

COVID-19 and International
Trade Law Instruments:
a Legal Toolkit by
the UNCITRAL Secretariat



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

COVID-19 and International Trade Law Instruments: a Legal Toolkit by the UNCITRAL Secretariat



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Introduction

In response to the unprecedented challenges posed by the COVID-19 pandemic, the United Nations Commission on International Trade Law (UNCITRAL) has taken a significant stride towards facilitating a nuanced understanding of the impact of the global health crisis on international trade law and has mandated the Secretariat to undertake exploratory work. The Secretariat received input from many States and other stakeholders and drafted the following toolkit, entitled “COVID-19 and International Trade Law Instruments: a Legal Toolkit by the UNCITRAL Secretariat.”

At its fifty-sixth session in 2023, the Commission commended the contributing States and the Secretariat for the work and authorized the Secretariat to publish the finalized text. The Commission encouraged States and other stakeholders to consult the toolkit, and the Secretariat to use it in its awareness-raising and promotional activities.¹

The Commission’s encouragement for States and other entities to consult and actively utilize this resource in their awareness-raising and promotional activities underscores the toolkit’s practical significance in shaping a more informed and adaptable global trade community.

¹ *Official Records of the General Assembly, Seventy-eighth session, Supplement No.17 (A/78/17)*, paras. 178-185.

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Background

1. The “COVID-19 and International Trade Law Instruments: a Legal Toolkit by the UNCITRAL Secretariat” (Toolkit) is a suite of solutions that allows States to understand and apply UNCITRAL instruments to develop a more robust and uniform legal framework, which in turn will better prepare States for future global emergencies, such as the COVID-19 pandemic.
2. The COVID-19 pandemic has indeed significantly impacted societies and economies globally with mandatory preventive health measures, such as social distancing and isolation. These measures caused lockdowns, closure of borders, supply chain disruptions and sudden increased difficulty in traditional trade processes, among other consequences. In some cases, the haphazard and non-uniform implementation of COVID-19 measures coupled with the lack of a robust legal framework made the disruption of the economy caused by the COVID-19 pandemic more acute.
3. Social distancing of persons led to a tremendous shift in how work and business were being carried out due to lockdown measures, preventing businesses from operating out of their physical workspaces. States, institutions and businesses scrambled to ensure that operations could be done remotely to the greatest extent possible. For example, in industries where remote work was impossible, businesses suffered a catastrophic loss of earnings and some were pushed to the brink of insolvency. As States closed their borders, supply chains were significantly disrupted and an increased difficulty in trade processes arose overnight. This gross uncertainty and sudden disruption in business operations arising from the COVID-19 pandemic culminated in the suspension or breach of contracts on an unprecedented scale.
4. This toolkit is structured in three parts: part I discusses the responses by States during the COVID-19 pandemic and the consequences of their respective responses; part II analyses how UNCITRAL instruments can be used as a suite of legal solutions to minimize or prevent the impact of the consequences of future global crises; lastly, part III provides recommendations for States and contracting parties.
5. The toolkit aims to assist States by providing them with a useful guide on how they can strengthen and harmonize their legal frameworks, and to assist contracting parties by providing them with possible mechanisms that they can incorporate in their contracts to prevent or minimize future trade disruptions.

Part one

**Consequences of the COVID-19 pandemic
and responses by States during
the pandemic**

Consequences of the COVID-19 pandemic for international trade

6. COVID-19 measures have severely altered and eventually revolutionized the way businesses operated and how work is being done. Remote working, that is, the relaxation of the requirement to be physically present at the business premises, became the default method of working and trading as businesses had to comply with COVID-19 preventive health measures. This accelerated the need for digitalization, as businesses required employees to have the relevant infrastructure in their homes to allow for remote working. The use of electronic documents, electronic identities and electronic authentication became even more critical as logistics became an issue due to lockdown measures and closure of delivery services. In addition, the lockdown and quarantine measures compelled businesses to sell their goods and services via e-commerce or online if they were able to do so; otherwise, they risked having ongoing overhead expenses without gaining revenue. Businesses operating in certain sectors, where it would be virtually impossible to sell goods and services online (e.g., gastronomy, tourism) were most at risk as they struggled to operate their businesses or may not have had enough capital to invest in digital infrastructure to permit online operations.

7. Micro-, small and medium enterprises (MSMEs) additionally faced more challenges as they were at a higher risk of becoming insolvent due to problems caused by supply chain disruptions, materialization of business risks or inability to make payments on debts due. In many cases, the fates of the owners of such MSMEs were tied to the fortunes of their businesses (e.g., through the taking of personal guarantees with banks or credit institutions to finance their business operations), which meant that such persons faced personal bankruptcy in addition to business insolvency. In States where MSMEs form the bulk of businesses or employers, the failure of these businesses could significantly impact the livelihoods of a large segment of society.

8. Insolvency not only applies to MSMEs, but also to large or global enterprises. With the sudden imposition of numerous measures that prevented trade operations, businesses that were already on the brink of insolvency or were operating with a tight margin quickly became susceptible to statutory insolvency proceedings against them.

9. On a broader scale States' measures to contain the spread of the COVID-19 pandemic had severe implications for global trade as a whole. Over the years, globalization and a liberal international trade regime have allowed for developing cross-border supply chains, where different parts are sourced from across the world. As States restricted cross-border travel and enacted laws and regulations to curb the spread of the COVID-19 pandemic, supply chains were severely disrupted as contract parties were unable to fulfil their contractual obligations (vertically or horizontally) on the

supply chain. A delay by one supplier could easily lead to a further breach of contracts down the chain as parties struggled to fulfil their contractual obligations.

10. One consequence of such unreliability in trade flows has been the rise in disputes because of contract breaches. Contracting parties, if there is no temporary enactment of laws to prevent trade disputes from arising because of the COVID-19 pandemic, are unable to perform their contracts as easily as in pre-pandemic times, and therefore are susceptible to contractual penalties or contentious disputes. The combination of having to operate in an uncertain and unpredictable economic climate while facing contractual penalties or potential litigation that may jeopardize the business can be a severe threat to the future of global trade if no measures are undertaken to reverse this situation.

Responses by States and measures undertaken during the COVID-19 pandemic to alleviate the impact on international trade

11. To reduce the negative consequences caused by the COVID-19 pandemic, numerous measures were undertaken by States to alleviate the situation faced by businesses. These measures can be broadly categorized in the following ways: (a) measures to enable businesses to operate as normally as possible remotely; (b) measures to reduce or suspend the negative effect of the COVID-19 pandemic; and (c) measures to aid MSMEs and help contracting parties reduce disputes as much as possible.

12. A general questionnaire was sent to States to establish their responses to the COVID-19 pandemic. A review of these responses shows that some States undertook common measures to address the pandemic. A summary of these key common measures can be found below:

Summary of responses by states on measures undertaken for the COVID-19 pandemic²

Measure	Description	Examples
Digitalization of trade: acceptance of electronic processes in lieu of physical processes	Remote/virtual/online participation in meetings (as required by law or by applicable rules) is accepted in lieu of physical presence.	<ul style="list-style-type: none"> • Austria: Participation in civil procedural or insolvency hearings using modern technology • Indonesia: Support for electronic holding and reporting of shareholders' meetings for public companies • Italy: Remote participation in court hearings • Malta: Virtual holding of annual general meetings • Russian Federation: Possibility of holding general shareholders' meetings online without determining a particular venue • Singapore: Permission for companies and other organizations to hold meetings through electronic means • Sweden: Temporary law to make it easier to (a) hold general meetings of company shareholders and association members without shareholders or members being physically present, (b) participate by proxy, (c) allow voting by mail, and (d) allow general meetings to be held digitally (online, by telephone, etc.) and/or only by mail • Switzerland: An exemption from the obligation to appear in person during the COVID-19 pandemic was provided for in the Ordinance on Certification Services in the Field of Electronic Signatures and Other Applications of Digital Certificates.
	Functional equivalence of electronic documents to physical documents	<ul style="list-style-type: none"> • Argentina: Temporary authorization to exceptionally accept documents of origin in electronic form for accreditation and to determine the origin of imported goods. Presentation of original format to customs not required • Japan: Clarification on the interpretation of electronic contracting services
	Enabling electronic signatures and electronic authentication	<ul style="list-style-type: none"> • Austria: Extension of the electronic notarial act to all transactions and processes that require the involvement of a notary • United States of America: The Internal Revenue Service (IRS) permitted the use of digital signatures (including scanned/photographed images of signatures) for certain IRS forms that must be filed manually.
Public procurement	Amendment of procedures	<ul style="list-style-type: none"> • Czechia: Recommendations issued for shorter tender procedure • Italy: Procedures relating to public contracts simplified

² See compilation of responses of States that are publicly available on the UNCITRAL Secretariat questionnaire on measures taken by States to overcome the consequences of the global COVID-19 pandemic, available at <https://uncitral.un.org/en/content/crisis-impact-international-trade-law-covid-19-and-beyond>.

