic to be discussed at the session tentatively scheduled for September 2022). Support was expressed for the Working Group to continue to make progress on the Future Text and meet in the second half of 2022 as scheduled.