Summary of responses by states on measures undertaken for the COVID-19 pandemic (*continued*)

<i>Measure</i>	<i>Description</i>	<i>Examples</i>
Assistance to MSMEs	Tax breaks and exemptions	<ul style="list-style-type: none"> • Argentina: Export duties for MSMEs temporarily waived (60 days) • Indonesia: Tax exemptions up to 50 per cent provided for selected businesses determined by the Government until December 2020 • Kyrgyzstan: Taxpayers allowed to submit applications for deferred or instalment payments for the amount of tax arrears due to force majeure without having to submit documents on a bank guarantee for a period up to one year • Russian Federation: Six-month deferral for payment of all taxes (excluding VAT) for selected industries implemented
	Direct financial assistance/subsidies	<ul style="list-style-type: none"> • Armenia: One-time assistance in the amount of 10 per cent of the turnover of goods and services provided in Q1 of 2020, but not more than twice the minimum wage • Slovakia: Subsidies offered to cover fixed costs if an entrepreneur in the segment of culture and creative industries recorded a decrease in turnover of at least 30 per cent in March to December 2020 compared to the same period in 2019 • Sweden: Compensation scheme implemented for undertakings faced with turnover losses due to COVID-19
	Loans	<ul style="list-style-type: none"> • Angola: Credit lines made available to finance (a) the purchases of family producer cooperatives and small- and medium-sized agribusinesses; and (b) microfinance societies, field schools and community credit banks • Armenia: Loans provided to companies in certain sectors • Italy: General moratorium on loans granted to MSMEs implemented, for example, suspension of the payment of mortgage instalments and maintaining credit lines or other forms of bank financing • Jordan: Financial programmes initiated with caps on interest rates; loanable funds obtained to finance working capital and operating expenses • Russian Federation: Low-interest loans provided to SMEs • Thailand: Offered soft loans in total of 20 billion baht to financial institutions at 0.01 per cent rate per annum. These loans allowed those institutions to provide loans to SMEs. Fiscal measures supporting SMEs were also allocated for SMEs in the tourism industry and MSME and individuals. A loan guarantee over 10 billion baht for MSMEs including individual persons, salaried employees, self-employed workers, and family members. • United States: US Small Business Administration provided with \$7 billion in disaster assistance loans to offer to small businesses

Summary of responses by states on measures undertaken for the COVID-19 pandemic (*continued*)

Measure	Description	Examples
	Deferral of the repayment of loans provided	<ul style="list-style-type: none"> • Jordan: Banks allowed to postpone the instalments due of outstanding credit facilities granted to their customers • Slovakia: Banks and branches of foreign banks required to defer payments for up to nine months at the request of the borrower. Other (non-bank) lending companies had to do so for a period of three months, with the possibility for the borrower to extend this deferral for another three months.
Modified insolvency regimes to reduce or suspend negative effects of the COVID-19 pandemic	Simplified insolvency regimes	<ul style="list-style-type: none"> • Singapore: Simplified Insolvency Programme introduced to allow for low-cost, faster and more efficient debt restructuring and winding up proceedings
	Amendment of insolvency laws and procedures	<ul style="list-style-type: none"> • Armenia: Temporarily increased threshold for bankruptcy declaration from AMD 1 million to AMD 2 million • Austria: Deadlines for filing by debtors extended; suspension of filing for insolvency by creditors • Czechia: Duty of debtors/creditors to file for insolvency suspended; prolongation of deadlines for debtors' applications • India: Threshold of default increased; initiation of the corporate insolvency resolution process suspended for six months (later extended for a further three months) • Israel: Freeze of collection proceedings and enforcement bureaux only allowed to carry out limited collection operations in exceptional cases • Italy: General freezing of bankruptcy filings with certain exceptions • Kyrgyzstan: Suspension of the initiation of bankruptcy process by state bodies in relation to business entities showing signs of insolvency due to circumstances related to the spread of COVID-19 • Malta: Suspension of the right of creditors to file for insolvency and a stay of procedure for those cases filed after 16 March 2020. Moratorium of 4 months introduced, extendable to 12 months to provide companies with "breathing space". • Russian Federation: Bankruptcy freeze for certain legal entities and individual entrepreneurs doing business in the industries most affected by the pandemic, and strategic and systemic organizations • Singapore: Temporarily increase to the monetary threshold for bankruptcy and corporate insolvency and lengthening of the statutory period to respond to demands from creditors

Summary of responses by states on measures undertaken for the COVID-19 pandemic (*continued*)

<i>Measure</i>	<i>Description</i>	<i>Examples</i>
	Amendment of insolvency laws and procedures	<ul style="list-style-type: none"> • Switzerland: Temporary suspension of enforcement procedures and extension of the debt-restructuring moratorium from 4 to 8 months • United States: Increased debt limit under the Small Business Reorganization Act of 2019 from \$2.7 million to \$7.5 million for small businesses that chose to restructure under Chapter 11 of the Bankruptcy Code
Legislation impacting contractual relations	Relief from legal and enforcement action for individuals and businesses unable to perform contractual obligations	<ul style="list-style-type: none"> • Italy: General obligation to renegotiate contracts based on the principle of “good faith in the execution of the contract”, which could take into account also the changed circumstances originally unknown to the parties • Singapore: Relief from contractual obligations for certain contracts (e.g. construction contracts or supply contracts) • Türkiye: Evaluation of COVID-19 within the scope of the “force majeure” article in contracts; additional time given to enterprises to complete their work and fulfil their responsibilities
	Limitation of interest	<ul style="list-style-type: none"> • Austria: Limited interest on arrears and on the exclusion of contractual penalties • Czechia: Limited late payments of monetary debts to statutory default interest
	Suspension of limitation of periods/ extension of procedural periods and deadlines	<ul style="list-style-type: none"> • Italy: Temporarily suspended procedural time limits • Lebanon: Suspension of legal, judicial and contractual deadlines

13. The summary above highlights the multi-faceted impact that the COVID-19 pandemic had on States and contracting parties alike. It is with this in mind that the subsequent section considers how UNCITRAL instruments can be applied to alleviate the negative impact that may be caused by future global crises of a similar nature and scale.

Part two

UNCITRAL instruments and how they can help in times of global emergencies

Flexibility in utilizing UNCITRAL instruments

14. UNCITRAL instruments can apply in numerous ways to assist States and contract parties during global emergencies, depending on the existing legal framework that the State has and the degree of its adoption of UNCITRAL instruments. The degree of adoption can be determined based on two factors: (a) the number of UNCITRAL instruments adopted and (b) whether any modifications have been made in the adoption of said UNCITRAL instrument.

Degrees of adoption of UNCITRAL instruments

States have adopted the UNCITRAL instruments fully without modifications.	States have adopted some UNCITRAL instruments and/or made modifications or reservations.	States did not formally announce that they have adopted the UNCITRAL instrument, but State legislation is identical/ almost identical to the UNCITRAL instrument.	States have not adopted UNCITRAL instruments.
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15. The extent to which a State will be able to benefit from UNCITRAL instruments in times of global crises or emergencies will depend on the degree of implementation of the relevant UNCITRAL instruments. Nonetheless, States that have adopted only certain parts of the relevant UNCITRAL legislative instruments, or none of them, are still able to benefit from guidance and advice provided in instruments of a contractual nature adopted by UNCITRAL, or the recommendations formulated in the legislative guides it has published. Furthermore, States may use the various model provisions and legislative guides adopted by UNCITRAL to shape their policies.

16. Contracting parties that operate in States that have not adopted the UNCITRAL instruments or only a part thereof are still able to benefit from some UNCITRAL contractual-based instruments that do not require a State's legislative action, such as the UNCITRAL Arbitration and Mediation Rules in dispute resolution.

17. The following sections discuss how the various UNCITRAL instruments can be utilized by either States or contracting parties, with reference to part I on the consequences of the COVID-19 pandemic, and how States have utilized legal tools to reduce negative impacts.

Strengthening an enabling legal framework for a digital economy and a conducive framework for digital transactions

Digital economy and the prevention of immediate international trade disruption

18. The adoption of UNCITRAL instruments may prevent immediate trade disruption due to lockdowns and mandatory closures by enabling the creation of a legal framework for government agencies and the private sector to operate digitally. As seen in part I, the adoption of remote operations measures was initiated by States to ensure business operations continued as much as possible. The UNCITRAL instruments on electronic commerce (e-commerce) have enabled the creation of a legislative framework to facilitate the use of electronic means to engage in paperless cross-border commercial activities. The first UNCITRAL standard on e-commerce, the UNCITRAL Model Law on Electronic Commerce (1996) (MLEC),³ remains the most widely enacted standard. The MLEC establishes rules for the equal treatment of electronic and paper-based information and the legal recognition of electronic transactions and processes, which are based on the fundamental principles of non-discrimination against the use of electronic means, functional equivalence and technology neutrality.

19. Continued developments in e-commerce proved to be essential to ensuring the functioning of a digital economy within a State as the COVID-19 pandemic forced numerous States to order various degrees of measures to prevent the spread of the virus and the overburdening of health-care systems. Since the adoption of the MLEC in 1996, legislation based on or influenced by the MLEC has been adopted in 83 States and a total of 163 jurisdictions as of November 2023. The adoption by States of the MLEC, together with other UNCITRAL e-commerce instruments such as the UNCITRAL Model Law on Electronic Signatures (2001) (MLES),⁴ the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (ECC)⁵ and the UNCITRAL Model Law on Electronic Transferable Records (2018) (MLETR)⁶ enables the functioning of a digital economy.

20. Digitalization efforts supported by UNCITRAL e-commerce instruments are crucial not only to States but also to contracting parties in order to prevent immediate

³ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) with Additional Article 5 bis as Adopted in 1998 (United Nations publication, Sales No. E.99.V.4).

⁴ UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (2001) (United Nations publication, Sales No. E.02.V.8).

⁵ United Nations Convention on the Use of Electronic Communications in International Contracts United Nations, Treaty Series, vol. 2898, p. 3.

⁶ UNCITRAL Model Law on Electronic Transferable Records (United Nations publication, Sales No. E.17.V.5).

trade disruption. As States adopt the UNCITRAL e-commerce instruments, contracting parties can rely on these instruments for a smooth functioning of trade in the digital sphere. For instance, article 1(1) of the ECC provides that the provisions of the ECC shall apply to electronic communications in connection with the formation or performance of a contract, resulting in a broad application to contracts. Contract parties can thus rely on electronic communications in the formation and performance of a contract, which is important in a crisis where regular postal services may be disrupted, as seen by multiple instances of delivery services having delayed operations due to COVID-19 outbreaks at dispatch and/or logistics centres.

21. The importance of an enabling legal framework for digital transactions was already noted by UNCITRAL in the early months of COVID-19. In 2020, the Commission held a panel series on “UNCITRAL Texts and COVID-19 Response and Recovery”, where topics such as “Identification and Authentication in the Digital Economy” and “Digital Economy and Trade Finance” were discussed.⁷ These discussions focused on how the COVID-19 pandemic accelerated the need to transition to online trade and how UNCITRAL instruments, such as the MLETR, can be a legal enabler of paperless trade. Reference was made to the work that eventually led to the adoption of the UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (2022)⁸ (MLIT) to establish trust in transactions conducted remotely. The COVID-19 pandemic has highlighted the need for modernizing the law of electronic payments, particularly for financial inclusion and in developing economies. Adopting UNCITRAL e-commerce instruments can thus help to harmonize the legal framework on digital transactions, which will help promote the use and acceptance of digital transactions among States and contract parties.

Enabling electronic signatures and electronic authentication

22. The enabling and acceptance of electronic signatures in lieu of written signatures has been a key measure that States have undertaken to preserve the functioning of business operations as much as possible despite shutdowns and travel restrictions. The lack of legal recognition of electronic signatures made it impossible for many business transactions to be executed in a legally enforceable way during the pandemic. This also prevented the issuance of official documentation and records needed in international trade. Acceptance of electronic signatures has been a topic of concern for UNCITRAL for more than three decades and two dedicated texts – the MLES and the MLIT – have been adopted. The MLES aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence

⁷ UNCITRAL, *Virtual Panel Series: UNCITRAL Texts and COVID-19 Response and Recovery – 8 to 9 and 13 to 16 July 2020*, available at <https://uncitral.un.org/en/COVID-19-panels>.

⁸ UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (United Nations publication, Sales No. E.23.V.10).

between electronic and handwritten signatures. Thus, the MLES may assist States in establishing a modern, harmonized and fair legislative framework to effectively address the legal treatment of electronic signatures and give certainty to their status.

23. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of electronic means. In response to such needs, the MLES builds on the fundamental principle underlying article 7 of the MLEC with respect to the fulfilment of the signature function in an electronic environment by following a technology-neutral approach, avoiding preference for any specific technology or process. This means, in practice, that legislation based on the MLES may recognize both digital signatures based on cryptography (such as public key infrastructure (PKI)) and electronic signatures using other technologies. That flexibility is particularly important to ensure that the law accommodates both current and future technologies supporting electronic signatures.

24. Finally, in July 2022, UNCITRAL adopted the MLIT. The MLIT provides a set of model legislative provisions that legally enable the use of identity management services for online identification of physical and legal persons as well as the use of trust services to provide assurances as to the quality of data in electronic form. With more States and contracting parties moving towards the digitalization of operations, trust in digital identity becomes even more important as an increasing number of data exchanges are made.⁹ The MLIT is thus a welcome addition in strengthening the legal framework for a digital economy, which has shown to be critical for the functioning of trade and services during the COVID-19 pandemic, and possibly for future emergencies.

Digitalization of the dispute resolution industry and online dispute resolution

25. While States can benefit from the MLES and MLIT, further work is required in the dispute resolution industry as there remain issues on the acceptance of electronic signature and electronic awards.¹⁰ In the case of online dispute resolution, the UNCITRAL Technical Notes on Online Dispute Resolution (ODR) (2016)¹¹ provide guidance on how online dispute resolution can assist contract parties in resolving

⁹ See also the UNCTAD Digital Economy Report 2021, which recognizes increasing cross-border data flows. *Digital Economy Report 2021: Cross-border data flows and development: For whom the data flow* (United Nations publication UNCTAD/DER/2021).

¹⁰ Consult the UNCITRAL Website for further developments.

¹¹ *UNCITRAL Technical Notes on Online Dispute Resolution, Official Records of the General Assembly, 2016, Supplement No. 17 (A/71/17), annex I.*

their disputes in a fair, transparent and efficient manner. The implementation of a robust ODR system will bolster the creation of a comprehensive digital economy and provide reassurance for businesses and consumers that disputes arising from online transactions can be resolved quickly and efficiently.¹²

Paperless trade environment with electronic transferable records

26. The COVID-19 pandemic has disrupted shipping activities and consequently affected supply chains worldwide. As the United Nations Conference on Trade and Development (UNCTAD) reports,¹³ the physical shipment of goods has impacted the availability of documents accompanying these goods, such as negotiable bills of lading.¹⁴ If made available in electronic form, negotiable bills of lading and other transferable documents which are commonly used in transport and logistics in international trade may be greatly beneficial for facilitating electronic commerce by, for example, improving speed and security of transmission, permitting the reuse of data and automating certain transactions through “smart contracts”. The MLETR is specifically designed to enable the functional equivalence of electronic transferable records to their physical counterparts, by removing discrimination between physical and electronic forms and promoting technology neutrality in the acceptance of electronic transferable records.

27. According to the MLETR, an electronic transferable record is functionally equivalent to a transferable document or instrument if that record contains the information required to be contained in a transferable document or instrument, and a reliable method is used to (a) identify that electronic record as the electronic transferable record; (b) render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and (c) retain the integrity of that electronic record. Control is a fundamental notion of the Model Law since it represents the functional equivalent of possession of a transferable document or instrument. In particular, the possession requirement is met with respect to an electronic transferable record if a reliable method is used to (a) establish exclusive control of that electronic transferable record by a person; and (b) identify that person as the person in control.

¹² Official Records of the General Assembly, Seventy-seventh session, Supplement No. 17 (A/77/17), para. 222. The Commission continues to take part in the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (iGlip); see also the APEC collaborative framework for Online Dispute Resolution of Cross-Border Business to Business Disputes (ODR Framework) which is modelled after the UNCITRAL ODR text; for further information, see <https://www.apec.org/SELL/Overview>.

¹³ UNCTAD, *COVID-19 and International Sale of Goods: Contractual Devices for Commercial Risk Allocation and Loss Prevention, 2023* (United Nations publication, Transport and Trade Facilitation Series), p. 20.

¹⁴ *Ibid.*, p. 28.

28. Moreover, the MLETR allows additional information in an electronic transferable record that may not be included in a paper-based transferable document or instrument. The MLETR also provides guidance on assessing the reliability of the method used to manage an electronic transferable record and on the change of medium (electronic to paper and the reverse), among other things. Finally, the MLETR aims to facilitate the cross-border use of electronic transferable records by supporting the principle of non-discrimination against the foreign origin or use abroad of an electronic transferable record. The MLETR does not affect in any manner the law applicable to transferable documents or instruments, which is referred to as “substantive law” and includes rules on private international law.

29. Articles 17 and 18 of the MLETR allow the replacement of an electronic transferable record with a physical version (or vice versa) when circumstances so require. Article 17(1) provides that “an electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used”, and article 17(3) further provides that once an electronic transferable document is issued, the physical transferable document “shall be made inoperative and ceases to have any effect or validity”. Article 18 provides for the reverse, that is, the replacement of electronic to physical. These articles provide contracting parties with the flexibility of changing the physicality of the document to suit their needs and purposes, especially if they would need to navigate in emergencies or unforeseen situations.

30. The MLETR is promoted as a key legislative tool for the facilitation of paperless trade by the International Chamber of Commerce (ICC). The ICC Digital Standards Initiative, which has the goal of harmonizing the digital trade environment,¹⁵ has specifically listed the MLETR as an enabler to trade digitization for States. The ICC promotes the widespread adoption of the MLETR through a dedicated web page on the MLETR with legal material and evidence to support legislative reform.¹⁶ Furthermore, the ICC Digital Standards Initiative has published a “Standards Toolkit for Cross-border Paperless Trade”, and has listed the MLETR as a master reference that helps supply chain actors integrate in the ecosystem.¹⁷ The ICC’s work and pushing of the MLETR highlights the MLETR as a key pillar in the functioning of a digital economy for international trade.

31. In addition, the MLETR also encompasses the inclusion of dynamic information, including contract automation, also known as “smart contracts”, that is, scripts that allow for automatic conclusion or performance of a contract when specific conditions are satisfied. These specific conditions may be fulfilled by referencing the smart contract to metadata (e.g. geolocation tags) which is also permitted and recognized

¹⁵ ICC, *The ICC Digital Standards Initiative*, available at <https://www.dsi.iccwbo.org/>.

¹⁶ ICC, *Policymakers*, available at <https://www.dsi.iccwbo.org/policymakers>.

¹⁷ ICC, *Standards Toolkit for Cross-border Paperless Trade*, available at <https://iccwbo.org/news-publications/policies-reports/standards-toolkit-for-cross-border-paperless-trade/#anchor-download>.

under the article 6 of the MLETR. One such example is the automatic transfer of possession of the electronic transferable record and triggering of transfer of money when the ship's GPS attains certain coordinates (i.e., the ship has reached the port successfully). Legal recognition of contract automation, which is a topic currently dealt with by UNCITRAL Working Group IV (electronic commerce) provides contracting parties with alternative forms of contracting during a crisis.¹⁸

32. The functioning of a digital economy is a key step for States to operate effectively in situations where there is severe trade disruption. The COVID-19 pandemic has pushed numerous States to legislate measures to prevent the spread of the pandemic and these measures were often put into place within a very short time period. Key institutions of the States, such as administrative units, national banks, etc., had to either suspend their services or reduce their opening hours, causing delays in international trade and finance. Adopting the Commission's e-commerce texts can be effective in preventing disruption in international trade and finance by: (a) ensuring that States can operate in the digital economy; (b) allowing the recognition of electronic documents as functionally equivalent to their paper-based equivalents; and, (c) recognizing electronic identities and signatures to allow paperless processing of international trade and customs, if possible.

Swift reaction by public authorities in public procurement matters

33. The UNCITRAL Model Law on Public Procurement (2011)¹⁹ (MLPP) provides a framework for States to develop a procurement system that will achieve value for money and prevent mismanagement or inefficiency. The MLPP allows government purchasers to take advantage of modern procurement techniques, such as electronic procurement, to allow it to maximize value for money in procurement. It contains procedures to allow for: (i) standard procurement; (ii) urgent or emergency procurement; (iii) simple and low-value procurement; and, (iv) procurement of large and complex projects (in which, and where appropriate, the government can interact with potential suppliers and contractors to obtain the best solution to its needs). All procedures are subject to rigorous transparency, competition and objectivity safeguards. In addition, the MLPP requires that all decisions and actions taken in the procurement process can be challenged by suppliers or contractors, including potential ones, and provides mechanisms for effective review of challenges.

34. States that have passed legislation enabling electronic procurement were able to avoid numerous difficulties arising from the disruption due to the closure of the

¹⁸ Consult the webpage of Working Group IV.

¹⁹ UNCITRAL Model Law on Public Procurement, *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 17 (A/66/17)*, annex I.

authorities' offices during the COVID-19 pandemic. The MLPP enables electronic procurement generally and provides for specific electronic-procurement methods and tools, such as an electronic reverse auction and open framework agreements. This, combined with the enactment of the UNCITRAL instruments on e-commerce as elaborated earlier in this toolkit, allows public procurements to continue digitally despite restrictions that are placed by governments to face-to-face communications similar to those that were in effect during the COVID-19 pandemic.

35. In the case of a global emergency, there may be a need for emergency procurement processes in order to swiftly address the impact caused by the event. The MLPP has provisions for urgent and emergency procurement, whether caused by a catastrophic event or other unforeseeable events that are not the result of the procuring entity's dilatory conduct. This may include procurement of equipment to prevent the spread of infectious diseases or vaccines to roll-out to the population as soon as possible.

Supporting MSMEs and providing the legal framework for their survival and success during and after a global emergency

36. According to the World Bank, MSMEs account for “the majority of businesses worldwide and are important contributors to job creation and global economic development”.²⁰ MSMEs are particularly vulnerable to economic downturns, as they typically operate with tight cashflows and lack of financial reserves to face business outages. It is thus not surprising that the COVID-19 pandemic had a significant negative impact on MSMEs. UNCTAD reported in its publication *[T]he COVID-19 Pandemic Impact on Micro, Small and Medium Sized Enterprises* that “many MSMEs have already ceased trading, and many more are either on the cusp of closure or remain highly vulnerable.”²¹ As seen in part I, States have enacted specific measures to support MSMEs to enable them to survive turbulent times. UNCITRAL instruments can further support States in providing MSMEs with more legal certainty in areas such as financing and also helping to reduce the negative impacts that arise in the event that MSMEs are insolvent during and after a global emergency.

²⁰World Bank, *Small and Medium Enterprises (SMEs) Finance: Improving SMEs' access to finance and finding innovative solutions to unlock sources of capital*, available at <https://www.worldbank.org/en/topic/sme/finance>.

²¹The COVID-19 pandemic impact on micro, small and medium sized enterprises: *Market access challenges and competition policy, 2022* (United Nations publication, UNCTAD/DITC/CLP/202/3, Chapter 1.

Secured transactions and financing to benefit MSMEs

37. The UNCITRAL Model Law on Secured Transactions (2016)²² (MLSS) aims to provide a transparent, comprehensive and rational legislative framework of secured financing, with beneficial impact on the availability and the cost of credit, in particular to MSMEs in developing countries. For instance, article 10 provides rules where proceeds in the form of money or funds credited to a bank account are mingled with other assets of the same kind. This is a situation that MSMEs may face as they may have intermingled personal assets with the business. Article 4 further provides that a person must exercise their rights (including enforcement) in a “commercially reasonable manner”. Article 1(5) provides an expressed priority of laws for the protection of parties to transactions made for personal, family or household purposes.

No requirement for surrender of goods for secured transactions

38. The MLSS also provides a regime where the debtor is not required to surrender their goods, making this more efficient than court proceedings, as court proceedings could lead to delays and problems.²³ This is particularly useful in cases where the encumbered assets are perishable or declining rapidly in value.²⁴ In order for the secured creditor to take possession of the encumbered assets, there are three conditions that need to be satisfied: (i) the debtor needs to consent in writing; (ii) the secured creditor needs to notify the debtor (and any other person in possession of the assets) in advance that the debtor is in default and that the creditor intends to take possession (for perishable assets or assets that might decline rapidly in value, this condition is waived); and (iii) the secured creditor can only take possession over the encumbered assets if the person in possession of the encumbered assets does not object when the secured creditor attempts to take possession.

39. With a reliable secured transactions registry that has an up-to-date and accurate register of secured creditors, the MLSS offers MSMEs a simplified and efficient procedure, reducing the administrative burden that they need in the event of a secured creditor taking over encumbered assets.

²² UNCITRAL Model Law on Secured Transactions, General Assembly resolution (71/136)

²³ UNCITRAL Practice Guide to the Model Law on Secured Transactions (United Nations publication, Sales No. E.20V.6), p. 79.

²⁴ *Ibid.* 79.

Access to credit with the model law on secured transactions

40. Credit lines are critical for MSMEs during global emergencies such as the COVID-19 pandemic. The purpose of the MLSS is helping States develop a modern secured transactions law dealing with security rights in movable assets. The MLSS is designed to increase the availability of credit at more affordable rates by providing an effective and efficient secured transactions law. This helps to improve access to credit and lower the cost of credit to MSMEs.²⁵ The MLSS is based on the assumption that, to the extent that a secured creditor is entitled to rely on the value of the encumbered asset for the payment of the secured obligation, the risk of non-payment is reduced and this is likely to have a beneficial impact on the availability and the cost of credit.²⁶

41. For instance, article 6 outlines the requirements for creation of a security right, as well as the form and the minimum content of a security agreement. The article aims for the parties to obtain a security right in a simple and efficient manner.²⁷ Furthermore, under paragraph 4, where the secured creditor is in possession of the encumbered asset, an oral security agreement with the grantor is sufficient for a security right to be created. This is because the very fact that the secured creditor is in possession of the encumbered asset is itself evidence that the grantor may not have unencumbered ownership.²⁸

Recommendations on variation of rights after default to avoid formal enforcement processes where possible

42. The MLSS adopts the policy that maximizing flexibility in enforcement is likely to increase the efficiency of the enforcement process.²⁹ Article 72 of the MLSS provides that after default, the grantor and the secured creditor are entitled to exercise any right under the provisions of this chapter of the Model Law; and any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Model Law. Furthermore, article 73 of the MLSS provides that the secured creditor may exercise its post-default rights by application to [a court or other authority to be specified by the enacting State] or without such an application. By allowing secured creditors to exercise their post-default rights either through the court process or extra-judicially, the flexibility to avoid formal enforcement processes where possible helps to increase the availability and reduce the cost of credit. This is especially beneficial for MSMEs, where access to cheaper credit can be an important lifeline to a business impacted by a global emergency.

²⁵ UNCITRAL Model Law on Secured Transactions: Guide to Enactment, (United Nations publication, 2017).

²⁶ Ibid.

²⁷ Ibid., p. 31.

²⁸ Ibid., p. 33.

²⁹ Ibid., p. 129.

43. The financing gap faced by MSMEs enterprises was exacerbated during the global pandemic, as noted during the series of virtual panels organized during the 2020 Commission session. During these virtual panels a wide range of actions taken by the public sector to enhance access to credit for MSMEs enterprises were noted. The need to coordinate such actions with private sector initiatives and to implement financial regulatory policies to achieve concrete results were also highlighted. Thus, legislative reforms based on UNCITRAL texts on secured transactions could have a positive impact on access to credit for MSMEs enterprises by facilitating the use of a wide range of movable assets (including receivables) as collateral.³⁰

Addressing MSMEs' finance gap through easier access to credit

44. The UNCITRAL Guide on Access to Credit for Micro, Small and Medium-sized Enterprises (MSMEs) (2023)³¹ provides States with guidance on how to improve their domestic legal framework to reduce obstacles MSMEs face in obtaining credit for their business. In addition to recommending reforms of relevant areas of private or commercial law (e.g. secured transactions, personal guarantees), the Guide also discusses regulatory and policy measures (e.g. public credit guarantee schemes, support for MSMEs in financial distress) which can enhance the effectiveness of the legal reforms supporting MSMEs' access to credit. The Guide recognizes that it is often more challenging for micro- and small enterprises to obtain credit than for medium-sized enterprises, as certain obstacles (e.g. high interest rates) may affect smaller MSMEs more severely, and it thus mainly focuses on micro- and small enterprises, although it differentiates, as appropriate, the provisions and policy measures respectively applicable to micro- and small enterprises and to medium-sized ones. Further, the guide highlights that MSMEs owned by women often face more obstacles in accessing credit than those owned by men and it thus recommends that requirements for access to credit should not discriminate potential borrowers based on their gender.

Developing a business registry to allow MSMEs to benefit from streamlined and simplified registration procedures

45. The UNCITRAL Legislative Guide on Key Principles of a Business Registry (2019)³² (Guide BR) provides a reference tool for policymakers, registrars and experts involved in business registries reform on the features of an effective and efficient business registry and the minimum necessary requirements for a business to register. The

³⁰ Official Records of the General Assembly, Seventy-fifth session, Supplement No. 17 (A/75/17), Part two, paras. 116-117.

³¹ Recommendations on Access to Credit for Micro-, Small and Medium-sized Enterprises, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 17 (A/78/17), annex V.

³² UNCITRAL Legislative Guide on Key Principles of a Business Registry (United Nations publication, Sales No. E.19.V.15).

Guide BR is based on the view that businesses of all sizes, and in particular MSMEs, benefit from streamlined and simplified registration procedures as they reduce the registration burden, and often the cost, for the business. Streamlined and simplified registration may also encourage MSMEs operating in the informal economy to migrate to the formal economy. Registered MSMEs have fewer difficulties in gaining access to the banking sector and government subsidies or other programmes, which may become particularly important in times of crises. Experience shows that in several countries unregistered MSMEs may miss out on such benefits.³³

46. Efficient business registration is user-friendly (e.g. requires businesses to submit minimum information to register), time- and cost-effective, and allows the public easy access to the registered information, which facilitates the search for potential business partners, clients or sources of finance and reduces risk when entering into business partnerships. This also plays an important role in a cross-border context as it makes access to business information by users from foreign countries as simple and fast as possible.

47. As described in the Guide BR, there are different approaches to organizing and operating a business registry. Regardless of which approach is adopted, maintaining good quality and reliable information is imperative for the registry and this applies not only to the information provided when registering a business, but also to the information that is submitted to the registry during the lifetime of the business. The Guide BR thus encourages States to devise provisions that allow the registry to collect, maintain and disseminate information in a transparent and efficient way.³⁴ High-quality and reliable registration systems may help to prevent trade disruption as key information needed by finance institutions or public authorities for processing of financial loans or grants can be obtained or verified at the business registry, thereby reducing the administrative hurdles businesses face in times of a crisis.

48. Digitalization of the business registry (e.g. permitting online registration, providing electronic versions of the notice of registration, annual reports or other key data of a business, and being able to obtain such information readily online), also enhances the good quality and reliability of the registration process. Moreover, it may support users needing to obtain information on registered businesses swiftly.

A simple vehicle to facilitate MSMEs' formation and operation

49. Streamlining and simplifying business registration is not the only way to encourage MSME formalization. Many States of different legal traditions around the world have adopted legislation on simplified business forms, which has often lowered entry

³³A/CN.9/1156, para. 65.

³⁴Ibid., para. 33.

barriers into the formal economy, provided effective organizational solutions and reduced transaction costs, thus encouraging entrepreneurs to migrate to the formal economy. As noted above (see para. 45), MSMEs operating in the formal economy have easier access to the banking sector and government subsidies, especially in times of crisis.

50. The UNCITRAL Legislative Guide on Limited Liability Enterprises (2021) (Guide LLE)³⁵ attempts to distil the lessons learned from those States' reforms into a series of recommendations on how domestic legislators can devise a simplified legal form for MSMEs. This not only promotes MSMEs' compliance with legal requirements, but it also improves their visibility to the public and can support women entrepreneurs and other entrepreneur groups such as youth and ethnic minorities, otherwise disadvantaged by an unfavourable cultural or institutional environment.

51. The simplified form of enterprise proposed in the Guide LLE entails legal personality of the MSME, which MSMEs in several States cannot enjoy, and limited liability for its owners. Legal personality permits the MSME to acquire rights and assume obligations in its own name, separate its assets from those of the owners and be shielded from the personal creditors of the owners. Limited liability permits the MSME owners to take business decisions without concern that they may jeopardize their personal assets if the MSME does not perform well or becomes involved in legal disputes. This is important both for the protection of the owners and for the promotion of innovation and business creation, as it allows entrepreneurs to take business risks without fear of failure.

52. Another key feature of the simplified form proposed in the Guide LLE is the freedom of contract in the MSME governance, meaning that the operation of the MSME is governed by the agreement of its owners. To fill any gaps in the governance rules, the Guide LLE includes several default rules (e.g. on owners' rights, MSME management structure, distributions) from which the owners may deviate by agreement. These rules can be particularly important for smaller or less-experienced MSMEs that may not be able to craft detailed internal governance rules addressing all issues for the successful operation of their business. At the same time, the Guide LLE recognizes the need for transparency and certainty about the operations of the MSME and it thus contains provisions that cannot be derogated by agreement of the MSME owners.

53. MSMEs are particularly vulnerable to economic downturns, as they typically operate with tight cashflows and a lack of financial reserves to face business outages. It is thus not surprising that the COVID-19 pandemic had a significant impact on MSMEs. The UNCITRAL collection of texts on MSMEs and the UNCITRAL texts on secured transactions explained above could support MSMEs to survive

³⁵ UNCITRAL *Legislative Guide on Limited Liability Enterprises* (United Nations publication, Sales No. E.22.V.21).

and recover from future global emergencies by enabling a legal environment that facilitates MSME formation, operation and simplified registration procedures; access to credit and secured finance; and simplified insolvency proceedings for micro- and small enterprises.

Reducing the negative impacts of insolvency by developing the appropriate legal frameworks for insolvency proceedings

54. The UNCITRAL Legislative Guide on Insolvency Law³⁶ provides States with guidance on a possible legal framework that they can consider adopting for business of different sizes, including individual entrepreneurs and other micro- and small enterprises (MSEs).

55. Various measures introduced by States to contain the spread of COVID-19 have significantly affected the operations and cash flow of businesses, in particular MSMEs. As seen in part I, States have introduced measures such as moratoriums for insolvency filings or other measures to allow businesses to continue to operate as long as possible and to weather the hardship caused by the COVID-19 pandemic. However, in the event that businesses are not able to survive the economic fallout caused by global emergencies like the COVID-19 pandemic, insolvency becomes unavoidable. The development of a robust insolvency framework is critical to ensure that both debtors and creditors reach a swift resolution to financial difficulties, as this helps to prevent insolvencies or to minimize the negative impacts from insolvency.

Digitalization of insolvency proceedings

56. States may also consider digitalizing the insolvency process, such as making available the use of paperless communications, submission of evidence and service of notices through digital means which may help in expediting the insolvency process for all parties involved. In certain legal frameworks, commencing an insolvency proceeding can be a slow or complicated process, which may for instance require the need for a formal physical advertisement of the debtor's insolvency application in the newspapers or digest. With digitalization, States may be able to reduce this procedural burden by providing a platform for the publication of official notices or announcements of insolvencies, and the publication of such an announcement on this platform would constitute the satisfaction of specified insolvency procedures.

³⁶UNCITRAL Legislative Guide on Insolvency Law (United Nations publication, Sales No. E.05.V.10).

57. If States were to consider a simplified insolvency regime, digitalizing such insolvency procedures would be further beneficial to both debtors and creditors. Processes such as permitting digital communications and the submission of evidence through digital means reduce the time needed for formal notices and documents to be sent by post. Parties involved can retrieve such information almost instantaneously online. This also reduces time and financial burdens on parties having to ensure that the documents are sent out by post in time to meet the procedural deadlines. States may consider developing this insolvency framework in tandem with the development of a legal framework for a digital economy as well, that is, the adoption of UNCITRAL e-commerce instruments, to be prepared in times of global emergencies.

Simplified insolvency proceedings for micro- and small enterprises

58. Where insolvency cannot be avoided, a simplified insolvency regime may help entrepreneurs and creditors reach a resolution swiftly. As seen in part I, such a regime has been adopted by certain States during the COVID-19 pandemic to ease the negative impacts of insolvency. Part five of the UNCITRAL Legislative Guide on Insolvency Law (2022) addresses insolvency law for MSEs and provides guidance in this context.³⁷ It recommends a simplified insolvency regime with the key objectives of ensuring flexible, low-cost, expeditious proceedings easily accessible to MSEs, while promoting a fresh start for the MSE debtor and protecting persons affected by the simplified insolvency proceedings.³⁸

59. Such an insolvency regime provides for both simplified liquidation and reorganization procedures. As a majority of MSE insolvency cases may result in liquidation, such a regime puts in place simple and fast mechanisms for the sale of any MSE debtor's assets, distribution of proceeds and liquidation of the business. At the same time, it also provides for safeguards against the risk of prematurely liquidating viable MSEs. For example, the procedure most appropriate to the resolution of the MSE debtor's financial difficulty is to be applied by the competent authority, who is a judicial or administrative body exercising overall supervision and control over insolvency proceedings. The main features of such a simplified insolvency regime are (a) procedural tools to increase efficiency; (b) early access to the simplified insolvency regime; (c) involvement of the debtor in the proceedings; (d) discharge and fresh start; and (e) insolvency preventive measures, including through the protection of business rescue finance.

³⁷ UNCITRAL Legislative Guide on Insolvency Law. Part V: Insolvency Law for Micro- and Small Enterprises (United Nations publication, Sales No. E.22.V.18).

³⁸ Ibid., para. 271

60. Notably, lenders to MSEs often require guarantees to secure business loans. Such guarantees are commonly provided by individual entrepreneurs, owners of limited liability MSEs or their family members. Personal guarantors will face payment claims where the guaranteed obligation cannot be performed by the debtor, which is usually before or after the opening of an insolvency proceeding. Allowing unrestricted enforcement of guarantees could lead to destitution for the entire family of individual entrepreneurs or owners of limited liability MSEs. For this reason, part five of the UNCITRAL Legislative Guide on Insolvency Law recommends that a simplified insolvency regime should address, including through procedural consolidation or coordination of linked proceedings, the treatment of personal guarantees provided for business needs of the MSE debtor by individual entrepreneurs, owners of limited liability MSEs or their family members. For example, the law may allow the guarantor to bring potential claims of creditors for consideration in the insolvency proceeding commenced against the MSE debtor so that those claims could be accorded appropriate treatment with the purpose of preventing the potential insolvency of the guarantor.

61. With a global emergency, it is likely that MSEs will face financial distress. Insolvency regimes that enable a quick and fresh start for such businesses and business owners after a global emergency will help such MSE owners restart their lives again.

Cross-border insolvencies

62. As businesses operate across borders, it is common for creditors and debtors to come from different legal regimes. In an emergency such as the COVID-19 pandemic, a business facing financial distress due to the unforeseen circumstances may face inability to make timely payments to its local and foreign creditors. The UNCITRAL cross-border insolvency framework³⁹ is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvencies, including by (a) providing unhindered access of creditors and insolvency representatives to foreign courts; (b) facilitating expeditious and simplified recognition of foreign insolvency proceedings as well as recognition and enforcement of insolvency-related judgments; (c) facilitating obtaining relief (assistance) necessary for the orderly and fair conduct of insolvency proceedings, protection of creditor interests and the assets of the debtor; (d) empowering courts to communicate directly with their foreign counterparts and foreign insolvency representatives; (e) enabling otherwise cooperation and coordination among courts and insolvency representatives; (f) ensuring coordination of parallel proceedings commenced with respect to the same debtor or different debtors members of the same enterprise group, thereby

³⁹ UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations publication, Sales No. E.14.V.2); UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (United Nations publication, Sales No. E.19.V.8) and UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (United Nations publication, Sales No. E.20.V.3).

avoiding inconsistent judgments and relief with respect to the same asset, proceeding or person.

Establishing a robust dispute resolution framework

Dispute resolution due to breach of contract or trading terms

63. In times of crisis, contractual obligations may be breached, or contracts may be terminated, leading to cross-border legal disputes. A robust dispute resolution and enforcement mechanism by States will allow ease of enforceability decisions from one State to another State. UNCITRAL has developed frameworks for alternative dispute resolution mechanisms, such as for arbitration and mediation, that States can utilize.

64. In addition, all UNCITRAL contractual instruments play a role in assisting contracting parties during an emergency or crisis. The following sections describe how contracting parties may benefit from States that have adopted UNCITRAL instruments, and in the event that they are operating in States which have not adopted or ratified the UNCITRAL instruments, how contracting parties can adopt language from UNCITRAL instruments or make reference to UNCITRAL rules in their private contracts to reduce disruption to their business operations.

UNCITRAL framework for arbitration

65. UNCITRAL framework for international commercial arbitration includes two conventions,⁴⁰ a model law, several explanatory texts and contractual texts, and numerous additional frameworks.⁴¹

66. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) serves as the foundation of the international arbitration system, offering common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards, which has been adopted by 172 parties (as of November 2023) that come from various legal systems. The New York Convention has been described as the “most successful treaty in private international law”.⁴² The New York Convention

⁴⁰ *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards* United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3, (opened for signature 10 June 1958, entered into force 7 June 1959) which predated the establishment of UNCITRAL, has been a foundational component of UNCITRAL work on international arbitration; and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration United Nations *Treaty Series*, vol. 3208, No. 54749 (opened for signature 10 December 2014, entered into force 18 October 2017).

⁴¹ UNCITRAL framework on international arbitration available at <https://uncitral.un.org/en/texts/arbitration>.

⁴² The New York Arbitration Convention, *In Brief*, available at [https://newyorkconvention.org/in-brief#:~:text=The%20Convention%20on%20the%20Recognition,by%20more%20than%20160%20nations](https://newyorkconvention.org/in-brief#:~:text=The%20Convention%20on%20the%20Recognition,by%20more%20than%20160%20nations.).

ensures stability during global emergencies by requiring courts of contracting States to uphold arbitration agreements in matters covered by the agreement. The recognition and enforcement of foreign awards are subject to specific limited exceptions. Thus, the Convention promotes consistency and efficiency, especially in times of uncertainty as global crises.

67. Another important instrument is the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,⁴³ which is designed to assist States in modernizing their arbitration laws. It covers all stages of the arbitral process from the arbitration agreement (including its conclusion by electronic communication), the composition and jurisdiction of the arbitral tribunal, the extent of court intervention through the recognition and enforcement of arbitral awards. At the same time, the Model Law allows parties to adapt the proceedings to their needs. The Model Law has been widely adopted, to date in 121 jurisdictions (as of November 2023) and reflects a worldwide consensus on arbitral practices.

68. The Model Law has many default provisions, from which parties may deviate. This feature provides parties with the necessary flexibility to tailor the arbitral proceedings to their needs and circumstances (e.g. agreeing on the use of electronic means of communication in arbitral proceedings). This feature was essential during the global pandemic, where the use of technology allowed parties to continue with the proceedings while observing social distancing measures (e.g. communicating arbitration documents via email)

UNCITRAL arbitration rules for contracting parties

69. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The UNCITRAL Arbitration Rules have been used for the settlement of a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State to State disputes and commercial disputes, both ad hoc arbitrations and administered arbitrations, which shows the versatility and flexibility of the UNCITRAL Arbitration Rules.

70. The UNCITRAL Arbitration Rules have provided clarity and certainty for the contracting parties involved since its first version was issued in 1976. The Rules cover all aspects of the arbitral process, including the conduct of arbitral proceedings and the form, effect, and interpretation of the award. The Rules provide for a complete procedural framework to avoid procedural lacunae and still leave much flexibility to the parties to “agree otherwise”, for instance, on the use of electronic communication. For

⁴³ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (United Nations publication, Sales No. E.08.V.4).

instance, arbitration institutes implemented new technologies to ensure the smooth running of arbitration hearings despite the COVID-19 pandemic.⁴⁴ In 2010, the Rules were revised to include several decades of arbitration practice. In 2013, paragraph 4 in article 1 was added to the Arbitration Rules (as revised in 2010) to incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.⁴⁵ In 2021, paragraph 5, article 1, was added to the Arbitration Rules (as revised in 2010) to incorporate the UNCITRAL Expedited Rules as an appendix to the UNCITRAL Arbitration Rules. The Expedited Rules provide for a streamlined and simplified procedure with a shortened time frame (within six months from the date of the constitution of the arbitral tribunal unless otherwise agreed by the parties).

71. To enable contracting parties to quickly use the UNCITRAL Arbitration Rules, an annex has been provided in the 2021 version of the UNCITRAL Arbitration Rules, which set out a model arbitration clause for contracts.⁴⁶

72. Additionally, UNCITRAL developed explanatory texts, such as the UNCITRAL Notes on Organizing Arbitral Proceedings – Note 21, Early dismissal and preliminary determination,⁴⁷ providing practitioners with an annotated list on matters relevant to the organization of arbitral proceedings.

73. Furthermore, UNCITRAL has also published recommendations to assist arbitral institutions and other interested bodies regarding arbitration under the UNCITRAL Arbitration Rules (as revised in 2010),⁴⁸ which envisage using the UNCITRAL Arbitration Rules in various capacities: (a) as a model for institutions drafting their own arbitration rules; (b) for institutions that have offered to administer disputes under the UNCITRAL Arbitration Rules or to render administrative services in ad hoc arbitrations under the UNCITRAL Arbitration Rules; or (c) for institutions (or a person) that may be requested to act as an appointing authority, as provided for under the UNCITRAL Arbitration Rules. A list of arbitration centres which have served in the aforementioned capacities has been made available by UNCITRAL.⁴⁹

⁴⁴ See Shanghai International Economic and Trade Arbitration Commission (SHIAC), *International commercial arbitration in the time of covid-19* (Global Arbitration Review, 2021).

⁴⁵ Article 8 of the Rules on Transparency provides for the repository of published information under the Rules. The repository (the Registry) has been operated since its creation as an online database of arbitral documents and ISDS cases conducted under the Rules on Transparency. The operation of the Registry relies entirely on voluntary contributions from the European Union and the German Federal Ministry of Economic Cooperation and Development.

⁴⁶ UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013, and article 1, paragraph 5, as adopted in 2021) (United Nations publication 2021), p. 38.

⁴⁷ UNCITRAL Notes on Organizing Arbitral Proceedings – Note 21. *Early dismissal and preliminary determination*, Official Records of the General Assembly, Seventy-eighth session, Supplement No.17 (A/78/17) annex VII.

⁴⁸ *Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010)*, Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17, (A/67/17), annex I.

⁴⁹ UNCITRAL, Arbitration Centres, available at <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration/centres>.

Arbitration as the preferred choice of dispute resolution mechanism

74. The use of international arbitration during the COVID-19 pandemic has been substantial due to its (a) private and confidential nature, (b) capability to accommodate complex claims with multiple jurisdictions involved (e.g. global supply chain disruptions, earn-out clauses from merger and acquisitions transactions, and investor-state claims) and (c) flexibility within arbitration rules and proceedings for efficient procedures (unlike in the case of litigation before national courts) in the event of a global emergency.

Remote hearings in arbitration

75. The UNCITRAL instruments do permit for remote hearings, even if this is not explicitly stated. This has been clarified in the UNCITRAL Expedited Arbitration Rules, whereby the explanatory note on article 3(3) states that “[E]mphasizes the discretion provided to the arbitral tribunal to make use of a wide range of technological means to conduct the proceeding, including when communicating with the parties and when holding consultations and hearings.”⁵⁰ Furthermore, the explanatory note states that “[T]he inclusion of such a rule in the Expedited Rules does not imply that the use of technological means is available to arbitral tribunals only in expedited arbitration”, and further states that parties should be given “an opportunity to express their views on the use of such technological means and consider the overall circumstances of the case, including whether such technological means are at the disposal of the parties”. Nonetheless, the availability of virtual hearings provides contract parties with the possibility of continuing their arbitration proceedings without physical obstacles.

76. It is interesting to note that in March 2022, the International Council for Commercial Arbitration (ICCA) published the general report with the conclusions of an investigation whether contract parties have a right to a physical hearing in international arbitration.⁵¹ In this report, the authors scrutinized the laws of individual jurisdictions, including those that have adopted the Model Law on International Commercial Arbitration, and whether there were any repercussions on the enforceability of the arbitral award if a remote hearing were held. In essence, the report concluded that “[N]o jurisdiction expressly recognizes a right to a physical hearing in international arbitration, and only a handful recognizes such a right by inference and, even then, it is typically circumscribed.”⁵² Where enforceability is

⁵⁰ UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013, and article 1, paragraph 5, as adopted in 2021), pp. 51-52.

⁵¹ ICCA Projects, *Does a Right to a Physical Hearing Exist in International Arbitration?*, available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Right-to-a-Physical-Hearing-General-Report.pdf

⁵² *Ibid.*, p. 39.

concerned, the authors concluded that the risk of an award being set aside because of an arbitral tribunal's decision to use a remote hearing is very low, and there has been no reported case where an award was vacated solely on the grounds of a remote hearing. The findings of this report may reassure contract parties who decide to proceed with remote hearings.

Move towards the acceptance of electronic signatures and electronic awards

77. Although the UNCITRAL instruments do allow remote hearings, work remains to be done on issues such as electronic signatures and awards for international arbitration. In 2006, UNCITRAL adopted the recommendation regarding the interpretation of article II (2) and article VII (1) of the New York Convention⁵³ considering the widening use of electronic commerce and the trend towards enacting domestic legislation more favourable than the New York Convention on the form of arbitration agreements, arbitration proceedings and the enforcement of arbitral awards. This recommendation builds upon existing UNCITRAL legal instruments (e.g., the Model Law on International Commercial Arbitration, the MLEC, the MLES and the ECC) to recommend that article II (2) of the New York Convention on the term “agreement in writing” shall be applied recognizing that the circumstances described therein are not exhaustive.

78. It was also recommended that article VII (1) of the New York Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement. These are, however, recommendations and are not necessarily adopted by the Parties to the New York Convention. Furthermore, although the ECC explicitly refers to the New York Convention⁵⁴ and while the application of the ECC to arbitral agreements is undisputed, its application to arbitral awards is not (see para. 25).

79. This is likewise the case for the Model Law on International Commercial Arbitration, whereby article 7(2) of Option I provides that “The arbitration agreement shall be in writing”. Article 7(4) of that Option further provides that “The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference” and provides a definition for “electronic communication”. In

⁵³ Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, Official Records of the General Assembly, Sixty-first session, Supplement No. 17 (A/61/17), annex II.

⁵⁴ United Nations Convention on the Use of Electronic Communications in International Contracts United Nations, *Treaty Series*, vol. 2898, p. 3 (opened for signature 23 November 2005, entered into force 1 March 2013), p. 29.

addition, article 31(1) require awards to be made in writing and signed by the arbitrators. Considering the strong move towards digitalization of the economy and the growing acceptance of electronic signatures in lieu of wet-ink signatures, the formal need for a wet-ink signature on an arbitral award only serves as an additional hurdle for parties, especially in the case of a global emergency. However, due to the lack of harmonization of the acceptance of electronic signatures, the signing of an arbitral award using an electronic signature may result in its being unenforceable, depending on the State's regulations governing electronic signatures.⁵⁵ In light of the growing push for remote processes, there should be a bolder move towards the acceptance of electronic awards and electronic signatures in arbitration.⁵⁶

UNCITRAL framework for mediation

80. UNCITRAL has also developed a framework for international commercial mediation to complement the extensive work that has been done in laying down a framework on international commercial arbitration. The United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation")⁵⁷ establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. This Convention serves as a facilitator for international trade and promotes mediation as an alternative and effective method of resolving trade disputes.

81. Being a binding international instrument, the Singapore Convention on Mediation has been expected to bring certainty and stability to the international framework on mediation. It has also been highlighted at the UNCITRAL Academy at the Singapore Convention Week 2021 "[A]s an important step in promoting international trade as (...) the [Singapore] Convention provides an effective avenue for parties to enforce mediated settlement agreements for cross-border disputes, as well as the benefits of mediation, which can help businesses settle disputes quickly, amicably and cost-effectively."⁵⁸ This becomes especially relevant in times of crisis.

82. In addition, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018) (amending the Model Law on International Commercial

⁵⁵ See Felipe Volio Soley, *Signing the Arbitration Award in Wet Ink : Resistance to Technological Change or A Reasonable Precaution?*, available at <https://arbitrationblog.kluwerarbitration.com/2020/11/06/signing-the-arbitral-award-in-wet-ink-resistance-to-technological-change-or-a-reasonable-precaution/>.

⁵⁶ Exploratory work is ongoing in the field of dispute resolution in the digital economy, in *Official Records of the General Assembly, Seventy-seventh session, Supplement No. 17 (A/77/17)*, para. 222.

⁵⁷ United Nations Convention on International Settlement Agreements Resulting from Mediation United Nations Treaty Series Vol. 3369 (opened for signature 7 August 2019, entered into force 12 September 2020).

⁵⁸ Ministry of Law, Singapore, Singapore Convention Week Concludes, available at <https://mlaw.gov.sg/news/press-releases/2021-09-15-singapore-convention-week-2021-concludes>.

Conciliation, 2002),⁵⁹ (Model Law on International Commercial Mediation), is not only an alternative to the Singapore Convention but may also be used by States as a framework for domestic mediation. This provides States with the option of harmonizing their national laws with UNCITRAL instruments and to allow themselves time to gain experience in introducing and conducting mediation before proceeding with a convention. The Model Law contains a comprehensive set of rules in respect of the whole mediation process, from the commencement of mediation proceedings, number and appointment of mediators, conduct of mediation, communication between mediator and parties, disclosure of information, confidentiality, admissibility of evidence in other proceedings, and termination of mediation proceedings, to mediator acting as arbitrator. It further provides rules on international settlement agreements that States can consider adopting.

83. UNCITRAL has also continuously supported the development and discussion of the Singapore Convention on Mediation, which has added to the strengthening of the UNCITRAL framework on international commercial mediation. Since 2019, an annual Singapore Convention Week is held, which features a series of legal and dispute resolution-related events across an entire week. There is also an UNCITRAL Academy held during the Singapore Convention Week, which is organized by the Ministry of Law, Singapore and UNCITRAL, and comprises a conference and workshops.

84. The mediation framework that UNCITRAL has developed is also available for contracting parties to use. Contracting parties may use the UNCITRAL Mediation Rules (2021)⁶⁰ when conducting their mediation as they set out the process concerning the commencement of mediation, number and appointment of mediators, conduct of mediation, communication between the parties and the mediator, confidentiality, introduction of evidence in other proceedings, settlement agreement and termination of mediation.

Remote mediation processes

85. Similar to the UNCITRAL Arbitration Rules, the UNCITRAL Mediation Rules do permit contract parties to use technological means to conduct the mediation process. Article 4 of the UNCITRAL Mediation Rules explicitly provides that “in conducting the mediation, the mediator may, in consultation with the parties and taking into account the circumstances of the dispute, utilize any technological means as he or she considers appropriate, including to communicate with parties and to hold

⁵⁹ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation with Guide to Enactment and Use (2018) (United Nations publication, Sales No. E.22.V.25).

⁶⁰ UNCITRAL Mediation Rules (2021), Official Records of the General Assembly, Seventy-sixth session, Supplement No.17 (A/76/17), annex III.

meetings remotely.”⁶¹ This will enable contract parties prevented from cross-border travel or holding physical meetings due to a global crisis to be able to continue the mediation proceedings with as minimal disruption as possible.

Model mediation clauses for contracting parties

86. Likewise, the annex to the UNCITRAL Mediation Rules offers model mediation clauses that contracting parties can readily incorporate into their contracts, such as a multi-tiered clause, whereby parties can refer to a case that has not been settled during mediation after an agreed number of days have elapsed to arbitration under the UNCITRAL Arbitration Rules. The annex also provides for a model declaration of disclosure and model statement of availability that contract parties can consider. Furthermore, the UNCITRAL Notes on Mediation (2021)⁶² describe matters relevant to mediation to aid understanding of mediation. UNCITRAL has also made available recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021).⁶³ A list of mediation centres that have adopted the UNCITRAL instruments on mediation, similar to the list of arbitral centres in relation to the UNCITRAL Arbitration Rules, is available from UNCITRAL. In business-to-business contractual relations, States responded that disputes regarding contractual obligations affected by the epidemiological emergency were subject to mediation prior to being admissible in court. States also reported an increase in the use of online mediation and post-judgment mediation in commercial dispute settlement.⁶⁴

The Convention on Contracts for the International Sale of Goods and the prevention of disputes arising from supply chain impacts

87. The disruption to supply chains caused by COVID-19 outbreaks at factories, warehouses, logistics companies and lockdown or quarantine measures introduced by various States had a tremendous impact on the shipment of goods from supply actors. UNCITRAL instruments may be used to prevent disputes arising from supply chain impacts. In general, the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)⁶⁵ provides harmonized rules on the sale of

⁶¹ Ibid., p. 3.

⁶² UNCITRAL Notes on Mediation (2021) (United Nations publication, 2021).

⁶³ Recommendations to assist mediation centres and other interested bodies with regard to mediation under the UNCITRAL Mediation Rules (2021), Official Records of the General Assembly, Seventy-seventh session, Supplement No. 17 (A/77/17), annex III.

⁶⁴ A/CN.9/1080, paras. 23 (k) and 37 (j).

⁶⁵ United Nations Convention on Contracts for the International Sale of Goods United Nations Treaty Series, vol. 1489, No. 25567, p. 3 (opened for signature 11 April 1980, entered into force 1 January 1988).

goods across borders in regular trade situations. In the event of a global emergency, the CISG does provide for a framework to address the uncertainty arising from novel situations created by domestic or international crises and emergency situations, and government measures taken in response.

Force majeure

88. Force majeure has been widely invoked by contracting parties as an excuse for the non-performance of contract obligations during COVID-19. In the event that contracting parties do not explicitly or implicitly agree on a force majeure clause and the matter concerns an international sale of goods falling within the CISG scope of application, they may find a default solution in article 79 of the CISG, which addresses force majeure. Article 79(1) provides that “[A] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.” Article 79 suspends the party’s liability for non-performance or partial performance of their obligations while the impediment persists. The parties may complement the provision of article 79 with contractual provisions such as article 6.2.3 of the UNIDROIT Principles of International Commercial Contracts 2016⁶⁶ and on the ICC Force Majeure and Hardship Clause.⁶⁷ Under those additional provisions, the parties may agree to renegotiate the contract if certain impediments should arise. Another relevant provision is article 71 CISG, which allows one party to suspend the performance of its obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of its obligations and certain other conditions are met.

89. At the start of the COVID-19 pandemic, this may have been the case, although by 2022 most contracting parties would have factored in the possibility of a pandemic when concluding contracts after COVID-19. Nonetheless, these CISG provisions may still apply in times of other types of crises, and if the CISG has not been adopted by the States where the parties have their places of business, or by the State whose law governs the contract in accordance with CISG article 1(1)(b), contract parties may consider including them in their contracts or choosing the CISG, where possible, or the law of one of its States parties, including the CISG, as the law applicable to the contract.

⁶⁶ UNIDROIT Principles of International Commercial Contracts, 2016.

⁶⁷ See ICC, *ICC Force Majeure and Hardship Clauses*, available at <https://iccwbo.org/news-publications/icc-rules-guidelines/icc-force-majeure-and-hardship-clauses/>.

*United Nations Convention on Contracts for the
International Carriage of Goods Wholly or Partly by Sea
(the “Rotterdam Rules”)*

90. As for the transportation of goods, the Rotterdam Rules⁶⁸ permit the use and effect of electronic transport records. Article 9 sets out the procedures for the use of negotiable electronic transport records while article 10 provides that a negotiable transport document can be replaced by a negotiable electronic transport document if the procedures set out in article 10(1) are fulfilled. The legal recognition and convertibility of a paper transport document to that of an electronic transport document bolsters the establishment and functioning of a digital economy, which, as set out earlier in this toolkit, is a key element in reducing trade disruption in times of crisis.

⁶⁸ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, General Assembly resolution 63/122, (opened for signature 11 December 2008, not yet in force).

Part three

**Recommendations for States and
contracting parties**

Promotion of the adoption of UNCITRAL instruments for global emergencies

91. The adoption of UNCITRAL instruments can assist States and contracting parties on international trade issues that arise during a global emergency. The adoption of the UNCITRAL instruments can be categorized into a two-pronged approach: (1) reducing trade disruption; and (2) resolution of trade disputes due to trade disruption.

Two-pronged approach: (1) reducing trade disruption; (2) resolution of trade disputes due to trade disruption

Digital economy

92. The COVID-19 pandemic showed that there is a necessity for a digital economy whereby State institutions, businesses and consumers can continue regular business operations online even though physical trading in physical shops has been rendered impossible due to disease-prevention measures. Trade disruption can be significantly reduced or minimized if physical processes or operations are digitalized or made available online.

93. The adoption of the following UNCITRAL instruments on e-commerce law may assist States in developing a functioning digital economy:

- UNCITRAL Model Law on Electronic Commerce (1996)
- UNCITRAL Model Law on Electronic Signatures (2001)
- United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)
- UNCITRAL Model Law on Electronic Transferable Records (2017)
- UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (2022)

Trade terms and supply chains

94. With more than 90 parties having adopted the CISG, the Convention has been the cornerstone in harmonizing the law on the sale of goods internationally. As the CISG reached its 40-year anniversary in 2020, its relevance became even clearer during the global crisis as supply chains became severely disrupted due to unexpected measures. The Rotterdam Rules may also provide some relief in reducing supply chain disruption caused by the transportation of goods.

Having robust credit and insolvency systems in place

95. States that have a clear financial policy that encompasses robust credit and insolvency systems may be better prepared in times of global crises. UNCITRAL instruments on MSMEs, insolvency and secured transactions may thus be able to provide guidance to States. The following UNCITRAL instruments are useful in providing States with a framework for their credit and insolvency systems:

- UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013)
- UNCITRAL Model Law on Secured Transactions (2016)
- UNCITRAL Legislative Guide on Insolvency Law. Part Five: Insolvency Law for Micro- and Small Enterprises (2022)

Resolution of trade disputes due to trade disruptions

96. A harmonized framework for the enforcement of arbitral awards and international settlement agreements is crucial to the resolution of trade disputes. This becomes even more relevant in a global crisis where trade disputes may increase sharply, and efficient resolution of such disputes is necessary to reduce any backlog of cases. The following UNCITRAL instruments are useful in harmonizing States' dispute resolution mechanisms, in particular where enforcement is concerned:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")
- United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation")
- UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018)

97. Besides enforcement regimes, due consideration should also be given to online dispute resolution, which can be a useful alternative for dispute resolution. The UNCITRAL Technical Notes on Online Dispute Resolution (2016) may therefore be a useful guide for States that seek to establish, implement or adopt best practices in online dispute resolution systems.

Adoption of UNCITRAL instruments depends on State's strategy/approach and demands from its stakeholders

98. Every State has its own strategy and approach aligning with its different stages of growth and development. There is also finite number of resources that a State has when

adopting new standards, i.e., the adoption of an UNCITRAL instrument involves significant resources in determining how the relevant UNCITRAL instrument interacts with existing local legislation (if applicable). Whether an UNCITRAL Model Law should be adopted in its entirety or only specific articles would require public consultations with key stakeholders that may be impacted by the adoption of said UNCITRAL instruments. Then, there is the process of adoption and implementation.

99. In practice, this means that certain UNCITRAL instruments may take priority over others, depending on the needs of the State. States may wish to first focus on enacting legislation to prevent trade disruption that MSMEs face, such as considering the UNCITRAL Legislative Guide on Insolvency. Part V: Insolvency Law for Micro- and Small Enterprises, the UNCITRAL Model Law on Insolvency and the UNCITRAL Model Law on Secured Transactions. If resources permit, States may then simultaneously consider legislation on e-commerce laws, which also proved to be important and relevant for trade during the COVID-19 pandemic.

*The future of trade and UNCITRAL instruments
and how they may help states and contracting parties
in future global emergencies*

100. The COVID-19 pandemic showed that a single event can cause significant trade disruptions in the global economy, as some States continue to grapple with the economic impact of the measures taken to contain pandemic, while other States seek to kick-start the recovery of their economies. One of the key lessons of the COVID-19 pandemic is the importance of a functioning digital economy where all possible stakeholders, that is, States and contracting parties, can continue to operate or provide the necessary services and goods with minimal disruption.

101. The importance of establishing an international and harmonized digital economy and ecosystem thus cannot be ignored. As previously described, the adoption of UNCITRAL instruments on e-commerce can significantly assist States in providing a legislative framework for a functioning digital economy. The additional benefit of adopting these UNCITRAL instruments is the creation of a harmonized digital economy, whereby rules on e-commerce are the same across States. For instance, harmonized acceptance of the functional equivalence of electronic documents and electronic communications will greatly reduce uncertainty of the legal validity of offer, acceptance, formation, performance and enforcement of contracts.

102. Furthermore, as discussed earlier, other UNCITRAL instruments can also help to prevent trade disruption in a global emergency, such as the CISG, which intends to harmonize trading terms to minimize supply chain disruptions. The UNCITRAL instruments also support access to credit, promote efficiency in insolvency proceedings

and facilitate dispute resolution. It should however be noted that many discussions on these UNCITRAL instruments refer to the digital economy, for example how dispute resolution mechanisms and procedures could be digitalized as well. The COVID-19 pandemic has thrust such discussions into the spotlight, as debates on the legal implications of the adoption of online arbitration hearings and issuing of digital arbitral awards become practically relevant. The reduced costs (from a time and monetary perspective) of having arbitrations on a digital level further highlighted the importance of the UNCITRAL instruments on e-commerce and their interaction with other UNCITRAL instruments. In essence, UNCITRAL instruments are designed to be complementary with each other, and all are designed with the broader picture of enabling international trade in mind.

103. States that have already adopted most of the UNCITRAL instruments are able to utilize the relevant provisions in the event of a global emergency. States that have only adopted some UNCITRAL instruments may wish to consider also adhering to the other UNCITRAL instruments that have been highlighted in this toolkit. States may also wish to consider future instruments that are currently being discussed, especially on the topics relating to MSMEs and digitalization, which have been earmarked as two topics to be further explored by UNCITRAL.

104. States that have not yet adopted the UNCITRAL instruments may nevertheless consider UNCITRAL model laws, technical notes, guidance notes and other resources, which may: (a) provide at least a source of substantive inspiration for a legislative framework that States may wish to introduce if they are not ready to adopt a convention or a model law in its entirety; (b) offer information on how other States have implemented certain legal frameworks, for example in the field of e-commerce or insolvency, which can subsequently serve as a reference for consideration.

105. Contracting parties can avail themselves of the UNCITRAL rules, regardless of whether they are operating in a State that has adopted UNCITRAL instruments or not. For instance, the UNCITRAL Arbitration Rules and UNCITRAL Mediation Rules are materials that contracting parties can rely on when having to commence an arbitration or mediation proceeding during a global emergency, as both rules permit remote hearings and lay a common basis that has been promulgated by a neutral party for contracting parties to rely on.

